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51

THE LAWYERS REPORTS ANNOTATED

BOOK LXI.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P.
FARNHAM, EDITORS.

ROCHESTER, N. Y.
THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY.
1903.

Entered according to Act of Congress, in the Year nineteen hundred three, by
THE LAWYERS' CO-OPERATIVE PUBLISHING CO.,
In the Office of the Librarian of Congress, at Washington, D. C.

Rec. Feb. 6, 1904.

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LAWYERS' REPORTS

ANNOTATED.

WISCONSIN SUPREME COURT.

STATE of Wisconsin *ex rel.* Henry HAL-
LAUER, *Appt.*,

v.

Lemuel W. GOSNELL, *Respt.*

(.....Wis.....)

1. Requiring approval by the common council of a city of the act of the board of public works in fixing water rates does not give the council power to take the initiative in the matter, where its former power in that regard was repealed, and a board of public works was established, with power to fix rates which should not be in force until submitted to and approved by the council.
2. The recommendation of water rates by an executive board may be made necessary to their adoption by the legislative body of a city, although the fixing of rates

is a legislative, and not an executive, function.

3. A municipal corporation may require consumers of water in certain cases to use meters and keep them in repair at their own expense, under charter authority to legislate as to means for ascertaining amounts to be paid as water rates by consumers, and to make regulations for the protection of the works and the use thereof.
4. A water meter is not so exclusively for the benefit of the one furnishing the water that the duty to furnish it cannot be imposed upon the consumer.
5. An ordinance for the protection of waterworks is not void for unreasonableness which requires all consumers using large service pipes to provide meters while giving other consumers an option to do so.
6. Certiorari will not be granted to review the action of a municipal cor-

NOTE.—Establishment and regulation of municipal water supply.

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poration in fixing water rates merely because the schedule did not originate with the executive board as required by charter, where it is not inequitable, and has received the approval of the legislative department, whose approval would have been necessary had it originated in the manner pointed out by statute, and the irregularity may be cured by ordinary means.

(February 3, 1903.)

APPEAL by relator from a judgment of the Circuit Court for La Crosse County in favor of defendant in a certiorari proceeding to review the action of the city of La Crosse in establishing water rates. *Reversed.*

Statement by **Marshall, J.:**

The city of La Crosse owns and operates

VIII. Rights and duties of municipality.

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I. Power to procure or furnish.

a. Of municipality.

1. In general.

There is some disagreement among the courts as to the necessity of express authority to enable a municipal corporation to procure or furnish a water supply.

In Louisiana it is held that a city has an implied power to contract for a water supply, although its charter fails expressly to authorize it to do so. *Lake Charles Ice, Light, & Waterworks Co. v. Lake Charles*, 106 La. 65, 30 So. 289.

And in Tennessee it is held that the erection of waterworks is one of the ordinary powers of a municipal corporation, and needs no enabling act to authorize the corporation to exercise the right within its charter limits; but it is one of the powers subject to amendment and the revocation of the legislature. *Memphis v. Memphis Water Co.* 5 Helsk. 495.

In Massachusetts it has been held that a town has authority to appropriate money for the construction of reservoirs for water for the extinguishment of fires. *Hardy v. Waltham*, 3 Met. 163.

There may be a distinction between authority to provide means to extinguish fires, and to furnish a water supply to citizens, so that *Hardy v. Waltham*, 3 Met. 163, is not necessarily an authority in favor of the more general power.

In fact, in Michigan it has been held that statutory authority conferred upon a municipal corporation to provide a supply of water for fire protection does not authorize it to construct waterworks designed to furnish the inhabitants with water as well as for fire purposes; but such action must first be authorized as required by the statute prohibiting the raising or expenditure of money for the construction of waterworks unless sanctioned by a two-thirds vote of the electors. *Savidge v. Spring Lake*, 112 Mich. 91, 70 N. W. 425.

So far as the question of furnishing a water supply for the benefit of the citizens generally is concerned, the weight of authority and the better reason deny such authority. Municipal corporations are limited strictly to their granted powers, or those necessarily implied. And it can hardly be claimed that the power to enter

a system of waterworks for the purpose of supplying water within the municipality for public and private use. Its charter, prior to 1887, vested power in the common council, by subdivision 11, § 3, subc. 4, chap. 135, Laws 1876, as amended by § 6, chap. 183, Laws 1881: "To provide for the erection of waterworks for the supply of water to the inhabitants of the city; to lay down water pipes; to establish water rates to be paid by persons using the water therefrom, and to prevent unnecessary waste of the water by any person or persons; to pass from time to time such ordinances as may be deemed necessary or expedient for the construction, regulation, or protection of such waterworks and pipes, and to enforce the same by suitable penalties."

That was amended in 1887 by chapter 162 of the Laws of that year, the words "to

into what is so nearly a business venture can be implied when express authority can be so easily obtained if it is necessary for the public welfare.

The power of a municipal corporation to build and maintain waterworks and furnish water to its inhabitants for a consideration is derived from, and governed solely by, statute. *Wagner v. Dock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545.

A municipal corporation has no implied power, from the mere fact of its creation, to engage in the business of supplying its citizens with water for pay. It cannot do so except by virtue of its express legislative authority. *White v. Meadville*, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 693.

The power to construct a waterworks for a city is not a necessary incident of its incorporation, but must, like all its other powers, be derived directly from the legislature of the state; and the power "to construct and maintain" such a system implies a duty of the municipality, through its corporate authorities, to maintain and preserve possession for the benefit of the public. *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 30 L. R. A. 848, 62 N. W. 975.

Supplying water to a town or city is not a public function. The power of a municipality to furnish water is derived wholly by act of the legislature. *Re Long Island Water Supply Co.* 30 Abb. N. C. 36, 24 N. Y. Supp. 807.

Even where authority is granted by statute, it is not the duty of a municipal corporation to supply its citizens with water or any of those conveniences which improve the sanitary condition of the community and are beneficial to its inhabitants. The state delegates such powers as privileges. *Wainwright v. Queens County Water Co.* 78 Hun. 146, 28 N. Y. Supp. 987.

A city which has not adopted the provisions of the statute authorizing municipalities to hold and operate waterworks and legislate on matters connected therewith is without power to grant a franchise for owning and operating waterworks and the exercise of the rights and privileges incidental thereto. *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 29.

So, the erection of a municipal water supply is not a "necessary expense" for the welfare of a municipal corporation within a constitutional prohibition of the issuing of bonds or levying of taxes for other than a necessary expense without a vote by the electors. *Charlotte v. Shepard*, 120 N. C. 411, 27 S. E. 109; *Thrift v. Elizabeth City*, 122 N. C. 31, 44 L. R. A. 427, 30 S. E. 349; *Edgerton v. Goldsboro Water Co.* 126 N. C. 93, 48 L. R. A. 444, 35 S. E. 243.

establish water rates to be paid by persons using the water therefrom" being eliminated. The charter was at the same time and by the same law further amended by establishing a new department of city government of an executive character, to be known as the "board of public works," and to consist of members elected by the people. At the same time and by the same law the charter was further amended, adding thereto a new chapter, numbered 9, on the subject of waterworks, in which the maintenance and everything in relation to the operation of the waterworks, so as to effect the purposes thereof, was placed under the immediate charge of the board of public works, but subject to the direction of the common council. By § 1 of that chapter it was provided as follows: "The board of public works, subject to the direction of the com-

mon council, shall assume and have exclusive charge and superintendence of the waterworks of said city, and of all property, records, contracts, transactions, reports, accounts, surveys, maps, plats, estimates, profiles, plans, and documents of whatsoever nature pertaining thereto, and it shall thereafter be the duty of such board of public works to examine and consider all matters relative to supplying the city of La Crosse with a sufficient quantity of pure and wholesome water for the use of its inhabitants."

By § 7 the waterworks, and all the grounds, buildings, fixtures, machinery, and other things appertaining thereto were declared to be under the control of the said board, with power to regulate and control and have general supervision of the same, subject to the authority of said common

Congress, having the legislative power over the District of Columbia, can create a general system to store water and furnish it to the inhabitants of that district, and prescribe the amount and method of collection of the assessment. *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

In considering the duties and liabilities of the municipality growing out of its undertaking to furnish water, the rights of consumers, and the control of the courts over the matter, a municipality is regarded as exercising a public or governmental function in furnishing a water supply. *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 30 L. R. A. 660, 42 N. E. 405.

Waterworks for supplying cities and towns with water are undoubtedly for public and municipal purposes, power to erect and operate, or to purchase, which may be conferred on municipal corporations by the legislature; and to that end they may incur expenditures, levy taxes, issue bonds, and exercise the right of eminent domain. *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612.

The waterworks of a city, constructed under a power conferred upon the city by its charter "to construct and maintain waterworks" for protection against fires and for furnishing the inhabitants thereof with a supply of pure water for domestic purposes, and constructed and maintained at the expense of the inhabitants of such city, are held as the property of the municipal corporation, for public use, and charged with a public trust, of which the inhabitants of such city are the beneficiaries. *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 30 L. R. A. 848, 62 N. W. 975.

To furnish organized communities with an abundant supply of pure and wholesome water is one of the duties imposed on municipal corporations, and comes clearly within the purview of a public use. *Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238.

A supply of water for municipal purposes, as well as for the use of its inhabitants, is a city purpose within a constitutional provision forbidding the incurring of indebtedness except for city purposes. *Re Comstock*, 25 N. Y. S. R. 611, 5 N. Y. Supp. 874.

Artesian wells sunk by townships at the expense of the taxpayers, as authorized by law, the water to be placed in tanks in the public highways, to supply the general public for watering stock and other domestic uses, and to be used for irrigation purposes,—are for a public purpose, within a constitutional provision that "no tax or assessment shall be levied or col-

lected, or debt contracted, by municipal corporations, except in pursuance of law for public purposes specified by law;" and townships may issue bonds and levy taxes for the purpose of constructing such wells. *Miles v. Benton Twp.* 11 S. D. 450, 78 N. W. 1004.

A grant of power to a municipal corporation to issue water bonds does not confer a corporate power or privilege within the meaning of a constitutional provision prohibiting such grants by special laws. *Brady v. Moulton*, 61 Minn. 185, 63 N. W. 489.

The power of a municipal corporation to extend water mains, or to maintain them in particular places, is legislative and governmental, and is discretionary. *Linck v. Litchfield*, 31 Ill. App. 118.

The issuance of bonds for a municipal water supply is for a city purpose within the meaning of a constitutional provision permitting the contracting of indebtedness for such purpose. *Sweet v. Syracuse*, 129 N. Y. 337, 27 N. E. 1081, 29 N. E. 289.

The use of a statute providing for the construction of a water plant and the raising of funds to pay for the same is charitable in its nature, so as to give a court of equity jurisdiction over a proceeding to compel the trustees of the fund to account, where it provides for the raising of such fund by a tax or water rate, from the payment of which a part of the population, by reason of their small pecuniary ability, is exempt. *Atty. Gen. v. Dublin*, 1 Bligh N. R. 312, 9 Bligh N. R. 395.

Although no use is made of water taken by a town to supply a waterworks system, for supplying its public buildings or hydrants in the street, yet the use is public if any inhabitant along the line of the pipe who desires to obtain water can do so. *Smith v. Lincoln*, 170 Mass. 488, 49 N. E. 743.

A municipal corporation does not lose its municipal character, and become a private or business corporation, by erecting waterworks, and supplying its citizens with water. *Lehigh Water Co.'s Appeal*, 102 Pa. 515.

An exclusive right in a municipal corporation to operate waterworks is distinguished from an exclusive right held by a private corporation. In this, that the city exercises the right by and for the people, not for profit, but for the public welfare, and the correction of the oppressions and abuses in its management is in the hands of the city; while a private corporation exercises such right for private gain with every incentive to oppress. In the latter case the exclusive right may create a monopoly, but in the

council. By § 8 the board was given power to establish water rates, the following language being used: "The said board shall have power from time to time to make and enforce by-laws, rules, and regulations in relation to the said waterworks, and before the actual introduction of water they shall make by-laws, rules, and regulations fixing uniform water rates to be paid for use of water furnished by the said waterworks, and fixing the manner of distributing and supplying the water for use or consumption, and for withholding or shutting off the same for cause, and they shall have power, from time to time, to alter, modify, or repeal such by-laws, rules, and regulations now in force: Provided, however, that no such by-law, rule, or regulation, and no alteration, modification, or repeal thereof, shall have

any force until submitted to and approved by the said common council."

Section 9 gave the common council power as follows: "The common council shall have power by ordinance to make and enforce all needful regulations for ascertaining the amounts to be paid as water rates by persons or corporations using the water, keeping accounts thereof, and giving the notices required by this act and by ordinances. It may provide for the payment of such water rates directly to the city treasurer, or for their collection by some subordinate of the board of public works, or a collector of water rates, to be appointed by said board of public works, and may require such subordinate or officer to give bond in such sum and with such sureties as it may prescribe."

By § 12 further power was given to the

former case it will not. *Brenham v. Brenham Water Co.* 67 Tex. 542, 4 S. W. 143.

So, water-supply companies are engaged in a business of public interest and importance, and hold their property and franchises affected with a public use. *Spring Brook Water Supply Co. v. Kelly*, 5 Lack. Legal News, 299.

A municipal corporation in Ohio must be the sole owner and controller of waterworks in which it invests its funds, and cannot join its property to that of a corporation or individual, each retaining ownership to its respective portion, so that the whole taken together forms a complete waterworks system. *Alter v. Cincinnati*, 56 Ohio St. 47, 35 L. R. A. 737, 46 N. E. 69.

The fact that a town is financially unable to construct a system of waterworks does not disabie it from granting a franchise to a water company for the construction by it of such a system. *Fidelity Trust & Guaranty Co. v. Fowler Water Co.* 113 Fed. 560.

A statute authorizing the levy of a tax to create a sinking fund for the purchase of waterworks for a city is not in contravention of the Constitution, where the council has power to determine the question of the acquisition of the works although by another statute the contract for their acquisition must be approved by a majority of the voters of the city, on the ground that, as the electors may not approve the contract, the object of the tax is uncertain, and there is no contract for the erection of the works or submission of the proposition to the voters of the city prior to the levy of the tax. *Youngerman v. Murphy*, 107 Iowa, 686, 78 N. W. 648.

2. Charter authority.

When authority is not expressly given to a municipality to provide a water supply, it is sometimes spelled out of power conferred in general terms which are held to include such authority.

Thus, power to contract for a water supply is given to a municipal corporation by charter authority to enact laws and regulations in relation to every matter or thing which it may deem to be indispensable for the welfare and good order of the city. *Greenville v. Greenville Waterworks Co.* 125 Ala. 625, 27 So. 764.

So, a city authorized to maintain health and cleanliness, and to provide for the extinguishment of fires, may contract for a water supply, and, in so doing, may agree upon the price to be paid and the kind and amount of water to be furnished: and, so long as the city does not exceed the limits of its power to contract, its dis-

cretion will not be interfered with by the courts in the absence of fraud. *Conery v. New Orleans Waterworks Co.* 41 La. Ann. 910, 7 So. 8.

In *Grace v. Hawkinsville*, 101 Ga. 553, 28 S. E. 1021, the rule is recognized that a municipal corporation has power, under a general welfare clause in its charter, to construct and maintain waterworks necessary to provide citizens with water for drinking and other domestic purposes.

A municipality has power to enter into a contract with a water company to supply it with water, under a provision in its charter empowering its mayor and board of aldermen to pass such ordinances as may be deemed expedient in maintaining the peace and good government, health and welfare, of the city. *Webb City & C. Waterworks Co. v. Webb City*, 78 Mo. App. 422.

Or, under a charter empowering its mayor and board of aldermen to prevent and extinguish fires. *Ibid.*

The general power given a municipal corporation in respect to police regulations, the preservation of the public health, and the general welfare includes the power to establish municipal waterworks. *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885.

The power of a municipal corporation whose charter gives it all the powers possessed by cities under the general statutes of the state includes the power given municipalities by those statutes to issue bonds for the purchase or erection of waterworks. *Ibid.*

An act of legislature authorizing all cities, incorporated towns, and villages to construct and maintain waterworks applies to all cities, whether incorporated under special charters or under the general law, where, by its terms, "all cities" are included without reservation, and the only exception contained in the act is with reference to cities, towns, or villages in which waterworks are now managed or controlled by a board of public works, thereby implying that no other exceptions are intended to be made. *Dutton v. Aurora*, 114 Ill. 138, 28 N. E. 461.

Waterworks and sewers are internal improvements, so that provisions for their construction are sufficiently covered by the title to an act to authorize the construction of internal improvements. *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014; *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077.

Under the Missouri statutes a city of the fourth class may contract to expend its current income for a municipal water supply after the salaries of its officers and a reasonable police force are paid. *Webb City & C. Waterworks Co.*

common council in these words: "It shall be the duty of the said common council, and they are hereby empowered, from time to time to pass such ordinances as may be deemed necessary or expedient to protect said waterworks and the use thereof, and to enforce the by-laws, rules, and regulations of the said board of public works," etc., and to enforce all such rules and regulations by appropriate penalties.

Under the scheme of the charter service pipes, curb stops, and all appliances for use of the consumer in taking water from the water main are required to be paid for by him.

March 8, 1901, the common council passed an ordinance containing provisions to the following effect: (1) A complete system of rates, arranged on the usual basis where water is not measured and also where

it is measured by means of a water meter. Each consumer, by this system, was given the privilege of paying for water by the meter rate upon condition of his putting a meter in at his own expense and keeping the same in repair, and not using water for his premises otherwise than through the meter, except those using water through a service pipe larger than $\frac{3}{4}$ of an inch in diameter, who were required to supply their premises with meters at their own expense. (2) A scheme in detail for the collection of water rents and a prohibition against any change of water rates except under certain conditions, not recognizing any authority of the board of public works in the matter. (3) Regulations of the enjoyment of the water service, to prevent misuse thereof, such as the care and management of seals on stand-pipes and automatic sprinklers, conditions

v. Cartersville, 142 Mo. 101, 43 S. W. 625, 153 Mo. 128, 54 S. W. 557.

Authority may be granted by the legislature to contract for the construction of municipal waterworks, and to lease the same from the constructing party, with the privilege of purchasing, and to convey to that party any property of the city which may be necessary for the construction thereof, where it is deemed by the board of commissioners inadvisable to proceed to construct the works itself, as such act is not a violation of the constitutional provision prohibiting any county, city, or township from raising money for, or loaning its credit to or in aid of, any stock company, corporation, or association. *Ampt v. Cincinnati*, 12 Ohio C. C. 119.

A municipal corporation may, by its mayor and council, make a contract for the construction of waterworks under a power given them in its charter to make all contracts in their corporate capacity which they may deem necessary for the welfare of the city, a contract for such purpose not being one which contravenes the Constitution of the state or of the Federal government, or the laws thereof. *Rome v. Cabot*, 28 Ga. 50.

The mayor and council of a city have authority, under a charter giving them power to do all things for the benefit of the city, to contract a debt for the erection and maintenance of waterworks. *Hellbron v. Cuthbert*, 96 Ga. 312, 23 S. E. 206.

A city has the power to proceed with the preliminary work of acquiring property and rights necessary for the construction of a waterworks system upon the credit of a special fund to be provided for the construction thereof out of the revenues of the system, although it has no power to issue warrants against that fund until after the letting of the contract, as provision for payment of such preliminary work may be made in some other lawful way. *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365.

A classification of cities for the purpose of constructing waterworks for a municipal water supply so as to form a class having not more than 15,000 and not less than 500 inhabitants is sufficiently general to be within the limits of the Constitution. *State, Lewis, Prosecutor, v. Moore*, 54 N. J. L. 121, 22 Atl. 993.

An unused power in a municipal corporation to construct and maintain waterworks is not repealed by a subsequently adopted constitutional provision that "all existing charters or grants of special or exclusive privileges, under which a bona fide organization shall not have taken place, and business been commenced in good

faith, . . . shall thereafter have no validity," when that provision evidently relates to private corporations only. *Lehigh Water Co.'s Appeal*, 102 Pa. 515, Affirmed in 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

Where an act of the state legislature grants the right to towns to construct waterworks of their own, a subsequent act authorizing a specified town to construct waterworks of its own will not be regarded as affecting the force of the general law. *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526.

Where an act incorporating a fire district gives power to the district to regulate the use of water and the price to be paid for the use, the inhabitants are beneficially interested in the exercise of such power, which is mandatory, and cannot be delegated by the district, although the language of the statute is permissive. *Arnold v. Pawtucket*, 21 R. I. 15, 41 Atl. 576.

Where a city has power, under its charter, to construct waterworks and gas works, it has no power to construct a dam, under the pretense of obtaining power for its waterworks and its gas works, for the purpose of securing a vast water power to be operated, rented, or leased for manufacturing purposes, for profit and to ludece people and capital to come to the city. *Nalle v. Austin* (Tex. Civ. App.) 21 S. W. 375.

Separate municipalities having the statutory power by vote of their respective inhabitants to consolidate into one city may, under a statute authorizing municipalities, either to construct their own system of waterworks, or to grant a franchise therefore to a private company, adopt a plan of consolidation by which a portion of the city shall be supplied with water from pre-existing city waterworks under the control of a body other than the city council, and other portions by a private water company operating under an unexpired franchise from one of the separate municipalities. *Donahue v. Morgan*, 24 Colo. 389, 50 Pac. 1038.

A board of water commissioners has no power to construct or purchase a plant under a charter provision that such board "shall take and hold possession of, and have and receive general and exclusion supervision" of, the system of waterworks, and shall have the power to "improve, extend, add to, or change said system under its control, as the board may from time to time determine." *Austin v. McCall* (Tex.) 68 S. W. 791.

Although the power conferred by a city charter upon a board of commissioners to improve, extend, add to, or change an existing system of waterworks is broad enough to authorize the purchase of an independent system, that power

upon which water service might be re-established after being interrupted pursuant to the ordinances of the city or rules of the board of public works. (4) Penalties for wrongful interference with hydrants or stop cocks, or improper use of water contrary to such ordinance or rules. (5) Rules relating to the care of fire hydrants. (6) A declaration of authority to make other rules relating to water rates and collection of the same. Penalties for the violation of ordinances relative to the waterworks. A requirement regarding the management by consumers of their service appliances in case of an alarm of fire and during the continuance of a fire. A general repeal of all ordinances or parts of ordinances conflicting with the new enactment.

The ordinance was carried to the circuit court for La Crosse county for review, and was affirmed. The relator appealed.

is rendered useless and ineffectual without the co-operation of the city council, as the board of commissioners has no power to levy taxes and provide the necessary funds. *Ibid.*

How far power exhausted by exercise.

Unless there is something in the statute to indicate that one exercise of the authority will be final, it is usually held that it is not so.

The grant of power to a city, by charter, to construct, or authorize others to construct, waterworks, is not in the alternative so as to preclude the city, after granting a franchise which is not exclusive, from subsequently constructing waterworks of its own. *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 47 L. R. A. 214, 58 Pac. 773.

Where a city has power, under its charter, to construct waterworks and to provide the city with water, it does not exhaust the power under its charter by making a contract with a water company for water supply; but it has power to erect city waterworks, notwithstanding the existence of such a contract. *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960.

Where a city has constructed a waterworks system under power given in its charter, the necessity of increased waterworks is a matter resting within the discretion of its common council, and its exercise of that discretion will not be controlled when performed within the charter powers, except in case of fraud. *Nalle v. Austin* (Tex. Civ. App.) 21 S. W. 375.

Under an act incorporating a water district to supply a city with water, which act contains no limitation on the power to contract, the city by entering into a contract to supply the district for ten years, does not exhaust its powers to contract during the ten years, so that it may not during that period make a new contract as a substitute for the existing one. *Arnold v. Pawtucket*, 21 R. I. 15, 41 Atl. 576.

When a village charter grants unlimited power to obtain a water supply for domestic use and to extinguish fires, the mode of getting it and the sums to be spent therefor are in the discretion of the voters, to be honestly exercised for proper municipal objects; and, notwithstanding a main has been constructed affording, not only an ample supply of water for public and household uses, but a surplus for power as well, the building of another main and the expenditure therefor, voted in good faith, to make sure of water in the contingency of accident to the old one, will not be restrained by injunction at the suit of a complaining taxpayer. *Lucia v.* 61 L. R. A.

Messrs. McConnell & Schweizer, for appellant:

The common council has no authority to establish water rates.

There is no power given in the city charter to require the consumer to put in meters at his own expense, and no such authority can be implied.

1 Dill. Mun. Corp. § 27; *Brumm v. Pottsville Water Co.* (Pa.) 11 Cent. Rep. 792, 12 Atl. 855; *State, Red Star Line S. S. Co., Prosecutors, v. Jersey City*, 45 N. J. L. 246; *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910, 1046.

The rates established by the ordinance are not uniform, and the requirements of the charter are not complied with.

Griffin v. Goldsboro Water Co. 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319; *Rich-*

Montpellier, 60 Vt. 537, 12 L. R. A. 169, 15 Atl. 321.

The question of the necessity for a new city water plant when a city is already supplied by the plant of a private corporation is legislative, and not judicial, and the court will not substitute its judgment for that of the city council and voters of the city. *Janeway v. Duluth*, 65 Minn. 292, 68 N. W. 24.

A village which has granted to a water company a franchise permitting it to lay pipes in the village streets may thereafter, pursuant to statutory authority, construct a water system of its own, without taking by purchase or condemnation the property of the existing company, although the statute authorizes such acquisition, since such authority is permissive, and not mandatory. *Colby University v. Canandaigua*, 96 Fed. 449.

But when a municipal corporation has been authorized either to supply water or to contract for the performance of such service, its powers are exhausted by the exercise; and, having entered into and being under a contract therefor, it cannot erect municipal works under that authorization. *White v. Meadville*, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 693; *Metzger v. Beaver Falls*, 178 Pa. 1, 35 Atl. 1134; *Wilson v. Rochester*, 180 Pa. 509, 38 Atl. 136.

The corporation exhausts its power when it contracts, its obligation being fixed when the company comes into existence in reliance thereon. *Troy Water Co. v. Troy*, 200 Pa. 453, 50 Atl. 259.

When it has exercised its authority by contracting with a private corporation in the management of which it participates, it cannot, by divesting itself of such management, acquire a right to contract with another corporation to supply the borough with water. *Carlisle Gas & Water Co. v. Carlisle Water Co.* 188 Pa. 51, 41 Atl. 321.

Where a municipal corporation has executed its power of furnishing a supply of water, and is abundantly supplied, an attempt on its part to create competition in violation of its contract cannot be justified on the ground that it is a further exercise of that power. *Atlantic City Waterworks Co. v. Atlantic City*, 39 N. J. Eq. 367.

Such corporation obtains no enlarged powers by a subsequent law authorizing it to construct waterworks, as the two laws are not repugnant, and no distinctly additional powers are conferred. *Nelson v. Warren*, 200 Pa. 504, 50 Atl. 250.

Equity will restrain a municipal corporation

mond Natural Gas Co. v. Clawson, 155 Ind. 659, 51 L. R. A. 744, 58 N. E. 1049.

Mr. W. F. Wolfe, for respondent:

It can hardly be contended that the legislature intended, or did delegate, legislative powers to an executive board. Such a delegation of power would be unconstitutional.

State ex rel. Adams v. Burdage, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738.

The power to fix water rates in a city is a legislative one.

Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 88; *Marshall Field & Co. v. Clark*, 143 U. S. 650, 681-694, 36 L. ed. 294, 306-310, 12 Sup. Ct. Rep. 495.

Water rents cannot be said to be unreasonable because a less rate is provided where a large amount of water is used than where a small quantity is consumed.

unable to erect a municipal waterworks system because its power is exhausted by a contract with a private water corporation from contracting with another private corporation with the intention of making the plant practically a municipal plant, and thus do indirectly what it cannot do directly. *Welsh v. Beaver Falls*, 186 Pa. 578, 40 Atl. 784.

But the power of a municipal corporation to supply water to its citizens is not exhausted by accepting gratis the relatively infinitesimal quantity required for the extinguishment of fires; and a water company which has acquired no exclusive franchise by legislation or other act of the municipality cannot complain if it establishes a competing plant. *Boyetown Water Co. v. Boyertown*, 200 Pa. 394, 50 Atl. 189.

A municipal corporation which has contracted with a private corporation for its water supply, and is authorized by law then to establish a municipal plant only by purchase of the private plant by amicable or legal proceedings, has no inherent power whereby it can construct an independent system; and it will be restrained by equity from so doing. *Tyrone Gas & Water Co. v. Tyrone*, 195 Pa. 566, 46 Atl. 134.

Duty to purchase.

A statute allowing a city or town to acquire a water plant only by purchasing one from private parties if it has given them a contract or franchise for a water supply is in violation of a constitutional provision prohibiting the legislature to levy taxes upon inhabitants or property of a municipality for municipal purposes. *Helena Consol. Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382.

A liability in respect to transactions or considerations already past is imposed on the people of a city in violation of a constitutional provision prohibiting the imposition of such a liability, by a statute which allows the city to acquire a water plant only by purchase from private parties if it has already made a contract or given a franchise for a water supply to be furnished by private parties. *Ibid.*

b. Of private corporation.

Corporations organized to furnish a supply of water to a municipality and its inhabitants are like other corporations controlled by their charter authority; but the question frequently arises whether or not the charter limitations are all the limitations upon their power. The municipality frequently seeks to impose restrictions, or 61 L. R. A.

Wagner v. Rock Island, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545; *Silkman v. Yonkers Water Comrs.* 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612; *Rieker v. Lancaster*, 7 Pa. Super. Ct. 149; *State ex rel. Lanyon v. Joplin Waterworks*, 52 Mo. App. 312; *Frothingham v. Bensen*, 20 Misc. 132, 44 N. Y. Super. 879.

Marshall, J., delivered the opinion of the court:

Jurisdiction of the common council to pass the ordinance is challenged upon two grounds: First, because authority independently of the board of public works to fix rates was taken away from the common council by chapter 162, Laws 1887; second, because the charter does not grant authority to require consumers of water to measure the same through meters provided at their own expense.

to add conditions, which involve a construction of several statutes besides the charter. See *infra*, VII.

The general right to supply water to the inhabitants of a municipality has many of the elements of a franchise, so as to be incapable of exercise without grant from the sovereign. From the facts that it is necessary to use the streets for laying pipes, and that public convenience demands that the number of pipes shall be limited, it results that one establishing a plant for a water supply has practically an exclusive privilege, and is in a position to take toll, so that the elements of a franchise plainly exist.

So, it has been held that a grant by ordinance of the right to supply a city and its inhabitants with water for a term of years, and the privilege of occupying the streets of the city for that purpose, is a franchise. *Cedar Rapids Water Co. v. Cedar Rapids (Iowa)* 91 N. W. 1081.

In *Spring Valley Water Works v. Bryant*, 52 Cal. 132, it is said that the power to charge tolls or rates for water is a franchise conferred on corporations formed under the general laws for the formation of water companies, and can be exercised only in the manner provided by those laws; and that is recognized in *San Francisco v. Spring Valley Waterworks*, 53 Cal. 608.

A franchise to furnish a city with water is a special privilege not belonging of common right to the people at large. *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818.

But the appellate court of Illinois, for the purpose of upholding its jurisdiction over a case, held that the grant by a city of the right to construct, maintain, and operate a system of waterworks within the city is the grant of a license, and not a franchise. *Cain v. Wyoming*, 104 Ill. App. 538.

And in California it is held that any individual, or corporation organized under the laws of the state, may introduce water into cities, towns, or counties not owning or controlling waterworks, for the use of such municipalities and their inhabitants, and is entitled to lay down pipes therein so far as is necessary to such purpose, under the California Constitution declaring the use of water appropriated for sale, rental, or distribution to be a public use, the rates or compensation for which when furnished to any city and county, or city, or town, are required to be fixed annually by the board of supervisors or other governing body, and providing that such individuals and corporations may lay down such pipes under such general regulation as the municipality may prescribe for

We cannot escape the conclusion that the purpose of dropping out of the enumerated powers of the common council the supreme power to fix water rates and transferring unlimited authority in the matter to the board of public works, its action not to have the force of law till approved by the common council, was to make that method of dealing with the subject exclusive. Indeed, it does not seem that the legislative idea in the change is open to reasonable controversy. It is as plainly set forth as if a special law on the subject had been passed, giving to the board of public works power to fix the water rates, subject to the approval of the common council, and expressly repealing the existing law lodging such power absolutely in the council. The argument that, since the action of the board of public works is without force until ap-

proved by the lawmaking power of the city, its common council, inferentially such council has authority to take the initiative in the matter and legislate regardless of the board, is contrary to the settled doctrine that, where the charter of a city provides the manner in which the will of the people shall be exercised, resort to any other method is usurpation. *Sawton v. Beach*, 50 Mo. 488; *Irvin v. Devors*, 65 Mo. 625.

It is said that the fixing of water rates is the exercise of legislative power, and that the charter expressly makes the board of public works a mere executive body. Whether the fixing of water rates is so distinctly the exercise of legislative power as not to fall, in any reasonable view of it, within the scope of executive authority, and whether, if it is the exercise of legislative authority, it can be granted to a body of city officers

damages and indemnity therefor, whether the legislature, from which the Constitution in the respects indicated has taken the control of the subject, has adopted laws for the regulation and control of the exercise of the right to collect the rates established or not, which the Constitution declares a franchise which cannot be exercised except by authority and in the manner prescribed by law. *People v. Stephens*, 62 Cal. 209. On the authority of this case an order dissolving a preliminary injunction restraining defendants from laying pipes was affirmed in 62 Cal. 238.

A water company supplying water to the inhabitants of a municipal corporation is a quasi public corporation, whose duty is to furnish water for reasonable compensation and without unjust discrimination; and a state legislature may enforce this duty. *Danville v. Danville Water Co.* 180 Ill. 235, 54 N. E. 224.

In *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264, the court, in passing on the right to compel the furnishing of water by one who has appropriated the same for distribution and sale, which is declared a public use by the California Constitution, says that water appropriated for distribution and sale is *ipso facto* devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it.

The authority of a water corporation authorized to supply water in the town, borough, city, or district where it may be located is limited to the municipality in which it may be located. *Bly v. White Deer Mountain Water Co.* 197 Pa. 80, 46 Atl. 929.

The franchise of a company, granted under a charter authorizing the city council to grant it after submitting the question to the voters and receiving their approval, is not rendered invalid by the council making changes in the specification after it has been approved by the voters, as such changes are matters of detail, and rest in the discretionary powers of the council. *Johnson v. Rock Hill*, 57 S. C. 371, 35 S. E. 568.

A franchise to supply water to a municipal corporation which was irregularly or fraudulently granted should be annulled by quo warranto or *scire facias* at the suit of the state, and not by equitable action at the suit of private parties. *Stedman v. Berlin*, 97 Wis. 505, 73 N. W. 57.

The state is not estopped from proceeding by quo warranto against a waterworks company organized without the requisite statutory action on the part of the municipal authorities, although the latter have recognized and dealt

with the company as an existing body. *Atty. Gen. v. Hanchett*, 42 Mich. 436, 4 N. W. 182.

A water company organized in another state with power to operate waterworks in any or all the states will, under the rule of comity, be permitted to carry on business in Kansas on compliance with its statutes, so long as it does not depart from the original authority conferred in its charter. *State ex rel. Godard v. Topeka Water Co.* 61 Kan. 547, 60 Pac. 337.

A statute providing for the formation of corporations for specified purposes, or for the purpose of engaging in any "species of trade," authorizes the formation of a corporation for the introduction of water into a city and county for the purpose of supplying inhabitants and public buildings, as water, when collected in reservoirs or pipes and thus separated from the original source of supply, is personal property, and is as much the subject of sale as ordinary goods and merchandise. *People ex rel. Heyneman v. Blake*, 19 Cal. 579.

Under a statute authorizing the organization of a private corporation to supply water after the municipal authorities have determined the expediency of the work and that it is inexpedient for the municipality to undertake it, such action on the part of the authorities is necessary, and subsequent recognition by them of a corporation organized without it does not cure the defect. *Atty. Gen. v. Hanchett*, 42 Mich. 436, 4 N. W. 182.

The words "other purposes," in a statute incorporating a water company to furnish a town and its inhabitants with water for extinguishing fires, and for domestic, sanitary, and other purposes, do not include the furnishing of power for light manufacturing, so as to entitle the corporation to impound and divert the waters of a natural stream in derogation of the rights of lower riparian owners on payment of damages in condemnation proceedings, since that is taking private property for purposes not public, which the legislature has no constitutional power to authorize. *Re Barre Water Co.* 62 Vt. 27, 9 L. R. A. 195, 20 N. W. 109.

A waterworks company cannot take land and construct works other than those authorized by statute; and where it is authorized to construct a tunnel 45 feet below the surface of a tract of land, it cannot afterward take the entire tract and construct additional works thereon. *Simpson v. South Staffordshire Water Co.* 11 Jur. N. S. 453, 4 DeG. J. & S. 679, 34 L. J. Ch. N. S. 587, 13 Week. Rep. 729, 6 New Rep. 184, 12 L. T. N. S. 360.

A corporation undertaking the performance of a public trust under a statute authorizing it to

elected by the people other than the city council, are questions not necessary to be considered. Granting all that is claimed on that branch of the case, so far as the principle thereof is concerned, it does not help respondent so far as we can see, because the power of the board of public works to fix rates amounts to no more than authority to recommend by the adoption of a by-law embodying the judgment of the board, leaving the question of whether such recommendation shall have the force of law to the judgment of the common council in the exercise of its legislative authority. It cannot be doubted that the legislature may prescribe the conditions upon which a common council may legislate upon any matter, where all legislative authority is vested in it, and may limit the scope of its action. Taking the view most favorable to appel-

lant, that is all that seems to be embodied in the charter under consideration. In effect, the common council is empowered to fix water rates only by acting upon the recommendation of the board of public works.

The provision in the ordinance permitting certain consumers to have meters at their own expense, and requiring those using a service pipe larger than $\frac{3}{4}$ of an inch in diameter to use meters, seems to be within the express powers given to the common council under the charter. As indicated in the statement of facts, in the general enumeration of the powers of the council, it is authorized to legislate by adopting such means as it may deem expedient to prevent waste of water and to protect and regulate the waterworks, and to enforce such legislation by suitable penalties. In the chapter

construct a leat or water course for the purpose of supplying water for ships and a town, and to scour the channel of a haven, cannot convey a portion of the water of the leat other than that which may remain after the public purposes intended by the act are fully satisfied. *Atty. Gen. v. Plymouth*, 9 Beav. 67, 15 L. J. Ch. N. S. 109.

Federal courts should, in construing the charter of a waterworks company and its rights under the Constitution and statutes of a state, adopt and follow the decisions of the highest court of the state. *New Orleans Waterworks Co. v. Southern Brewing Co.* 36 Fed. 833.

A statute authorizing a municipal corporation in which an aqueduct is situated to put conductors into the pipes for the purpose of withdrawing water therefrom to extinguish fires has no application to a water company whose charter does not confer a similar power upon the town in which it is situated. *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782.

Injunction is a proper mode of relief where a city refuses to allow a water company to lay mains and pipes under its alleged charter rights. *Baltimore v. Baltimore County Water & Electric Co.* 95 Md. 232, 52 Atl. 670.

An injunction *pendente lite* restraining a village from removing hydrants from the mains of a water company or in any manner interfering with its enjoyment of its franchise will not be continued where the plaintiff's right to the ultimate relief sought is not clearly established, and all the equities of the complaint are denied in the answer,—especially where the defendant has ceased to do the things sought to be restrained, and is not threatening to do any of them. *Warsaw Waterworks Co. v. Warsaw*, 4 App. Div. 509, 40 N. Y. Supp. 28.

A grant to a water corporation of the exclusive right to exercise "franchises and privileges" refers to the powers of sovereignty then granted and has no reference to private rights already subsisting in individuals; and the corporation cannot interfere with a private water main already laid in the streets with municipal consent. *Freeport Waterworks Co. v. Prager*, 3 Pa. Co. Ct. 371.

An assignee of a lease of city waterworks, having paid for the privilege of selling water for domestic purposes in the city under an agreement between it and the city for such privilege, the consideration for which was the payment of an annual rent, cannot be compelled to pay a license fee fixed by a subsequently enacted ordinance for the privilege of vending water for domestic purposes. *Los Angeles v. Los Angeles City Water Co.* 61 Cal. 65.
61 L. R. A.

Where the undertaking of a waterworks company is transferred under statutory authority to a borough, and it is authorized to use the profits of the waterworks for its borough improvement fund, or, at its option, such profits to be applied in reducing the price of water to consumers, the borough constitutes a water company within the meaning of a statute defining a water company as a body supplying water for its own profit. *Wolverhampton v. Bilston* [1891] 1 Ch. 315, 39 Week. Rep. 394.

A statute requiring a water company to make reports of its business to the city authorities does not deprive it of any vested property rights; and, as it is a public corporation, it cannot object to it on the ground that it violates any right to secrecy in its affairs, and it may be enforced by mandamus. *Leavenworth v. Leavenworth City & Ft. L. Water Co.* 62 Kan. 643, 64 Pac. 66.

c. Extraterritorial rights.

A title, "An Act to Amend the Several Acts in Relation to" a particular city is sufficiently broad to cover a section giving water commissioners power to contract with the trustees of villages through which the water of the city may be conducted to supply such villages with water. *People ex rel. Rochester v. Briggs*, 50 N. Y. 552.

A municipal corporation may deliver water to a consumer who for his own use distributes the water throughout his premises, which lie partly within and partly without the corporate limits. *Lawrence v. Methuen*, 186 Mass. 206, 44 N. E. 247.

A water company authorized by statute to supply a city with water is not limited to the liberties of the city, but may supply those lying adjacent to it. *New River Co. v. Graves*, 2 Vern. 431.

Where a statute, requiring a corporation to supply a township with such an amount of water as it may demand within certain specified minimum and maximum limits, does not limit the purposes for which the water is to be used, the township may take more than the minimum amount and sell part of the water at a profit to a neighboring township, and the corporation supplying the water cannot object, on that ground, to supplying more than the minimum amount. *Halifax v. Southill Upper Local Board*, 31 L. T. N. S. 6, Affirming 30 L. T. N. S. 513.

The corporation of a town furnishing its inhabitants with water has no right, in the absence of statutory authority, to tear up the streets of an adjoining district for the purpose

devoted expressly to the subject of water-works, by § 9 the council is empowered to legislate as to means for ascertaining amounts to be paid as water rates by consumers; and by § 12 it is empowered to legislate, in its discretion, for the "protection of the works and the use thereof," and to enforce any and all of such legislation by suitable penalties. We do not doubt that under either the provision for the prevention of waste or the provision to make regulations for ascertaining the amount to be paid by consumers of water, the requirement contained in the ordinance for consumers, in certain cases, to use meters, and to provide and keep them in repair at their own expense, is legitimate. It is a matter of common knowledge that the use of meters has a double purpose, and that the dominant one, as regards the party furnishing

the opportunity to take water, is to prevent useless consumption thereof. Secondly to that, and more for the benefit of the consumer than the party responsible for keeping up an adequate supply of water under proper pressure, is the measurement of the water. The consumer is burdened with the expense of providing a meter and keeping it in repair, but has the counter-vailing advantage, by the exercise of prudence in the use of the water, of paying only for the amount actually taken from the public supply, which, in most cases, by reasonable attention, can be made much less than what he would be required to pay by the schedule of rates where meters are not used.

The idea advanced by appellant's counsel, perhaps having some support in the authorities called to our attention, that a meter

of furnishing its inhabitants with water. *Preston v. Fulwood Local Board*, 34 Week. Rep. 196, 53 L. T. N. S. 718, 50 J. P. 228.

But the court will not restrain a waterworks company from laying its pipes outside a particular district upon the ground that their authority is limited by statute, without a trial of the legal questions first being had at law, unless it appears that the construction of the statute is free from doubt. *Cardiff v. Cardiff Waterworks Co.* 4 DeG. & J. 596.

Although a local board of health is entitled to an injunction restraining a waterworks company authorized by statute to supply the town with water from breaking up land within the town for the purpose of carrying water to parishes outside the limits specified to be furnished with water by the water company. *Cardiff v. Cardiff Waterworks Co.* 5 Jur. N. S. 953, 7 Week. Rep. 386.

A water company authorized to supply water to territory west of a certain municipal boundary and "parts adjacent" cannot extend its pipes east of that line when the legislature intended no conflict between this franchise and one previously granted to include the territory in the municipality. *Willamspout Water Co. v. Lycoming Gas & Water Co.* 95 Pa. 35.

A waterworks system of one of three municipalities, which are consolidated into one city, under a plan which vests the title to such system in trustees with full control and power thereover, and expressly provides for the extension of the mains to supply the inhabitants of one of the other municipalities with water, may be extended by such trustees as a municipal agency, and as representing the consolidated city in the management of the waterworks, so as to supply water to additions that may afterwards be made to the consolidated city outside its original territorial limits. *Donahue v. Morgan*, 24 Colo. 389, 50 Pac. 1038.

A municipal corporation may be authorized to contract to supply water to premises outside of its corporate limits, and to have the same right to recover rents therefor as it has within its limits, even to entering a lien against the real estate. *Pittsburgh v. Brace Bros.* 158 Pa. 174, 27 Atl. 854.

Statutory authority to grant the right to any private corporation to supply water to the village and its inhabitants, and to lay water pipes and mains through and under the streets, authorizes a contract with a corporation empowered to supply the inhabitants of Duluth and vicinity with water to lay mains in the streets through which, in addition to supplying the village and its inhabitants, the inhabitants of a

neighboring municipality may be supplied. *Duluth v. Duluth Gas & Water Co.* 45 Minn. 210, 47 N. W. 781.

Where an act incorporating a fire district empowers a town to supply it with water, and the district is authorized to receive the same, on such terms as may be agreed upon by the town council of the town and said district; and it is further authorized to distribute the water throughout its territory, to regulate the use thereof, and to determine its price,—a contract between the town and the fire district by which the town is to furnish the water, to collect the rates without expense to the district, and to pay to the district a rebate therefrom, to charge the inhabitants of the district the same rates, and furnish the water to them under the same regulations, as applied to the citizens of the town, is *ultra vires*, as the agreement delegates to the city the powers conferred upon the district by the statute. *Arnold v. Pawtucket*, 21 R. I. 15, 41 Atl. 576.

Power given to a municipal corporation to lay pipes for the distribution of water throughout the city will not include power to lay pipes to supply an island lying in tide water 3 miles from the shore, although it is within the city limits. *Quincy v. Boston*, 148 Mass. 389, 19 N. E. 519.

A water corporation does not forfeit its franchise by entering into an agreement to furnish water to the pipes of a company supplying an adjoining borough, terminable upon twenty-four hours' notice, when the water is needed for its own customers, as there is no such conveyance of property and franchise as will incapacitate it from performing its corporate duties. *Com. v. Punxsutawney Water Co.* 197 Pa. 569, 47 Atl. 843.

The common council authorized by statute to establish a scale of water rates and extra rates to be charged shipping may, by ordinance, delegate to the commissioner of city works the entire control of the subject of furnishing water to boats in the harbor outside the city limits, which the city is under no legal obligation to furnish; and he may fix the rates therefor by special contract. *Cooper v. Brooklyn*, 11 App. Div. 71, 42 N. Y. Supp. 762.

Statutes providing that a town board may establish a water-supply district outside of a city or village, and may contract with a corporation in the name of the town for a water supply for such district, the expense thereof, however, to be assessed only upon the property within such created district, do not authorize a town comprising one district as a whole to contract for a water supply for a small portion

is a mere convenience solely for the party furnishing the water, is very wide of the mark. With as much propriety it might be said that the service pipe, curb stop, or use of self-closing faucets and other appliances that might be mentioned, are mere conveniences for the party furnishing the water. They are necessities, required as a condition of the consumer's taking water from the public supply, made so by such legislative authority as is contained in the charter before us,—that to prevent waste of water, to protect the use of the water service, and to prescribe the methods of determining the amount to be charged for water. The whole scheme of the charter is that the consumer shall bear all of the expense necessary to enable him to take water from the public supply. The service pipe, laid in the street from its connection with

the water main to the curb stop, under the scheme of the charter, is required to be put in by the consumer or the owner of the property to be served.

We are unable to discover anything in the cases cited to our attention by appellant's counsel, when properly understood, seriously conflicting with the views above expressed. The question involved in *State, Red Star Line S. S. Co., Prosecutors, v. Jersey City*, 45 N. J. L. 246, was this: Can a city, under a system which contemplates that it shall pay all the expenses of procuring and distributing water to consumers, provide a water meter, locate it on property to be served, and compel a subsequent occupant of the property as lessee to pay for the meter as a condition of enjoying the water service? In deciding that question language was used upon which appel-

thereof, thereby making those not benefited pay for benefits enjoyed by others. *People ex rel. Tupper Lake Water Co. v. Sisson*, 75 App. Div. 138, 77 N. Y. Supp. 376.

Where, under a statute requiring a municipality to furnish water to all the inhabitants of an adjoining town who lived within a reasonable distance of the main pipe, the city for nearly thirty years furnished water to all inhabitants of such town who laid pipes in a certain manner, or who gave a certain guaranty, it by its practical construction declared that all those inhabitants did live within a reasonable distance of its main pipe. *West Hartford v. Hartford Water Comrs.* 68 Conn. 323, 36 Atl. 786.

The city cannot, however, conclusively determine what distance is a reasonable one, as that is a matter for judicial determination. *Ibid.*

A municipal corporation acquires control of the hydrants which are thrown within its corporate territory by an alteration of its limits. *Bloomfield Twp. v. Glen Ridge*, 54 N. J. Eq. 284, 33 Atl. 928.

d. Right of way.

The grant to a water company of an easement in a strip of land for the purpose of the conveyance of water thereover gives the company no right, after having selected its right of way, to trespass on other portions of the grantor's land in laying a temporary line of pipes on other lands. *McCue v. Bellingham Bay Water Co.* 5 Wash. 156, 31 Pac. 461.

A water company authorized by statute to bring its supply of water to a city across private property in a trench of brick or stone 10 feet wide may construct a pipe of smaller dimensions, as the intent of the statute was to give it power to construct a trench not exceeding the specified dimensions. *New River Co. v. Graves*, 2 Vern. 431.

A lease or grant by a railroad company of the privilege of laying a water main along a railway, partly under the track, is *ultra vires*, and will be so declared on suit by the corporation. *Canada Southern R. Co. v. Niagara Falls*, 22 Ont. Rep. 41.

But after a water company has acted upon a parcel license granted by a railroad company, and laid pipes over a part of its line for the supply of the municipal corporation along the railroad right of way, the railroad is estopped from revoking the license and requiring the removal of the pipes. *National Waterworks Co. v. Kansas City*, 65 Fed. 691.

Equity will interfere to prevent the owner of land through which a pipe is laid to supply some of the inhabitants of the village with water

from a spring, from cutting the pipe, where the pipe causes no injury to the landowner, and the rights of the parties turn solely upon the legal construction of a deed under which the one seeking to cut the pipe claims to hold the land. *Wilcox v. Wheeler*, 47 N. H. 488.

A water company has no right to enter upon private property over which there is a public footpath, under an act of Parliament empowering it to break up the soil and pavement of roads, highways, and footways, and providing that it shall not enter upon any private lands without the consent of the owner, as the term "footways," as used in the act, does not include footways over private land. *Scales v. Pickering*, 4 Bing. 448, 1 Moore & P. 195.

A preliminary contract by a water company with the trustee of an estate, who was also the husband of the life tenant and entitled to tenancy by the curtesy in case of his survivorship, by which it was agreed that the company might acquire by condemnation proceedings land belonging to such estate for a reservoir site, reserving to himself, however, the right to gather ice from the waters of the reservoir and the exclusive right of fishery therein, conveyed only a personal right to such trustee to those privileges, which does not extend to the owners of the land or to the heirs of such trustee, where such company paid the full value of the land in the condemnation proceedings, and acquired thereby its use in perpetuity for reservoir purposes, and, but for the reservation in such contract, no person would have had any right or interest in the condemned land save the company, except, perhaps, the bare possibility of reverter for nonuse, and such contract conferred no rights to the land other than a surrender of such rights, present or contingent, as he had in himself thereto; and the fact that, by a subsequent contract, such company acquired the right to overflow other lands of the estate in consideration of fixed damages and an annual rental, which reserved to such trustee and his wife, their heirs and assigns, the exclusive right to fishery and to harvest ice on the waters of that part overflowed, in no way modified the first contract, but left the land condemned theretofore as though the second contract had not been made. *Lexington Hydraulic & Mfg. Co. v. Preston*, 20 Ky. L. Rep. 617, 47 S. W. 380.

A bond by the proprietors of a town, binding them, their heirs or executors, to bring the water of a run to the town for the benefit of the inhabitants thereof, who at the time of its execution were unincorporated and therefore incapable of taking, and executed to the commissioners of a certain county who were then not

lant's counsel rely, somewhat out of harmony with the conclusions here reached. We will not refer thereto at length. Much of it, if warranted at all by the facts of the case, is, because of the peculiarities of the charter under consideration, not found in that before us. It has this glaring infirmity: It refers to a water meter as a mere contrivance simply for use in distributing water so as to regulate quantity to price,—a contrivance merely for the convenience of the party furnishing the water. The fallacy of that is clearly shown in a case to which we will presently refer. If true in any view of the matter, it is only so as to large consumers. As to the great mass of them it certainly is not. In general, as we have said, the primary purpose of using water meters is to prevent the unnecessary use of water. Many consumers

habitually abuse the privilege to take water. They may do it in a way extremely difficult to detect, and to greatly impair the efficiency of the water service for many purposes, fire protection and operation of motors being significant among them. Meters are used to guard against the danger of carelessness in leaving faucets and hydrants open when there is no necessity therefor. That idea was in mind in drafting the ordinance before us, as indicated by the provision that the use of meters by consumers using large service pipes was not left optional with them, while the use of meters on smaller pipes was so left. The danger of unduly and unnecessarily reducing water pressure by open hydrants and faucets, especially on large service pipes, was deemed so great that meters were required, it being supposed, naturally, that

in being, will not justify an entry, under orders of a common council of the subsequently incorporated town, upon the premises of a grantee of such proprietors for the purpose of repairing conduits constructed by the proprietors across the premises prior to the sale thereof, even if the bond be considered a grant of the use of the premises, the requisites of which it lacks. *Sloane v. McConahy*, 4 Ohio, 157.

The measure of damages for a trespass in entering upon real estate and digging trenches and laying water pipes through it is such sum as is sufficient to put the property in as good condition as before the injury, with such additional sum as will compensate for the use of property of which the owner is deprived by the injury, and the value of such property as is wholly destroyed and cannot be restored to the condition in which it formerly was. *Graessle v. Carpenter*, 70 Iowa, 166, 30 N. W. 392.

In assessing the damages to a landowner's other property, adjoining the land appropriated by a municipal corporation for a reservoir site, such damages cannot be enhanced by a supposition that such corporation, in the construction of a reservoir thereon, will act in a negligent manner, although apprehended injury likely to result from the proximity of the reservoir when properly constructed may be considered. *Alloway v. Nashville*, 88 Tenn. 510, 8 L. R. A. 123, 13 S. W. 123.

Placing waterworks which have been constructed by a municipal corporation in the hands of individuals to be run without expense to the town will not interrupt the running of a prescriptive right to property occupied in the construction of the works. *Smith v. Lincoln*, 170 Mass. 488, 49 N. E. 743.

A municipality, proceeding under a statute authorizing it to grant a license to a water company to supply water to the city, has no right to acquire a lot for the purpose of a site for the waterworks plant, or to give it or its use to the water company. *Cain v. Wyoming*, 104 Ill. App. 538.

A condition in a deed granting land to a city, that it shall be improved, dedicated, and forever used as and for a common park and boulevard, and for no other purpose, is broken by placing a pumping station, consisting of a building containing a steam pump, engine, and boiler thereon. *Howe v. Lowell*, 171 Mass. 575, 51 N. E. 536.

Mere nonuser for any length of time, short of the period prescribed by the statute of limitations, of the right of way over an owner's land, granted a water company for the purpose of laying its water pipes, after the same has been

selected and located and cleared preparatory to actual operations, without actually intending an abandonment, will not defeat the company's right to occupy and use it for the purposes of the grant, where no time for occupation and use was prescribed in the grant. *McCue v. Bellingham Bay Water Co.* 5 Wash. 156, 31 Pac. 461.

II. Purchase or construction of plant.

a. Power of municipality.

The fact that a city has power to secure a water supply does not imply that it always has power to purchase or construct one of its own. The limitation of its power to incur debt may interfere with such a course. See note to *Ottumwa v. City Water Supply Co.* (C. C. App. 8th C.) 59 L. R. A. 604.

The terms of the statute may be such as plainly to prohibit the purchase or construction of a plant, and existing contracts of the city may preclude further action until they expire.

An act of the legislature authorizing cities to provide for a supply of water for the purpose of fire protection and for the use of its inhabitants by the erection and maintenance of a system of waterworks, and to borrow money and levy and collect a general tax therefor, and appropriate money for the same, leaves such cities unrestricted as to the character and cost of the means whereby the supply of water shall be provided, and authorizes them to borrow money for that purpose to the extent that it shall be necessary in order to make the contemplated improvement. *Dutton v. Aurora*, 114 Ill. 138, 28 N. E. 461.

A city is not authorized to purchase a water plant, where, by the terms of its charter, the place and manner of constructing one are definitely stated. *Austin v. McCall* (Tex.) 68 S. W. 791, Affirming (Tex. Civ. App.) 67 S. W. 192.

The sovereign power of the state may authorize a municipal corporation to purchase, by money raised by taxation or otherwise, an existing waterworks system for the purpose of supplying water for its own municipal wants and for the domestic use of its inhabitants; and, if such purchase is made in good faith for these purposes, the constitutionality of the legislation authorizing such purchase, and the action therein, including the raising of money by taxation, is not affected by the fact that incidentally to these main purposes in the purchasing of the property the municipal corporation may be compelled to carry out the obligation of the original water company in furnishing water for some takers outside of the limits of the pur-

as a rule open faucets or hydrants would not be allowed under a meter system when water was not needed. We apprehend that if the charter which the New Jersey court had under consideration had plainly indicated that consumers were expected to take water from the main supply pipe at their own expense and under such regulations and conditions as the city council might, in its discretion, see fit to adopt, broad powers being given to prevent waste, to preserve the use of the water system, and to make and enforce needful regulations for the ascertainment of the amount which consumers of water should pay for the privilege of drawing water from the water main, some expressions found in the opinion would not have been made.

In *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 6 L. R. A. 750, 22

Pac. 910, 1046, another case referred to by counsel, the question decided was this: Is a requirement in an ordinance that the party furnishing water shall be at the expense of the meter to measure the water, and shall charge only for water actually used as indicated by the meter, a reasonable regulation, there being nothing in the organic law of the water company inconsistent therewith? Whether a requirement that consumers shall furnish meters at their own expense as a condition of enjoying the water service, under charter regulations such as govern the case before us, was not involved. The language of the opinion, "The expense of water meters could not be imposed upon the consumer," must be taken with reference to what was under discussion in the case. True, *State, Red Star Line S. S. Co., Prosecutors, v. Jersey City* was cited, but

chasing municipality. *Mayo v. Dover & F. Village Fire Co.* 96 Me. 539, 53 Atl. 62.

A borough authorized by statute to make certain waterworks cannot use any part of its funds in paying the expense of the application to Parliament for an extension of its powers. *Atty. Gen. v. Plymouth*, 1 Week. Rep. 445.

A statute authorizing a city council to pledge $\frac{1}{4}$ of 1 per cent of its general revenue for the payment of any money to become due by virtue of the terms of any contract made by said city for the purchase of a water plant confers upon the city the power to purchase a water plant. *Austin v. McCall (Tex.)* 68 S. W. 791, *Reversing (Tex. Civ. App.)* 67 S. W. 192.

Water commissioners acting under a statute authorizing the construction of a system of water works, and empowering them to acquire the rights, privileges, grants and properties of an existing water company not possessing an exclusive privilege if it becomes necessary for any of the purposes of the act, are not thereby imperatively required to purchase such property. *Warsaw Waterworks Co. v. Warsaw*, 16 App. Div. 502, 44 N. Y. Supp. 876.

A statute authorizing a village to construct a system of waterworks is not unconstitutional in failing to provide for the purchase of an existing system not enjoying an exclusive privilege, where the Constitution at the time of the enactment of the law incorporating the company provided that such laws might be from time to time altered or repealed. *Ibid.*

An ordinance of a city council directing the laying of a water pipe is equivalent to an avowment that the necessity for laying it has arisen under a statute authorizing the laying of water mains whenever the council shall declare the laying of the same necessary. *Young v. St. Louis*, 47 Mo. 492.

Where, by the authority given to a town to purchase waterworks and by the vote of the town giving that right, it is contemplated that the acquisition of the works shall be for the town generally, it is no objection to such purchase that only the taxpayers within a fire district will be benefited by the purchase, as it will not be assumed that the benefits of the works will not be extended beyond the limits of the fire district as rapidly as can be reasonably done. *Peabody v. Westerly Waterworks*, 20 R. I. 176, 37 Atl. 807.

That the cost of a system of waterworks supplied by an artesian well may not be known in advance, or that the effort to secure water in that way may prove a failure, is no argument against the people and council of a municipality

adopting such a system of waterworks. *Taylor v. McFadden*, 84 Iowa, 262, 50 N. W. 1070.

General acts authorizing cities, villages, etc., to construct waterworks and to levy and collect taxes therefor may be regarded as repealing the limitation of the taxing power of a city under its special charter granted prior to the passage of the acts referred to. *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781.

An injunction will be granted to restrain the purchase of waterworks by a city council to whose discretion such purchase is left by the charter, where the price is grossly excessive, and the works inadequate to the needs of the municipality. *Avery v. Job*, 25 Or. 512, 36 Pac. 293.

In an action against a municipality to recover on a contract for the boring of an artesian well, it cannot be set up as a defense that the authorities should not have incurred the expense of an artesian well, but should have contented themselves with the cheaper modes of accomplishing the object. *Livingston v. Pippin*, 31 Ala. 542.

Where the statute giving water commissioners of a city power to contract for a water supply limits the amount to be expended, no recovery can be had on a contract for work done beyond the amount so limited. *Kingsley v. Brooklyn*, 78 N. Y. 200.

Where water commissioners of a town are, by a vote of the people under a statute, limited to an expenditure of a certain sum for waterworks, they will be enjoined from making any expenditures in excess of that sum. *Farnsworth v. Pawtucket*, 13 R. I. 83.

The fact that the building of waterworks by a city having the statutory authority so to do will increase the municipal indebtedness and impose additional taxation upon the citizens because it will still be obliged to continue paying water rents to a private company supplying it with water under an unexpired franchise, is no objection to the sale of bonds and the erection of the plant with which the courts are concerned, but is a matter within the discretion of the municipal authorities. *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 865.

Under act R. I. gen. assen. May 26, 1897, which expressly authorizes the Westerly Waterworks Company to sell, and the town of Westerly to purchase, all the property of the waterworks, whether situated within or without the state, it is no objection to the purchase by the town of the portion of the waterworks in the state of Connecticut, that the right granted by that state to the waterworks company to construct a portion of its plant in the state was merely a revocable license; since it will not be

we do not see that it has anything to do with the point under discussion. In any event, the delegated power exercised in passing the ordinance there under discussion was dissimilar in many material particulars to that involved in this case. The question was whether the company might be compelled to bear the burden of putting in meters, not whether consumers might be compelled to bear such burden.

We find the general subject of whether a consumer of water can be required to measure what he takes from the public supply through a meter provided at his own expense, the corporation being authorized to charge meter rates, and its system contemplating mere permission to consumers to take water from its water mains, as in this case, was discussed at considerable length in *Sheffield Waterworks Co. v. Bingham*,

L. R. 25 Ch. Div. 443. The conclusion reached was that it was competent for a water company, under the circumstances suggested, to impose upon the consumer the burden of providing at his own expense his water meter. The reasoning leading to such conclusion may well be adopted here. We quote from the opinion: "The Sheffield company are bound to put mains down in the streets. They are bound to keep those mains charged with water at high pressure now, and, having done that, every householder in Sheffield is free, either to make use of the water in that main, or to decline to make use of it, as he pleases. If he desires to make use of it, he himself makes the communications between his own house and the main, subject, of course, to all proper provisions for taking care that he does no injury to the waterworks company

assumed that the legislature of Connecticut will revoke the license because of the change of ownership of the waterworks,—especially where the charter of the water company makes express provision for the sale of the waterworks to the town, as it will not be regarded as improbable that the legislature of Connecticut knew of that provision at the time the license was granted. *Peabody v. Westerly Waterworks*, 20 R. I. 176, 37 Atl. 807.

Proceedings for the inauguration of a water system instituted under a statute are entitled to be carried to a final conclusion notwithstanding its repeal. *Champlain v. McCrea*, 165 N. Y. 264, 59 N. E. 83.

Additions to existing waterworks system are within the terms of a charter provision requiring all local improvements, the funds for the payment of which are to be derived from assessments upon the property benefited, "and such improvements as the city council shall by ordinance prescribe," to be made by contract let to the lowest bidder. *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29.

Where a city has the power, under its charter, to construct a system of waterworks, it is not necessary that its council, before entering into a contract with reference to it, shall pass an ordinance authorizing the works to be constructed, or the contract to be made, when the charter does not require it. *National Tube-Works Co. v. Chamberlain*, 5 Dak. 54, 37 N. W. 761.

Water commissioners of a city can let out work for the construction of works necessary for the water supply only in the manner prescribed by statute. *Dickinson v. Poughkeepsie*, 75 N. Y. 65, Affirming 7 Hun, 2, where it was held that a board of water commissioners having power to let contracts for work after publishing for proposals for the work for two weeks, and by giving the contract to the lowest bidder, has no authority, after the bids have been opened, to alter the contract materially by adding a clause thereto and then awarding the contract to one of the original bidders without new advertisements or proposals.

b. Contract to purchase.

1. In general.

Where a water company agrees that at a certain time the municipality may take over its rights and works at an appraisal to be fixed in a certain way, said appraisal to be the same at which the municipality "shall have the right to buy said rights and works, and for which said company agrees to sell said municipality the 61 L. R. A.

works and rights," the municipality need not bind itself to take the works at the appraised value until after the appraisal is made, although the company is bound to sell at the value when it is ascertained if the municipality elects to take the property. *Farmington v. Farmington Water Co.* 93 Me. 192, 44 Atl. 609.

Stein v. McGrath, 128 Ala. 175, 30 So. 792, follows *Mobile v. Stein*, 54 Ala. 23, to the effect that where a municipal corporation, in granting a right to erect a water plant, reserves only a right to purchase at a certain time, no rights vest in it unless the option to purchase is exercised.

A town under contract to buy a complete system of waterworks from a company furnishing it with water cannot complain that such plant is incomplete on account of its furnishing water from its reservoirs to another town, when there is a supply much beyond its needs, and ample for the other town also. *Bristol v. Bristol & W. Waterworks (R. I.)* 49 Atl. 974.

After a town has once voted to purchase the plant of a water-supply company the contract is complete, so that it cannot be rescinded by a subsequent vote to the opposite effect. *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 16 N. E. 420.

A contract for the purchase of a water plant from a corporation some of whose directors are members of the common council which made the contract, is voidable. *State, Stroud, Prosecutor, v. Consumers' Water Co.* 56 N. J. L. 422, 28 Atl. 378.

The objection that a town has not power to purchase waterworks cannot be made by the owner of the works in order to defeat its contract with the town for the sale thereof. *Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 32 L. R. A. 740, 34 Atl. 359.

The vendor of waterworks of a city, who has accepted its bonds in payment therefor, cannot rescind the contract and ask for a restoration of property on the ground that the issue of bonds was invalid, where the city has not denied its obligation to pay them, and does not propose to repudiate them. *Sala v. New Orleans*, 2 Woods, 188, Fed. Cas. No. 12,246.

The disability of a city, under its charter and acts of the legislature, to take title to waterworks cannot, if it has paid for the property, be set up by the waterworks company to defeat a purchase by the city, under a statutory provision that the city shall purchase if the grant be not renewed when the franchise expires. *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

in making the connection; and subject, also, to this, that the connections must be properly made, so as not to abstract more water than he is entitled to take, and not to do any injury of any sort or description to the waterworks company."

The court, by Justice Pearson, further reviewing the position taken,—that the water company, not the consumer, should furnish the meter; that if it charged meter rates it should measure the water at its own expense the same as a merchant in selling tea to his customer weighs the same out of his stock,—said, in substance: The argument is fallacious because, strictly speaking, the company does not furnish the water as a merchant furnishes tea. It provides a supply of water under pressure under such conditions that the consumer can, under its regulations, if he sees fit, connect

an appliance of his own therewith and take water therefrom. In other words, the company furnishes the opportunity outside of the consumer's property line, at its water main, for him to supply himself with water. He takes it. He is granted the right to take it under certain conditions. The company, from the necessities of the situation cannot know when he takes it. He is the only person in a position to measure the water, since he takes it whenever he likes and in whatever quantities he likes, under such conditions as may be prescribed to prevent his conduct from interfering with others enjoying the same opportunity. The company is entitled to have the measurement of what he takes made by him and in such a way that it will be reasonably protected from false measurements or reports. By the automatic method involving the use

That a water company has elected to sell its property to a city in conformity with the terms of a state statute, and that commissioners to appraise the value of the property have been appointed and have made their report, do not preclude the company from thereafter maintaining a bill to contest the constitutionality of the statute. *Newburyport Water Co. v. Newburyport*, 85 Fed. 723.

Waiver of the right to forfeit franchises of a water company whose property a municipal corporation has the option to acquire, for neglect to keep accurate accounts of the cost of construction as required by the ordinance granting permission to erect and operate the works, so that the rights of the municipality are prejudiced, is affected by long delay in moving for forfeiture, accompanied by active compulsion upon the company as to extension and operation of the work. *State ex rel. Atty. Gen. v. Janesville Water Co.* 92 Wis. 496, 32 L. R. A. 391, 66 N. W. 512.

A city upon purchase of the plant of a waterworks company, encumbered with liens to the satisfaction of which the city is entitled to have the purchase money applied, will not be required to pay the amount without protection from the claims of possible lien holders, and a commissioner will be appointed by the court to act with the agent of the company to see that lien holders are paid, and proper releases are given. *National Waterworks v. Kansas City*, 65 Fed. 691.

A waterworks company directed by decree to convey its plant to a city will be required, where its system includes a supply station from which it is supplying another city with water under a contract for a continuous supply, to give security for the supply of such city from independent sources as a condition of the acceptance of the conveyance. *Ibid.*

A contract between a town and a waterworks company for the purchase by the town of the waterworks at a price to be mutually agreed upon, or, on failure to agree, to be fixed by arbitrators, will be enforced by the court if the waterworks company refuses to agree or to appoint arbitrators, where the agreement to purchase is merely a part of another more extensive contract under which the parties have incurred obligations so that they cannot be placed *in statu quo*. *Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 32 L. R. A. 740, 34 Atl. 359.

Upon a bill in equity to enforce the performance of a contract to convey waterworks to a city at a price to be agreed between the owner of the waterworks and the city, or by arbitra-

tors to be appointed by the parties, the owner of the waterworks, as defendant, cannot object that no arbitrator was appointed by the city, where it appears that defendant expressly notified the city that he refused to appoint an arbitrator. *Ibid.*

A person to whom a city has granted the exclusive right to maintain waterworks, the city reserving the right to purchase the works, is not a necessary or proper party to a bill to compel a conveyance to the city, where it appears that before the beginning of the suit he had conveyed all his interest in the waterworks. *Ibid.*

A water company is entitled to an injunction restraining a municipality from using its municipal power to take forcible possession of waterworks, to the possession of which it is not entitled because of failure to pay for improvements made by the company under a contract requiring such payment as a condition of the city's right of possession, where the city's present inability to pay is apparent, and there is no method by which the water company can compel payment within a reasonable time. *Los Angeles v. Los Angeles City Water Co.* 124 Cal. 368, 57 Pac. 210, 571.

A water company which, in order to avoid municipal competition, had sold its property to the city under a state statute providing therefor, and which allows no compensation for the value of its franchises or on account of its future earning capacity or good will, is deprived of its property without due process of law or just compensation, in violation of the 14th Amendment of the United States Constitution. *Newburyport Water Co. v. Newburyport*, 85 Fed. 723.

But a water company does not sell its works to a city under such compulsion as amounts to duress, thereby making the sale involuntary and in effect a taking of its property without compensation in violation of the 14th Amendment to the United States Constitution, where, by statute, the city was authorized to construct a plant of its own, but was first required to vote whether it would do so and whether it would purchase the works of the existing company, and, after determining to supply itself, but not to purchase such works, a statute was passed obliging the city to purchase such existing plant if it was for sale, and, in case of inability to agree upon the terms, directing the appointment of appraisers to ascertain the fair value of the property "for the purpose of its use by the city," and without enhancement on account of future earning capacity or good will, or on account of the franchise of the company. *New-*

of the meter, that is accomplished. The consumer measures the water by the act of taking it, and informs the company of the result by exhibiting to it the register, which it can see only by his permission to come upon his premises for that purpose. The burden of the expense thereof is legitimately cast upon the consumer as a condition of his enjoying the privilege of taking water from the source of supply at his disposal.

A contrary view is favored in an article found in 27 Am. L. Reg. N. S. 277-283, reference being there made to *Sheffield Waterworks Co. v. Carter*, L. R. 8 Q. B. Div. 632, which is not entirely without warrant, there being some language used in the opinion in that case and in the syllabus thereto inconsistent with what was decided in the later case. But Justice Pearson, in writing the later opinion, reviewed at length

and critically analyzed all that was said on the subject in the former case, and concluded that it did not decide the point which was the precise one at issue in the case before him. He said: "I can only say, having given a good deal of attention to this case, that I believe the learned judges who decided that case would think I was erring very greatly indeed, and charging them with something they never intended to do, if I were to come to the conclusion that they had any notion of deciding the question which is before me to-day."

A point is made that the meter requirement in the ordinance fatally discriminates against consumers using large service pipes, in that it imposes upon them the burden of procuring a meter, while it leaves the matter of using a meter by others optional. We are unable to say that, as a matter of law,

Newburyport Water Co. v. Newburyport, 103 Fed. 584.

Where a contract for the construction of a waterworks system contained a provision allowing changes and additions as the work progressed, and the value of the material, labor, and plant furnished was found to be much less than the contract price, the contractors may recover for extra material furnished at the instance of the city, although no provision was made by the levy of a tax to pay the interest and create a sinking fund to discharge such debt. *Sherman v. Connor* (Tex.) 72 S. W. 238.

The measure of damage in a suit by a city against a contractor for the failure to complete a water system according to contract is the difference between the contract price plus extra material furnished by the contractor and the amount necessarily expended by the city to complete the contract, added to the amount paid to the contractor on the contract. *Ibid*.

2. Compensation.

When a waterworks plant is appraised for purchase by a municipal corporation, the question to be answered is, What is the market value of the plant including its franchises,—not its value to the municipality or to the waterworks company, but its value in view of all the purposes to which it is naturally adapted? so that, when a municipal corporation has reserved from the grant of a waterworks franchise the right to purchase the plant at the end of any five-years period, and the right of going into the business of supplying water to itself and its inhabitants, the waterworks company has no data for any forecast of any future business whatever, even with individual inhabitants; and an award of substantial damages, based on deprivation of such business, would have no foundation on either facts or probabilities. *Re White Plains Water Comrs.* 71 App. Div. 544, 76 N. Y. Supp. 11.

The actual cost of a water plant to a corporation having a franchise to construct it, which a municipal corporation is required by statute to pay for the plant in order to acquire title to it, is the actual cost to the water company without any allowance of profit to it, where it, before acquiring any funds with which to construct the plant, contracted for its construction by an individual, who was to be paid the cost of the work when it was completed, and to whom, or to the one who advanced the money, the corporation owes the entire contract price. *Falmouth v. Falmouth Water Co.* 180 Mass. 325, 62 N. E. 255.

Under a statute authorizing a water board 41 L. R. A.

to furnish a supply of water in districts outlying its own, and empowering the sanitary authorities of such outlying districts to purchase of the water board waterworks constructed in the district, the price to be fixed by arbitration, such price must be the reasonable value of the works; but no compensation can be allowed for the loss of the right of supplying water within the district. *Kirkleatham Local Board v. Stockton & M. Water Board* [1893] 1 Q. B. 375, 62 L. J. Q. B. N. S. 180, 4 Reports, 194, 67 L. T. N. S. 811, 57 J. P. 421.

"The fair and equitable value" which by statute and ordinance a city is to pay for waterworks on the expiration of a franchise is not the amount on which the income or earnings would pay interest; neither is it merely the original cost of construction, nor the cost of reproduction; but it includes, in addition to the cost of reproduction, the additional value created by the fact of connection with buildings and of the actual operation of the plant. *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

In determining the price to be paid by the city to a waterworks company for the purchase of its property, evidence of past earnings is rightly excluded when the company had no competitor. An allowance on the ground that the plant is a going concern is justifiable, and the value of the property at the date of its transfer to the city, adding interest to the date of payment, is a proper basis of valuation. *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

Where a water company has the right to acquire land or water rights by purchase, it may also purchase and hold a mill privilege of damming waters and flooding a meadow, although the running of a mill is beyond its charter powers. *Ibid*.

So, where, upon a transfer of the property of the water company to the city, the city objected to paying for said mill privilege on the grounds that the waters of the pond were not in actual use when the property of the water company was transferred to the city, that the mill privilege did not give the right to use the pond as a water supply, and that the waters could not be so used without acquiring a fee in the bottom of the pond,—it was held that the mill privilege was of value as a step towards the ownership of the pond as an auxiliary water supply, and was the property of the water company, owned and used by it, so that it must be paid for. *Ibid*.

Under statutory authority to determine the fair valuation of a water plant to be purchased

the classification of consumers thus made is unreasonable. The power vested in the council to protect the use of the waterworks is discretionary in character and conferred in broad general terms. It would require a very plain case of abuse of power in not giving equal opportunities to all to take water under like conditions and circumstances, to warrant the court in interfering in such a case as that presented by the ordinance in question. We can see a good reason why there are dangers to be guarded against where water is taken from a water main through a large service pipe, which, if they exist at all, do not to the same extent where a small service pipe is used. The different conditions may, and probably do, justify the classification made in the ordinance.

From what has been said, that part of

by a city "without enhancement on account of future earning capacity or good will, or on account of the franchise of the corporation," evidence of past net earnings is not to be considered. *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 538.

In estimating the price to be paid by a town upon the exercise of its option to buy a waterworks plant of a company to whom it had granted the exclusive right to maintain water pipes in the streets for a term of fifty years, such franchise for the unexpired term must be considered. *Bristol v. Bristol & W. Waterworks (R. I.)* 49 Atl. 974.

A contract by which a municipality agrees to pay the cost and expense of hydrants, and of putting them in, requires it to pay only the actual sum expended in putting them in, and not a reasonable profit to the water company in addition. *Bull v. Quincy*, 155 Ill. 571, 40 N. E. 1035.

Where waterworks buildings were destroyed by fire, thereby rendering the machinery useless, but not destroying the same, the taking possession by the municipal corporation of the lot upon which such waterworks were erected by the owners, under a contract with such corporation, was also a possession of the machinery thereon and of everything else, not destroyed by the fire, appertaining to such waterworks system, so as to render such corporation liable under a clause in its contract with the builders and owners of such waterworks which provided that, in case such waterworks should get out of repair, and so remain for ninety days, so that the town was not supplied with water, then the officers of such corporation might take possession thereof and use and occupy the same as its own, becoming liable thereupon for the payment to the owners of a certain amount over and above the money already advanced by it to such owners under the terms of such contract. *Pearl v. Nashville*, 10 Yerg. 179.

A town cannot refuse to pay more than the value of property authorized by its charter to be held by a water company for its plant, if it is in fact worth more than that sum. *West Springfield v. West Springfield Aqueduct Co.* 167 Mass. 128, 44 N. E. 1063.

The fact that a water company has conveyed waterworks to a city, and no longer supplies the city with water, does not relieve the city from its irrevocable agreement to pay a special tax for hydrant rentals, raised for the purpose, to a trustee of bondholders under a mortgage on the works given by the water company, such tax to be applied to the payment of interest and for taking up and paying off said bonds. *Center-* 61 L. R. A.

the ordinance under consideration relating to meters, and everything in it except the matter of fixing rates, were proper subjects for legislation by the common council independently of the board of public works. The requirement for meters being valid, a schedule of rates to be applied to meter measurements was necessary. It was the duty of the board of public works to take the matter in hand and, by a proper by-law, submit its conclusion to the common council for approval. That such method of treating the matter was necessary to a legal establishment of the meter rates, we have no doubt. But, since there is nothing inequitable that we can see in the rates fixed by the ordinance, and it was the duty of the board to adopt a by-law on the subject, and in the end no rates could have been established not approved by the common

ville v. Fidelity Trust & Guaranty Co. 118 Fed. 332.

Where, under a statute giving a municipal corporation the authority to purchase the plant of a water-supply company, it is given the right to maintain pipes in the street and to collect toll, and the water company voluntarily acts in offering its plant for sale, no allowance should be made to it for its right to lay such pipe and collect tolls. *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 538.

The value of connections with buildings, which is to be added to the cost of reproduction in determining the present value of a system of waterworks which a city must pay therefor, is not merely the cost of making such connections, since they are not compulsory, but dependent upon the will of property owners, and are secured only by efforts and inducements. *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

c. Provision of fund.

1. Bonding.

A city authorized to contract for waterworks has power to make necessary and proper arrangements to provide for paying for the same. *Fergus Falls Water Co. v. Fergus Falls*, 34 L. R. A. 526, 65 Fed. 586.

A municipal corporation having the power to borrow money for the construction and maintenance of waterworks has the power to issue bonds therefor as a necessary incident. *Dutton v. Aurora*, 114 Ill. 138, 28 N. E. 461.

A statute which authorizes a city to issue bonds for the purpose of erecting waterworks implies the authority to sell the bonds. *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665.

Power to issue bonds for the construction of waterworks implies the power to make them negotiable. *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960.

The issue of bonds the proceeds of which are to be devoted to the construction of waterworks to constitute a part of the city's already existing system is authorized by a statute authorizing the pledge of the city's credit, after the consent of the people has been obtained, "for the purpose of constructing, maintaining, and operating a system of waterworks" for the city. *State ex rel. Fremont v. Babcock*, 25 Neb. 500, 41 N. W. 450.

Under the Nebraska statutes, cities of the second class having more than 5,000 and less than 25,000 inhabitants may issue bonds for the

council,—no other rates than the ones which the council adopted unless they consented,—there is nothing in the ordinance inflicting any real injury upon the relator. At most there is a fatal irregularity, from a legal standpoint, in doing that which might have been done legally by observing strictly the charter method. From the standpoint of equity,—that occupied by the court in granting or denying the use of a discretionary writ,—relator is not injured at all by the ordinance complained of. As regards any pecuniary injury that could in any event have been inflicted upon him, it is believed that it would be trifling as compared with the disturbance of public affairs which would result from allowing every individual member of a city community, upon every trifling pretext involving the validity of an ordinance, to force it to defend its jurisdiction before the courts upon a common-law

writ of certiorari. After careful consideration of the matter we have concluded that it is an abuse of judicial discretion to allow the writ of certiorari in such a case as is here presented. The mischief that might result from a rule permitting every individual, not smarting under any substantial injury, nor any not remediable by ordinary methods, to make the court, in effect, a sort of upper house, to review all jurisdictional matters in municipal legislation, involving matters not of a really prejudicial character, is very great. The law is well settled that a suitor has no absolute right to a remedy by common-law writ of certiorari. When to permit and when to deny the use of it rests in the sound discretion of the court. Even on appeal to this court, after the lower house has been allowed such use, it is proper, where its action seems plainly wrong, upon a reversal of the judg-

purpose of constructing, maintaining, and operating a system of waterworks; but the authority to do so must be conferred upon the officers of the city by a majority vote of the people at an election held for that purpose, and of which four weeks' notice must be given by publication in a newspaper published in the county in which such city is located. *Ibid.*

Bonds of a water company, although delivered in pledge, are issued within the meaning of a statute providing that no corporation shall issue bonds except for money actually received by it equal to 75 per cent of the par value thereof; and, when put forth in violation of the statute, are void thereunder. *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 29.

Where a city has power, under its charter, to issue bonds for the purpose of erecting city waterworks, a court will not interfere on the ground that the proposed waterworks are greater than the present needs of the city demand, unless there is an undoubted excess of authority and the abuse of the discretion of the city council is palpable; and in such a case the proposed constructions must speak for themselves, and an inquiry will not be made from other sources as to the hidden motives of the city council. *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 900.

A municipal corporation has the power, under a statute authorizing it to issue all such bonds as in its judgment may be necessary to construct a waterworks system, to issue bonds for the amount approximating the amount of the indebtedness already incurred and to be incurred in constructing and completing its waterworks system; and it is no objection that the bonds are made to bear 10 per cent interest, where the statute authorizes a rate not exceeding that per cent. *Dally v. Columbus*, 49 Ind. 169.

A municipal corporation has the power, under a statute authorizing municipal corporations to issue and sell all such bonds as in their judgment may be necessary to carry out all contracts theretofore made for the construction of waterworks and fully to complete the same, to issue bonds to make up a deficiency in its waterworks fund by reason of the misapplication by the city treasurer of a part thereof, leaving debts unpaid on account of such waterworks. *Ibid.*

Bonds issued by a municipal corporation to pay for the construction of waterworks, being authorized by its charter and the laws of the state, are valid up to the constitutional limit. 61 L. R. A.

tion of its corporate indebtedness. *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781.

Under statutes permitting the issuance and sale of bonds for erecting or purchasing waterworks upon authorization of the vote of the electors, both purposes cannot be binding in one submission, but each one must be submitted separately. *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374, 49 N. E. 835.

Under a statute requiring water-supply bonds to be disposed of at not less than their par value, they must bring the amount of their principal and accrued interest at the time of the sale. *Ft. Edward v. Fish*, 156 N. Y. 863, 50 N. E. 973, *Airming* 86 Hun, 648, 33 N. Y. Supp. 784.

The existence of an ordinance prohibiting the sale of bonds for less than par at the time the proposition for their issuance is submitted to the voters of the municipality will not prevent the passage of an ordinance after the vote has been taken providing that the bonds shall be sold at a discount. *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960, *Reversing* (Tex. Civ. App.) 21 S. W. 375.

The adoption of a resolution for the purchase of an existing waterworks system and the ratification thereof by vote before any steps were taken under a prior resolution for the issuance and sale of bonds for the erection of a new waterworks system therein at a much larger expense revokes the right to issue and sell bonds under such prior resolution, where the waterworks purchased would be practically useless in connection with such new system, and it is apparent that the voters did not suppose that a double system of waterworks was intended to be secured. *Johnson v. Elyria*, 6 Ohio N. P. 372.

A formal ordinance is not required in submitting to the vote of the electors of a municipality a proposition for issuing waterworks bonds under the Nebraska statutes. *State ex rel. York v. Babcock*, 20 Neb. 522, 31 N. W. 8.

Under a constitutional provision requiring a petition of the majority of the freeholders of a municipality to authorize an election for the purpose of issuing bonds for waterworks, the statute cannot require a petition by a majority of the freehold voters of the town as a condition of holding such election. *State ex rel. McWhirter v. Newberry*, 47 S. C. 418, 25 S. E. 216.

A statutory provision requiring a two-thirds vote of the electors voting at the general election to carry a proposition to borrow money to build

ment to remand the proceedings with directions to dismiss the writ. *Knapp v. Heller*, 32 Wis. 467; *State ex rel. Schintgen v. La Crosse*, 101 Wis. 208, 77 N. W. 167. The common rule is that where the relator shows no equity, and, so far as his legal rights go, no injury not remediable at law, it is proper to deny the use of the writ. It is considered that the cases voicing the doctrine of this court establish the rule to be, also, that, where there are these additional elements to those above mentioned,—a private individual upon the one side as relator, with a trifling injury, if any, to be redressed, and that remediable by ordinary means, and the public on the other,—it is an abuse of discretion to permit the use of the remedy.

The logical result of the foregoing is this: The trial court should have considered the

use of the writ, under the circumstances of this case, as presenting a question of its own jurisdiction, and quashed the proceedings with or without a motion to that effect, as the circumstances required. Having proceeded to decide the matter presented on its merits, it should have sustained the jurisdiction of the common council only as to those portions of the ordinance that do not deal with the subject of fixing rates, and that only upon the ground that such portions are separable from the balance of the ordinance. It is considered that they are separable.

As the matter stands now *the judgment is erroneous, and it seems best that it should be reversed in toto* and the cause remanded with directions to dismiss the writ.

So ordered.

waterworks intends two thirds of the number of voters voting at the election, and not two thirds of those voting upon the proposition. *Daniels v. Long*, 111 Mich. 562, 69 N. W. 1112.

An ordinance of a municipal corporation providing for the issue and sale of bonds for the purchase or erection of waterworks, which gives the mayor discretionary powers as to when and how such bonds shall be offered for sale, also as to who is the highest bidder and the terms of bidding, is void as being a delegation by the council of the powers belonging to it alone, and which it cannot by ordinance or otherwise delegate to any person or body. Such ordinance is also void under a statute which requires such bonds to be sold in not more than four different series, at not more than four different times as the money may be needed for the proposed use. *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 874, 49 N. E. 335.

A special provision in a municipal charter requiring the approval of the trustees to the issuance of the bonds by the commissioners is not repealed by the general law containing provision for the signing, issuing, and registration of municipal bonds. *People v. Parmeter*, 158 N. Y. 385, 53 N. E. 40.

2. Taxation.

(a) In general.

The effect of the construction of a plant for municipal water supply being the investing of the municipality with facilities to furnish a commodity which has commercial value, the plant can be made to yield a revenue which may be applied to the cost of construction; and in most instances this is the most equitable and convenient method of meeting the expense.

An act prescribing that the water rents collected in cities of a certain class shall be applied to aid in the construction of waterworks therein is within the power of the general assembly, and not unconstitutional. *Alter v. Cincinnati*, 56 Ohio St. 47, 35 L. R. A. 737, 46 N. E. 69.

But quo warranto, or a bill in equity by the attorney general, will not lie against a municipal corporation for disregarding the provisions of a statute requiring rates to be charged for water furnished by it, which shall pay the interest and 1 per cent of the principal of the indebtedness incurred in establishing the plant each year, by establishing a nominal rate with a view to taxing the property and poles of the inhabitants to pay the expenses of the waterworks. The remedy by quo warranto is inapplicable where the purpose of the proceeding is

to compel the performance of a duty which the defendant neglects or refuses to perform, or to restrain improper use of a franchise or power clearly granted which does not work a forfeiture of the whole franchise. And a bill by the attorney general cannot be sustained for relief against a private wrong. *Atty. Gen. v. Salem*, 103 Mass. 138.

But in some instances the attempt to meet the cost by taxation is made, and the question then arises, What form shall the tax assume? So far as there is a direct benefit conferred upon a parcel of property by placing water within convenient reaching distance of it, there is no objection to a local assessment corresponding with this benefit. But the benefit to the city at large from increased protection against fire, and from improved sanitary conditions, as well as from the construction of mains, cannot equitably be made the subject of local assessment, but should be raised by general tax.

The construction of a canal for the purpose of securing an abundant water supply for a city is a purpose for which the city council may assess taxes on the inhabitants of the city and those holding taxable property therein, under legislative authority to make such assessments for the "safety, benefit, convenience, and advantage of the said city, as shall appear to them expedient." *Frederick v. Augusta*, 5 Ga. 561.

A general tax for a municipal water supply is not invalidated by the fact that the water has not been carried to all parts of the township. *State, Conger, Prosecutor, v. Summit Twp.* 52 N. J. L. 483, 19 Atl. 966.

The taxation of all taxable property in a town for the construction of waterworks for the protection of property in an unincorporated village therein, under an act authorizing such taxation, is not a violation of any constitutional restriction or rule of public policy rendering such act void. *Land, Log & Lumber Co. v. Brown*, 73 Wis. 294, 3 L. R. A. 472, 40 N. W. 482.

But a statutory provision authorizing the levy of an assessment upon the taxable property of a city to defray the expense of furnishing water for domestic and other purposes is unconstitutional and void, since the furnishing of water is partly a local matter, and it is not within the power of the legislature to compel taxation for that purpose without the action of the freemen of the city or their chosen representatives. *Blades v. Detroit Water Comrs.* 122 Mich. 366, 81 N. W. 271.

A provision in one section of a city charter permitting a certain percentage of taxation to

KANSAS SUPREME COURT.

A. E. ASHER *et al.*, *Plffs. in Err.*,
v.

HUTCHINSON WATER, LIGHT, & POWER
COMPANY.

(.....Kan.....)

*1. A contract by ordinance between a city and a water company, that the latter will lay water mains and supply the inhabitants with water on certain streets of the city, may, after such mains are laid, be so modified and changed by the city and water company as to require the water company to remove its mains from certain streets, where, in the judgment of the council,

*Headnotes by GREENE, J.

public necessity no longer requires their continuance, to other portions of the city where public necessity requires that mains should be laid, and injunction will not lie at the suit of an individual to prohibit the city and water company from making such change, notwithstanding it may greatly decrease the value of his property.

2. Where a city determines that the public welfare will be best subserved by removing to another portion of the city a large amount of water mains upon which there are 17 fire hydrants maintained at public expense, and where there is no demand for fire protection, and but one private consumer, injunction will not lie at the suit of such private consumer to restrain the removal of such mains, notwithstanding the removal thereof would render

be used "for current expenses and the general improvement" does not prohibit the levying of a greater rate for the construction of waterworks, where other sections of the charter permit the issuing of bonds for special and definite purposes, payment of which shall be provided for at the time they are issued. *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960.

The provisions of a general statute permitting the assessment of taxes to pay interest on water bonds is not abrogated by the charter of the municipality requiring the council to fix the water rates so that the aggregate amount collected shall be equal to at least 7 per cent of the water debt of the city. *People ex rel. Woolsey v. Long Island City*, 76 N. Y. 20.

An act of legislature granting municipal corporations incorporated under special charters the right to construct waterworks, with power to levy a tax for that purpose, does not authorize a tax levy over and above the general percent limit of the taxing power of municipal corporations as fixed by a prior general act, in the absence of express or necessarily implied authority in such act so to do. *People ex rel. Peterson v. Lake Erie & W. R. Co.* 167 Ill. 283, 47 N. E. 518.

The right of Jersey City, under its charter, to assess annually all lots vacant, or with buildings not taking water, situated on streets through which distributing water pipes are laid, cannot be sustained; for the reasons, first, that there is no implied covenant from the taking and using of the water to pay rent therefor; second, if the charge is a special assessment it is not guarded or limited by particular benefits conferred upon the lots; third, being limited to a district territorially less than the whole city, it is not a general tax, within the power of the legislature to confer the right to impose; and fourth, if it can be said that no limited taxing district is created, but merely particular kinds of property lying anywhere in it are selected for taxation, then there is a conflict with the Constitution requiring assessments for taxes to be by uniform rules according to the true value of the property; hence, a tax levied under such charter provision is void. *State, Vreeland, Prosecutor, v. Jersey City*, 43 N. J. L. 185, Affirmed, but not fully approved, in 43 N. J. L. 638.

A city, under a statute authorizing it to levy a tax for the purpose of creating a sinking fund for the purchase or erection of waterworks, and to continue the levy until the purchase price is paid, may levy such tax before it has entered into a contract for the purchase or erection of the works. *Youngerman v. Murphy*, 107 Iowa, 686, 78 N. W. 648.
61 L. R. A.

(b) *Local assessments.*

As indicated in the preceding subdivision, under some circumstances a local assessment for the cost of a water-supply plant is equitable and just, but of all local improvements there is, perhaps, the most reason for confining the assessment in this case strictly to the benefit conferred. There is not the ground for claiming an implied agreement to pay for the improvement because of public necessity that there is in case of drainage of a malarious or useless piece of land. Nor does the improvement enter into the social fabric as do highways. The reason for the existence of a water supply is the benefit it confers, and this benefit should be paid for by those who profit by it, and by them only so far as the benefit extends.

The same struggle on the part of the courts to find a satisfactory rule appears in this class of cases as in other kinds of improvements, and much the same lack of agreement is found.

So far as the benefit is confined to a particular district, and is fairly uniform throughout its limits, there is no objection to creating such district and levying the tax upon the property therein.

A constitutional provision authorizing assessments on real property for local "improvements" in towns and cities under such regulations as may be prescribed by law does not prohibit the legislature from authorizing the creation of improvement districts for the purpose of maintaining a system of waterworks, although the district embraces the entire area of a city or town. The object of the constitutional provision was to limit such local assessment to proper local purposes, for the accommodation of the inhabitants of the city or district upon which the tax was laid. *Crane v. Slioum Springs*, 67 Ark. 30, 55 S. W. 955.

Because a large sum of money borrowed by the municipal corporation has been used by it in extending water mains is no reason for holding that local district assessment cannot be resorted to in supplying districts of the city with water which are at present without it, or where there is an inadequate supply. *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612.

The laying of pipes for the conveyance of water along a particular street, although a part of the general waterworks system, is local to that particular street and of special benefit, and is a local improvement within the meaning of the statutory provision authorizing municipal corporations to make local improvements by special assessment. *Hughes v. Momence*, 163 Ill. 535, 45 N. E. 300.

It is no defense to a special assessment by a

his property practically valueless for the purpose for which it was improved.

(March 7, 1908.)

ERROR to the District Court for Reno County to review a judgment in favor of defendant in an action brought to enjoin the taking up of mains which supplied plaintiffs' property with water. *Affirmed.*

The facts are stated in the opinion.

Messrs. George A. Vanderveer, Frank L. Martin, and Harry D. Vanderveer, for plaintiffs in error:

A violation of a contract to furnish a supply of water for use or consumption may inflict irreparable injury.

Spelling, Injunctions & Extraordinary Remedies, 2d ed. § 504.

Injunction may be granted to prevent the

municipal corporation for water mains that no provision has been made, by means of general taxation, to pay for the waterworks proper. *Ibid.*

Because under the law a city may charge for the water furnished to its inhabitants and make a profit thereon, it is not inhibited from levying the cost of laying the mains upon benefited assessment districts, if the legislature has conferred such powers, and there is no specific or implied restriction in the Constitution in the exercise of such legislative power. *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612.

The revenues and taxes provided by the act authorizing cities and villages to construct, maintain, and operate water plants were deemed by the legislative authority as ample for the purposes named, and such municipalities cannot go beyond them without express authority; therefore, a water ordinance providing that, as compensation for increased protection against fire, there shall be paid for each lot or parcel of ground having a building thereon, which shall abut or adjoin any street, avenue, or alley through which any public water-supply pipe is laid, a certain sum in addition to the regular rate for water, is unconstitutional and void. *Lemont v. Jenks*, 197 Ill. 363, 64 N. E. 362.

A statute providing that the laying of water pipes within the limits of a municipal corporation shall be done at the expense of owners of the adjacent premises applies when the pipes are laid in a turnpike within the rural portion of the city. *Philadelphia v. McCalmont*, 6 Phila. 543.

Special assessments may be made.

Where power to provide a water supply by constructing waterworks from general taxes has been expressly conferred upon cities, they are not thereby prohibited by implication from making special assessments for that purpose, where the legislature is expressly authorized to make special assessments for the purpose of constructing waterworks. *Crane v. Siloam Springs*, 67 Ark. 30, 56 S. W. 953.

A village is empowered, under a general law authorizing cities, towns, and villages to levy special assessments for the expense of locating, erecting, and constructing reservoirs and hydrants for the purpose of fire protection, and the constructing and laying of water main pipes, to adopt an ordinance providing for the laying of water pipes in many streets of the villages with intersections and special connections, and for hydrants, constituting one general system of waterworks for the use of the inhabitants thereof, and that the cost thereof shall be de-

cutting of the pipes, and mandamus allowed to compel the furnishing of water and gas.

Williams v. Western U. Teleg. Co. 17 Jones & S. 140; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244; *Horsky v. Helena Consol. Water Co.* 13 Mont. 229, 33 Pac. 689; *Tacoma Hotel Co. v. Tacoma Light & Water Co.* 3 Wash. 316, 14 L. R. A. 669, 28 Pac. 516; *Gaslight Co. v. Colliday*, 25 Md. 1.

The defendant is a public corporation charged with a public duty which it has contracted to perform for a period of twenty years, and mandamus will lie to compel the performance of that duty.

Topeka v. Topeka Water Co. 58 Kan. 349, 49 Pac. 79; *Potwin Place v. Topeka R. Co.*

frayed wholly by a special assessment to be made in accordance with the law regulating that subject; and the same is not in contravention of any constitutional provision. *People v. Sherman*, 83 Ill. 165.

A judgment confirming a special assessment upon land for the construction of a general system of waterworks by a municipal corporation cannot be attacked in a proceeding to set aside the judgment of sale for the delinquent assessment, although the municipal corporation had no power to construct such improvement by a special assessment. *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922.

But a municipal corporation has no power to construct a general system of waterworks by special assessment where its only statutory authority for levying special assessments is in making local improvements; but an ordinance providing for such a levy is not void so as to deprive the court of jurisdiction to confirm the assessment, and the judgment of confirmation cannot be attacked on a collateral proceeding. *Ibid.*

So, a general waterworks system for a village fire protection and the use of the inhabitants is not a local improvement within the meaning of a provision in the general incorporation law under which it is organized, authorizing municipal corporations to make local improvements by special assessment; and, in the absence of other statutory authority, such village has no power to collect the cost of such waterworks system by special assessment. *Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611.

And a standpipe, reservoir, and pumping works of a waterworks system is not a local improvement within the meaning of the statute authorizing municipal corporations to make local improvements by special assessments, and a special assessment levied for that purpose is void in the absence of any other statutory authority to make it,—especially as such municipal corporation is expressly given the power to construct waterworks by general taxation. *Hughes v. Momen*, 164 Ill. 16, 45 N. E. 302.

So, an ordinance of a municipal corporation providing for the drilling of an artesian well and other waterworks for the purpose of furnishing the inhabitants thereof with an additional supply of water to be paid for by special assessment is void as not being a local improvement within the meaning of a clause in the general act under which such municipal corporation is organized, authorizing the making of local improvements by special assessment. *Blue Island v. Eames*, 155 Ill. 398, 40 N. E. 615.

A special assessment for the laying of water

51 Kan. 609, 33 Pac. 309; *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, 51 N. W. 84; *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 12, 15 L. R. A. 375, 28 Pac. 989; *People ex rel. Brush v. New York Suburban Water Co.* 38 App. Div. 413, 56 N. Y. Supp. 364.

The company cannot relieve itself from this duty by contract.

Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co. 121 Ill. 530, 13 N. E. 169; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; *Gaslight Co. v. Collday*, 25 Md. 1.

Mr. H. Whiteside, for defendant in error:

A franchise granted to a water company by a city is different from a franchise granted by a state. The former is in the nature of a privilege or right which can be bought, sold, or changed by mutual agree-

ment between the city and the grantee, while the latter is a right to live, and cannot be assigned.

State ex rel. Godard v. Topeka Water Co. 61 Kan. 560, 60 Pac. 337.

The city may arrange for water, either for a long or short time, with a private individual as well as a corporation.

Ibid.

It may make just such arrangement as, in its discretion, seems proper, and in various ways.

Burlington Waterworks Co. v. Burlington, 43 Kan. 728, 23 Pac. 1068; *Wood v. National Waterworks Co.* 33 Kan. 590, 7 Pac. 233.

There is no privity of contract between plaintiffs and defendant in this case.

Mott v. Cherryvale Water & Mfg. Co. 48 Kan. 15, 15 L. R. A. 375, 28 Pac. 989; *Davis v. Clinton Waterworks Co.* 54 Iowa,

main is invalid unless notice of the proposed assessment be made in strict compliance with the law. *District of Columbia v. Burgdorf*, 6 App. D. C. 465.

But notice to a property owner is not necessary to sustain an assessment for laying a water main, under an act providing that all assessments for laying such mains shall be at a specified rate per front foot on abutting lots, and which gives the commissioners power to lay mains whenever they deem necessary for the public safety, comfort, and health. *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

Benefited property may be assessed.

A legislative valuation of special benefits for the laying of a water main is not subject to judicial review. *District of Columbia v. Burgdorf*, 6 App. D. C. 465.

Under a statute providing for the annual ascertainment of the limit of the benefit or protection of waterworks for the purpose of taxation in their support, an ordinance providing that all territory or property within the distance of 2,000 feet of any fire hydrant shall be deemed to be within the limits of the benefits or protection of the waterworks is not illegal, if it also provides that the limits of the district shall be fixed by the council annually, the 2,000-foot limit merely fixing the standard by which benefit and protection are to be furnished and the limits fixed. *Creston Waterworks Co. v. Creston*, 101 Iowa, 687, 70 N. W. 739.

Under a clause in the charter of a waterworks company, making it the duty of the water commissioners to construct hydrants, and authorizing an assessment upon the houses and other buildings in the vicinity of such hydrants in the proportion in which they deem the same respectively benefited, such commissioners do not derive the power to levy annual assessments on such property for hydrants already constructed; but such clause will be construed as intending the assessment to be made at one time for the entire benefit conferred upon the property by such construction, in the absence of any language indicating a contrary meaning,—especially as the power to levy annual assessments for other uses of the water is expressly conferred in other parts of such charter. *Springfield Water Comrs. v. Conkling*, 113 Ill. 340.

Under a constitutional provision requiring all taxes to be imposed according to the value of the property in money, equally and uniformly, the legislature cannot provide for the sinking of artesian wells to furnish a water supply to

be paid for by assessment upon property benefited, to be apportioned with reference to the relative distance of the land from the well. *Turner v. Hand County*, 11 S. D. 348, 77 N. W. 589.

A municipal corporation is not prohibited from assessing the cost of constructing water mains on abutting property because they are to be tapped, at least until a more adequate supply is obtained, only for fire protection. *Philadelphia v. McCalmont*, 6 Phila. 543.

The legislature cannot fix, or authorize the governing body of a municipality to fix, an arbitrary basis for an assessment to be imposed upon property without regard to benefits from the laying of the water pipe. *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175.

Frontage assessment.

It would seem that a frontage assessment for laying water mains was wholly needless; but it has been made, and it has been upheld by the courts, even in cases where it seems inequitable. Perhaps the strongest case upholding such assessment is *State v. Robert P. Lewis Co.* 72 Minn. 87, *sub nom.* *Ramsey County v. Robert P. Lewis Co.* 42 L. R. A. 639, 75 N. W. 108. The court there held that a statute imposing a tax by the lineal foot on land fronting a water main is not invalid because it applies a uniform rate of assessment to both rural and urban lots within the city limits.

And also that one may not avoid a tax by the lineal foot upon his property abutting a water conduit on the ground that it is only placed in the street for the purpose of conveying water into the city, and that he is denied the right to tap it for the purpose of supplying his land with water. *Ibid.*

This case was overruled on second appeal in 82 Minn. 390, 53 L. R. A. 421, 85 N. W. 207, 86 N. W. 611, where the court, following *Norwood v. Baker*, 172 U. S. 209, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, decided that a rule of assessment for water pipes which is arbitrary, without regard to benefits and without the right of review, although within legislative discretion, is in contravention of the Federal Constitution and void. Upon a rehearing that decision, while expressing the views of the court, was held to be apparently contrary to the decision in *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, and was in turn reversed, the court returning to its first holding, being "somewhat influenced" thereto by the fact that it would thus make an appeal possible to the United States courts. The entire cost of the improvement

60, 37 Am. Rep. 185, 6 N. W. 126; *Housmon v. Trenton Water Power Co.* 23 L. R. A. 146, and note, 119 Mo. 304, 24 S. W. 784; *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 53, 51 N. W. 84.

The water company stands in relation to the plaintiff just as the city would stand if it was furnishing water itself; and it is certainly farfetched to take the position that, when a man once obtains a license or the privilege of a water company, it is irrevocable, and must last forever.

2 Dill. Mun. Corp. 3d ed. § 954; *Smith v. Philadelphia*, 81 Pa. 38, 22 Am. Rep. 731; *Reno Water Co. v. Leete*, 17 Nev. 203, 30 Pac. 702.

Greene, J., delivered the opinion of the court:

The plaintiff in error commenced this ac-

was, however, not assessed upon the abutting property in that case, only a small assessment was laid to assist in paying for the work.

The owner of abutting land is not exempt from assessment for the construction of a water main in the way of a turnpike company, which had existed as a highway previous to the granting of its franchise, under a license from the company (inferred from its silence), as a reversal to the state of the franchise will not deprive the public of the use of the road. *Philadelphia v. McCalmont*, 6 Phila. 543.

But, under a power to assess the expense of constructing water mains upon frontage, a municipal corporation cannot compel the owner of the land fronting upon two parallel streets to pay for the expense of constructing mains in both streets, upon application for construction in one of them, when none has been laid in the other. *Tenbrook v. Philadelphia*, 7 Phila. 103.

The right to make frontage assessments has been tested in the attempts to levy them against vacant property. The mere fact that property is vacant, however, does not furnish a conclusive reason why it should not share in the cost of the plant or in the expense of maintaining it. The iniquity of the assessment arises when property is required to bear the expense of the entire improvement when it is only benefited to a limited extent.

But it has been held that an ordinance ordering the laying of a water main at the expense of adjoining vacant property will not be declared unreasonable by the courts before that is made clearly to appear. *Myers v. Chicago*, 196 Ill. 591, 63 N. E. 1037.

In case of an annual assessment for maintenance, it has been said that the emergencies intended to be met and the security to all the village inhabitants to be provided for by a common water supply create other burdens of legitimate charge beyond that incident to its actual use for domestic purposes. One object is the protection of the life and property of each individual living within the village limits and having a right to call for the protection it affords in the hour of peril. While it may be true that a resident owner of buildings within the corporate limits may not actually appropriate the water provided by drawing it from a faucet in his living room, still it does not follow that he should therefore be free from the expense of the maintenance of the system. The protection it furnishes in case of fire, and which he as a resident has the right, when the emergency demands, to invoke, is of greater benefit than the simple daily use for household pur-

tion in the court below to enjoin the defendant from taking up a certain water main which ran to and theretofore supplied plaintiff's stock yards with water. A temporary restraining order was granted, which was set aside and an injunction refused. The plaintiff prosecutes this proceeding.

The Hutchinson Waterworks were constructed under an ordinance which required the company and its assigns to extend its mains and place fire hydrants along the streets of the city, in addition to those designated in the ordinance, at such times and places as might thereafter be designated by the city. The ordinance also provides that, in addition to furnishing water to extinguish fires, the company, its successors or assigns, shall furnish water to the inhabitants living or doing business along the

poses. *Dasey v. Skinner*, 83 N. Y. S. R. 15, 11 N. Y. Supp. 821.

Water mains laid by the city in a street constitute a special and peculiar benefit to the abutting property, to be measured by the benefit offered, and not by the extent of the use; and such benefit may be properly estimated by the frontage of the lots upon the street. *Batterman v. New York*, 65 App. Div. 576, 73 N. Y. Supp. 44.

In *Allen v. Drew*, 44 Vt. 174, an imposition of annual water rents upon vacant lots, as well as upon buildings adjoining streets in which pipes run, is upheld, where the rents are said to be applicable to the payment of interest on bonds issued for the expense of constructing the waterworks.

An annual assessment upon realty abutting a street in which water mains are laid and which is not supplied with water therefrom is reasonable, and is not prohibited by a constitutional requirement that revenue laws shall have uniform effect on all private property. *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473.

In a New York case which involved the validity of an assessment for water rents against vacant lots upon which no water was used the court said: "It is quite clear that these water rates were taxes assessed against the owner or occupants," and on that theory the assessment was held unconstitutional because made without giving such owner or occupant an opportunity for a hearing. *Re Union College*, 129 N. Y. 308, 29 N. E. 460, following *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564. And the same ruling was made in *Re Flower*, 41 N. Y. S. R. 644.

The power to impose any assessment on property by frontage rule has been vigorously assailed, and in South Carolina assessment of abutting property for benefits accruing from the laying of water mains cannot be upheld. *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322. In that case it is held that a system of special assessments for the payment of bonds issued for the construction of a municipal water plant whereby only the property abutting on the streets through which water mains are laid is to be assessed, and that according to its frontage and without regard to its value, violates the constitutional provision that taxes shall be laid upon all taxable property and according to its value, and cannot be justified as a proper exercise of the police power.

A municipal corporation cannot file and enforce a lien against rural property for the cost of laying a water main (not a service pipe) solely for the benefit of inhabitants of another

mains or pipes for the purpose and in accordance with such rules and regulations as may become necessary. The defendant became the owner of the waterworks, and succeeded to the rights, privileges, and obligations of the grantees in the franchise. Afterwards the city, by ordinance, extended the water main on Fourth avenue to the stock yards, to which main the then owner of the yards attached. Thereafter the plaintiff became the owner of the yards. Subsequently the city passed ordinance No. 402, providing that, "in addition to furnishing water from the fire hydrants for the protection and extinguishment of fires as herein contemplated, the said Hutchinson Water, Light, & Power Co., its successors or assigns, shall furnish water to the said city and the inhabitants thereof, living and doing business along the mains and pipes, for

all purposes, and in accordance with such rules and regulations as may be deemed necessary to the successful operation of said works." It is alleged in the petition that the defendant threatens to, and will unless restrained by the court, take up its main leading to plaintiff's yards, thus cutting off the water supply and thereby rendering its property valueless for the purposes for which it was improved and for which it is now being used. The defendant admits that it intended to take up such water main, but alleges that in doing so it is acting under the permission and direct authority of the city, and for the purpose of replacing the main and hydrants upon other streets where fire protection is greatly needed and private consumers numerous; that such authority is in the following resolution: "Be it resolved by the mayor and council of the city of Hutchinson,

part of the city. *Crawford's Estate*, 14 Phila. 323.

When the land in front of which municipal water pipes are laid is farm land or suburban property, it cannot be assessed according to the "foot-front rule;" if the pipe is simply laid in a newly opened street before macadamizing, to save expense, it is not a public improvement when laid. *Allentown v. Adams* (Pa.) 7 Cent. Rep. 195, 8 Atl. 430.

An assessment levied upon city lots in front of which water pipes are laid, but on which no water is consumed, is not a specific tax, but a tax in the most general sense of the word, and subject to the rules of law which govern taxes. *Jones v. Detroit Water Comrs.* 34 Mich. 273.

The constitutional requirement that taxation shall be uniform is violated by such a tax. *Ibid.*

A tax imposed upon city lots in front of which water pipes are laid, but on which water is not consumed, is not a local assessment when the revenue derived from it is not applied to expenses or constructions in the street or in any district in which it is raised, and is not proportioned in any way to the cost of such outlays, and where all property occupied by consumers of water is exempt from it. *Ibid.*

A statutory provision that whenever a water pipe or main larger than 6 inches in diameter is laid a just proportion of the cost of laying it shall be assessed to each lot to be benefited, to be determined by finding the ratio which the narrowest frontage of the lot bears to the entire frontage on both sides of the street on which it is located, is illegal and void. *Blades v. Detroit Water Comrs.* 122 Mich. 366, 81 N. W. 271.

The legislature is without power to confer upon a municipal water board appointed by the act the power to lay a pipe and impose an assessment upon abutting property, either directly or indirectly, by requiring the council to do so in conformity to the record of the water board, where, under the pre-existing statute, the board had no power to impose any burden of construction upon citizens or property by assessment. *Cook Farm Co. v. Detroit*, 124 Mich. 426, 83 N. W. 130.

As to the assessment of water rents on vacant property, see *infra*, VII. b. 1.

Exemptions.

A municipal corporation may levy a water tax against a county for property situated within the city limits, in the absence of any law exempting the property of counties from taxation, 61 L. R. A.

under a constitutional clause providing that the property of counties may be exempted from taxation, but such exemption is to be only by general law; thereby implying that, in the absence of any law exempting it, such property would be liable to taxation. *Cook County v. Chicago*, 103 Ill. 646.

A municipal assessment for laying a water pipe is not within a statutory exemption from taxation except for state purposes. *Philadelphia v. Union Burial Ground Soc.* 178 Pa. 533, 36 L. R. A. 263, 36 Atl. 172.

A young men's Christian association, although a benevolent and charitable corporation, is not exempt from the payment of water taxes under a provision in a city charter exempting "hospitals, orphan asylums, and all other charitable and benevolent corporations, societies, and institutions now existing in the city," since the rule *ejusdem generis* applies, and the words "hospitals and orphan asylums" must be given some effect. *People ex rel. Brooklyn Y. M. C. A. v. Willis*, 23 Misc. 545, 52 N. Y. Supp. 739.

A college entitled to exemption from all general taxes is not entitled to exemption from a water-frontage tax which was a special local assessment. *Ramsey County v. Macalester College* (Minn.) 91 N. W. 484.

Abutting property is not liable for an assessment for water mains so long as it is within a statutory exemption of premises having a well or spring from which a water supply is taken. *Reading v. Shepp*, 13 Pa. Co. Ct. 634.

There is no adverse possession upon which a prescriptive right to exemption from payment for a water main can be based, when a city can only file a lien for the expense of laying a water pipe after an application for a connection with adjoining premises has been made, and such application is not made before twenty-one years after the pipe is laid. *Com. ex rel. Taylor v. Wagner*, 24 W. N. C. 171.

Cost of house connections.

A city cannot, by virtue of its general police power or the authority given it under the general incorporation law to construct and keep in repair culverts, drains, sewers, etc., levy a special tax upon the abutting lots for the cost of connecting the same by service pipes with a water main in a public street, in the absence of express statutory authority so to do. *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.

A municipal corporation has not the power to assess the cost of each lateral service water pipe against the connecting lot, where the result of such assessment would be to require lots on

Kansas, that a permit be given the Hutchinson Water, Light, & Power Company to remove seventeen hydrants and the water main upon which they are located from the east end of Fourth ave. line and connections to stock yards to points designated by the council within the city, said hydrants to be attached to suitable main; also two hydrants to be removed from the corner of F and Main streets and one from the lower end of Main street near the old Missouri Pacific depot. one of said hydrants to be located on suitable main at the corner of Maple and Bigger streets near the Maple street school-house, the water, light, and power company to dig the trenches, and do all the work and bear all of the expense of the removal and relocation of hydrants above mentioned as may be designated by council and without additional hydrant rental, and the said wa-

ter, light, and power company is to assume all responsibility and liability that may arise by reason of removal of said hydrants, and shall hold the city harmless by reason of such removal." "The terms of the above resolution passed by the council May 10, 1902, hereby accepted." It is further alleged in the answer that the business carried on at the stock yards by the plaintiff is very inconsiderable, and water may be supplied by means of a gas engine at a cost not to exceed \$500. The city filed a disclaimer. At the trial oral evidence was introduced upon all questions involved. The court found generally for defendant.

The plaintiff contends that, because a water main had been laid to its yards from which it was being supplied with water at the time of the passage and acceptance of ordinance No. 402, such ordinance became

one side of the street to pay more than those on the other by reason of the location of the water main in the street; and an ordinance so providing is void. *Ibid.*

In an earlier case it had been held that incorporated towns and cities in Illinois have the power to establish and maintain waterworks within their corporate limits; and, in the absence of statutory provisions limiting their discretionary power to say in what streets the main and lateral service pipes shall be laid, the courts will not say that they have abused that discretion by laying lateral pipes from a main in a particular street to the lot line of vacant lots of an owner; and an assessment on such lots therefor will not on that ground be declared invalid. *Warren v. Chicago*, 118 Ill. 329, 9 N. E. 883.

In assessing vacant lots for the cost of laying lateral water pipes from the main pipe in the street to the lot lines, a city has no right to divide arbitrarily lots having a frontage of 45 feet on such street into halves, and assess the owner thereof for the cost of laying two lateral pipes to each of such lots, while it assesses the owners of the lots having a frontage of 25 feet for the cost of only one lateral pipe. Such a scheme discriminates unjustly against the owner of the larger lots, and an assessment based thereon is unauthorized and void. Under such circumstances, the property should not be assessed for more than one service pipe to each whole lot. *Ibid.*

Taxes levied for the expense of making connections with water mains and laying pipes from such connections to the curb line of the street before the paving of the street, under a charter provision that, when the paving of a street is ordered in which water mains have been previously laid, water-service pipes may be required to be laid first, are not invalid as a taking of private property for private use, although the mains are owned by a private corporation, since such preparation, avoiding subsequent tearing up of the streets, and the vesting of the contract of making such connections in the corporation in order to guard against unskillful work and jeopardy to the safety of property and convenience of patrons, is for the benefit of the corporation; nor can it be regarded as a taking of private property for public use without compensation, where the evidence shows that the cost thereof was balanced by an equivalent benefit to the property fronting on the street. *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249.

Where a regulation exists requiring persons desiring to use the water from city waterworks

to lay down, at their own expense, the service pipes from their lots to the main pipe in the street, the fact that the city at the time of laying the main pipe, and for the purpose of avoiding tearing up the pavement of a certain street by future connections therewith, also laid down service pipes from such main pipe to the lots abutting on the street, does not entitle the owners of such lots to connect with such service pipes free of charge; but the city has the right to require such owners to refund to the city the cost of laying them before they can make connections therewith. *Prindiville v. Jackson*, 79 Ill. 337.

A local assessment to defray the expense incurred by the city in laying connection between the main water pipe and the curb of abutting property after the refusal of the owner to lay the same in compliance with a notice to that effect from the city is void, where there is no statutory or charter authority therefor, although the charter requires such connection to be made before the laying of a contemplated asphalt pavement in the street. *Landon v. Syracuse*, 19 App. Div. 41, 46 N. Y. Supp. 1053.

The fact that water mains located in a public street of a city, and maintained for the use of the city and its inhabitants under the provision of an ordinance, belong to a private company, does not render an ordinance for the making of connections with such mains and to pay the cost thereof by special taxes upon the contiguous property void; since, in order to make such water-pipe connection available, it was the duty of the city to provide water mains to convey water to them, which duty it has discharged by using the water mains of such private company under a contract with it. *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.

Under a statute permitting the collection of a certain amount for the cost of the pipes, from property for which an application has been made for water, and into which it has been introduced, the duty to pay the assessments rests upon contract; and, when an application has been made and granted for water from pipes lying in the street in front of a corner lot, it cannot be assessed for the pipes lying in the streets along its side, from which it receives no water. *Baker v. Gartside*, 86 Pa. 498.

The enforcement of a void local assessment against abutting property for the cost of making connections with the water main in the street will be enjoined in equity as a cloud on title, where the defect avoiding the assessment would not appear in the certificate and conveyance given on the sale of the property for unpaid city taxes, but the certificate would simply state-

a contract between the defendant and each individual then doing business along its mains, by which defendant became obligated to furnish water to such persons for all purposes during the life of its contract; therefore injunction would lie by one on the line of its mains to prohibit it from removing such mains, or from doing any other act which would place it in such position that it would be unable to perform that part of its contract. This contention may be conceded, if the latter was acting without authority from the city. Mandamus will lie to compel a water company to supply water to one on its mains upon his compliance with its reasonable rules and regulations, and upon the same principle injunction will lie by the individual to prevent a water company from removing its mains without authority from the city, if such removal will deprive it of the means or disable it from fulfilling its

contract to the individual. It appears, however, that by the resolution of May 10, 1902, the city, in the exercise of its governmental powers, determined it was to the best interest of the general public that the main leading to the plaintiff's stock yards, and the fire hydrants located thereon, should be removed to other portions of the city, where fire protection was greatly needed and private consumers numerous. It therefore gave defendant permission to take such main and fire hydrants, and ordered that they be relocated on such other streets as it might thereafter direct. "Where a city council has power to act in a given case, and the mode of action is not prescribed by charter, it may proceed either by resolution or by ordinance." Smith, *Modern Law of Mun. Corp.* § 567; *Crawfordsville v. Bradon*, 130 Ind. 149, 14 L. R. A. 268, 28 N. E. 849; *Smith v. State*, 64 Kan. 730, 68 Pac. 641.

that the sale was made for such unpaid taxes. *Alvord v. Syracuse*, 163 N. Y. 158, 57 N. E. 310.

Other matters.

An assessment for water mains exceeding the actual cost of laying them is not for that reason excessive, when it is made, not merely to put the pipes down, but to raise a fund to keep the system in repair. *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 861.

It is within the power of the legislature to confirm an invalid water tax, and levy it on the several pieces of land on which it was originally assessed. *Re Flower*, 28 N. Y. S. R. 80, 7 N. Y. Supp. 866.

An assessment for the expense of laying water pipes, when made a fixed lien, is not discharged by a sheriff's sale under a subsequent encumbrance. *Northern Liberties v. Swain*, 13 Pa. 113.

d. Payment for work.

The implied liability of a city to pay for the waterworks exists from the time that they are first accepted and appropriated by the city; and the statute of limitations commences to run at that time. *Texas Water & Gas Co. v. Cleburne*, 1 Tex. Civ. App. 580, 21 S. W. 393.

Recovery can be had to the extent of the appropriation, upon a contract for building waterworks which exceed the appropriation made for that purpose, where the municipality was limited in its power to contract to the amount of the appropriation. *Keith v. DuQuoin*, 89 Ill. App. 36.

Although funds procured by a sale of waterworks bonds chargeable with the amount due the contractor have been paid out by the city in completing a water system contracted for, the contractor is not thereby prevented from recovering the value of his services rendered under the contract. *Sherman v. Connor* (Tex. Civ. App.) 72 S. W. 238.

Acceptance of a water plant by a city as being in compliance with the contract between it and the water company will determine the sufficiency and adequacy of the machinery, and establish the basis upon which its capacity may be tested as being that of the plant as accepted, and not the capacity called for in the contract. *Owensboro Water Co. v. Duncan*, 17 Ky. L. Rep. 756, 32 S. W. 478.

But a town is not liable for the construction of cisterns or reservoirs as part of a water-
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works system for protection from fire, which it had no original authority to construct, on the ground of ratification of the contract, either by the subsequent adoption by the electors at a special town meeting, instead of an annual meeting as required by statute, of a nonretroactive resolution giving the town board the powers relating to villages, which include authority to construct such works, or by the adoption and use of such reservoirs. *Dullanty v. Vaughn*, 77 Wis. 38, 45 N. W. 1128.

A contractor failing to complete a water system according to contract is entitled to recover the amount actually earned by him under the contract, less the amount paid him by the city under the contract, plus the amount necessarily expended by the city in completing the works. *Sherman v. Connor* (Tex. Civ. App.) 72 S. W. 238.

A lien for the purchase price of engines and pumps forming part of the waterworks system of a water company cannot be defeated on the ground of public inconvenience, as that would be an appropriation of private property to public uses without compensation. *Wood v. Holly Mfg. Co.* 100 Ala. 326, 13 So. 948.

e. Liability for injuries.

A municipality operating a water plant for its own use and that of its inhabitants, under statutory authority, is liable for injuries to adjoining property resulting from the negligent construction and maintenance of the plant, to the same extent as though it were a private corporation or natural person. *Boothe v. Fulton*, 85 Mo. App. 16.

That the waterworks of a city were built under authority imposed upon it by the legislature, and under the direction and supervision of a committee appointed by the legislature, will not exempt the city from the general rule which imposes upon municipal corporations owning and operating such works liability for injuries to private individuals through their negligent construction or operation. *Esberg Cigar Co. v. Portland*, 34 Or. 282, 43 L. R. A. 435, 55 Pac. 961.

When a water system is conducted by a municipality in part for profit, even if principally for public purposes, the municipality is liable for damages caused by negligence in its management. *Chicago v. Selz, S. & Co.* 104 Ill. App. 376.

A municipality maintaining a water system both for public purposes and private domestic use for hire is liable for a personal injury

In view of this resolution, the defendant was acting under direct authority from the city. Waterworks are public utilities. The power to own or otherwise provide a system of waterworks conferred upon cities has relation to public purposes, and for the public, and appertains to the corporation in its political or governmental capacity. They are supported at public expense, and are subject to the exclusive control of the city in its governmental capacity for the convenience, health, and general welfare of the city. The city determines the amount of water mains, where to be laid, and the number and location of fire hydrants. Over these the individual has no control. In the exercise of this political power the city has discretion, with which the courts have no right to interfere.

In such cases there is no contractual relation between the city and the individual

upon which the principle contended for by plaintiff can rest. It is true that by some of the conditions of the contract the individual is collaterally interested, but as to such the contractual relation is not between the city and the individual, but between the defendants and the individual. An individual can acquire no vested right as against the public in the continued service of a public utility. Such a doctrine, once admitted, would destroy the convenience as a public utility. It would then become hampered, and subject to the control of the individual, and made to subserve such interests, to the detriment of the public welfare. It follows that there was no error in refusing the injunction.

The judgment of the court below is affirmed.

All the Justices concur.

caused by its neglect to keep in a safe condition a part of the system devoted to supplying customers. *Wilkins v. Rutland*, 61 Vt. 336, 17 Atl. 735.

But a water company is not liable for injury resulting from the escape of water from its pipes, where it has exercised due care in constructing and maintaining them. *Blyth v. Birmingham Waterworks Co.* 11 Exch. 781, 25 L. J. Exch. N. S. 212, 2 Jur. N. S. 333.

And if the plan adopted for public works is not necessarily injurious or dangerous to private interests, and is executed with reasonable skill and prudence, the protection against liability is absolute; if, however, it must necessarily cause injury or peril to private persons or property, though executed with due care and skill, the law regards the execution of such a plan as negligence. *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762.

A general authority to build a pumping station, without designating the site, does not authorize a municipal corporation to erect it so near private property as to destroy or materially injure its rental value. *Morton v. New York*, 140 N. Y. 207, 22 L. R. A. 241, 35 N. E. 490.

A standpipe erected on municipal property in connection with the system of water supply is not *per se* a nuisance which can be enjoined by owners of adjoining property. *Whitfield v. Carrollton*, 50 Mo. App. 98.

The burden of proving that the standpipe of a municipal corporation, used in connection with its waterworks system, is an injurious structure and a menace to buildings in the vicinity, is upon the one claiming damages to his property by reason thereof. *Doyle v. Sycamore*, 81 Ill. App. 589.

A waterworks company which closes up the overflow pipes of its reservoir so that the reservoir overflows and water is forced back through a subterranean well of an adjoining owner, damaging it and injuring the premises, is liable therefor in damages. *Odell v. Nyack Waterworks Co.* 91 Hun, 283, 36 N. Y. Supp. 206.

The construction of waterworks by a municipal corporation, authorized by the law under which it is incorporated, is not a nuisance *per se* so as to render it liable for injuries resulting from such construction, in the absence of some act of negligence on the part of the contractor performing the work, or breach of duty on its own part causing the injury, and irrespective of whether the injured party was guilty of contributory negligence, even if it knew that blasting might become necessary in the progress of the work, and failed to insert the

necessary precautions in the contract, if in fact all proper care and precautions were taken in making the blast. *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166.

The acts of a municipal water board in wrongfully digging a ditch over another's real estate, connecting it with a weir, and for several years causing the adjoining land to be overflowed by opening the gate of the weir three or four times a year, making the land wet and marshy, constitute a nuisance. *Elsenmenger v. St. Paul Water Comrs.* 44 Minn. 457, 47 N. W. 156.

A request by a landowner to a municipal corporation not to interfere with the flow upon his land of water from its storage reservoir will prevent his maintaining a petition against the municipality for damages for the injury caused to him by such flowage. *Griffin v. Lawrence*, 135 Mass. 365.

Future damages cannot be accorded for the maintenance of a storage reservoir for a municipal water supply in such a manner as to injure adjoining land by percolation, since the municipality may prefer to change the manner of use so as to abate the nuisance. *Aldworth v. Lynn*, 153 Mass. 53, 10 L. R. A. 210, 26 N. E. 229.

It is the duty of a municipal corporation, in constructing its water pipe in a highway, to construct it in a safe manner, and exercise due diligence to keep and maintain it, at all times, in such a condition as not to endanger the safety of people lawfully passing along the highway; hence, it will be liable if injury results from negligently permitting water to escape from it with a hissing noise, to the affrightment of a roadworthy horse. *Baker v. North East*, 151 Pa. 234, 24 Atl. 1079.

A town which accepts a statute authorizing it to maintain a system for supplying water at rates to be established by the town is liable for injuries to a traveler on the highway received by the undermining of the highway by water leaking from the pipes, through their negligent construction. *Hand v. Brookline*, 126 Mass. 324. This is put upon the ground that for negligence in constructing works from which they are to receive profit, towns are just as liable for injuries as private corporations or individuals.

A municipal corporation is liable for damage to a neighboring cellar if, after notice, it fails to discover and repair a leak in its water main or a service pipe within the highway. *Hodn v. Lancaster*, 13 Lanc. L. Rev. 131.

A municipality supplying water for compensation is liable for injury inflicted on private

property by the leaking of a water main, where the leak resulted from the negligence of the city employees in constructing the main. *Dammann v. St. Louis*, 152 Mo. 186, 53 S. W. 932.

A municipal corporation is liable for negligently permitting water to escape from a water main wholly under its control, to the injury of property abutting on the street in which it is laid. *Rumsey v. Philadelphia*, 171 Pa. 63, 32 Atl. 1133.

No liability attaches for the damage due to the leakage of water pipes in an adjoining building, where the pipes were originally strong, and the break in them was not due to negligence or design,—especially where it took six months of close investigation to discover where the leak was, which was then promptly repaired. *Terry v. New York*, 8 Bosw. 504.

A city is not liable for an injury to private premises due to the leakage of water from water pipes in an adjoining building, on the ground that it owns the aqueduct from which the water supply is furnished, and derives emolument from its use. *Ibid.*

A water company is liable for damages caused by the negligence of its employees in so repairing a water main that a stream of water escaped and was thrown upon the roof of a building and ran down to the rooms below, to the injury of goods stored therein, the leaving open of skylights on the roof not being contributory negligence which will relieve it. *Yik Hon v. Spring Valley Waterworks*, 65 Cal. 619, 4 Pac. 666.

A water company authorized by act of Parliament to lay water mains is not liable for the bursting of a main and the flooding of adjoining property, in the absence of negligence on its part. *Green v. Chelsea Waterworks Co.* 70 L. T. N. S. 547.

Sufficient evidence of negligence in the construction of a water main to carry the question to the jury exists when it is shown to have burst three times under ordinary pressure, and that pipe of its size will not, when properly constructed and laid, burst under such pressure. *Eseberg Cigar Co. v. Portland*, 34 Or. 282, 43 L. R. A. 435, 65 Pac. 961.

On a grant of the right to a city to lay water pipes across private land, in which the city covenants to pay a fair and just compensation for any damage that may be done by the bursting of the pipes; and which provides that the amount of damage shall be appraised and fixed by appraisers, which shall be final and conclusive,—an award of the appraisers is not a prerequisite to the maintenance of a suit for injuries done. *Seward v. Rochester*, 109 N. Y. 166, 16 N. E. 348.

A city is liable for damages to the premises and goods of an abutting owner from the overflow of the premises by water escaping into the street from a service pipe which, with the permission of the city, and partly for its benefit as a source of revenue, was put in by another abutting owner and connected with the water main by a plumber licensed by the city, where, after notice that the water is escaping, it permits it to flow in the street and upon such premises; since the permission to the other owner could give him no control of the street, and it is the duty of the city after notice to use reasonable care to keep such artificially accumulated water out of the plaintiff's premises. *Cincinnati v. Jacob*, 10 Ohio Dec. Reprint, 27.

A water company is not liable for flooding adjoining property where it was caused by the action of a frost of extraordinary severity. *Blyth v. Birmingham Waterworks Co.* 25 L. J. Exch. N. S. 212, 2 Jur. N. S. 333, 11 Exch. 781.

But, under a statute requiring waterworks commissioners to make compensation for all damages occasioned by the bursting or escape of 61 L. R. A.

water from a reservoir, aqueduct, or pipe connected therewith, they must make compensation for damage by flood waters from the reservoir, although it results from a storm of extraordinary violence. *Roths v. Kirkcaldy Waterworks*, L. R. 7 App. Cas. 694.

In *Topeka Water Co. v. Whiting*, 58 Kan. 639, 39 L. R. A. 90, 50 Pac. 877, it is said that the fact that a municipality confers upon a water company the right to place its hydrants in the streets, and to open them for the purpose of flushing its mains, gives the company no license or right to flush its mains in such a manner as unnecessarily to impede travel or imperil the safety of those passing and repassing over the street, the license to flush carrying with it the obligation to do so with reasonable care and a due regard for the rights of others.

A municipal corporation is responsible for damages resulting from a broken fire hydrant whereby water is thrown onto private property, of the breaking of which it has notice, or its equivalent, it being on a public highway and subject to its authority. *McHale v. Throop*, 13 Pa. Super. Ct. 394.

A municipal corporation is not liable for injuries caused by water from a fire hydrant which was, in some way not known, removed from its place, unless it is shown to have failed to use reasonable care in the erection and construction of the hydrant, or thereafter in failing to keep it in repair. *Jenney v. Brooklyn*, 120 N. Y. 164, 24 N. E. 274, *Reversing* 44 Hun. 371, where it was assumed that the hydrant blew out, and was held that the blowing out was sufficient proof of negligent construction to carry the case to the jury.

A water company is, in the absence of contributory negligence, responsible for injuries to one thrown from a buggy on the sudden turning of a horse frightened by a stream of water thrown from a hydrant in the flushing of the water mains, where the method used for flushing was calculated to frighten ordinarily gentle horses, of which the company was aware, and no adequate precautions were taken to warn or protect travelers. *Topeka Water Co. v. Whiting*, 58 Kan. 639, 39 L. R. A. 90, 50 Pac. 877.

A water company is liable for an injury to a horse, resulting from failure to repair a fire plug in the street, although a statute requires the water company to keep the fire plugs in repair, provided that it be done at the cost of the local commissioners of the town. *Bayley v. Wolverhampton Waterworks Co.* 6 Hurlst. & N. 241.

A municipal corporation which represents a fire plug to be in good repair is liable for damages to adjoining property which is flooded because the plug cannot be closed after being lawfully opened. *Rice v. St. Louis*, 165 Mo. 636, 66 S. W. 1002.

But no liability attaches to a municipality for an injury arising from the negligent testing of a fire-department hydrant supplied by waterworks owned by the city, from which it derives no revenue, for use for fire purposes, in such a manner as to frighten a horse passing on the highway, when such hydrant is under the control of, and is operated by, officers not acting as agents or servants of the corporation, but as public officers whose duties are defined by general law, and when from the use of such hydrant the city derives no special benefit in its corporate capacity. *Edgerly v. Concord*, 62 N. H. 8.

Where a state statute enabling a city to introduce pure water empowers the city to elect water commissioners for a fixed term, and for such subsequent terms as the city may determine, to prescribe the duties and compensation of the commissioners, and to regulate the mode and causes of their removal from office; and the

city owns the waterworks, receives rents for water, and controls the use and distribution of the water,—the water commissioners and their employees are servants of the city, and it is liable where damage is caused by an unsafe highway, rendered so by a stream of water thrown from a hydrant by the employees of the water commissioners. *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 484.

The commissioner of public works of the city of New York is not an independent officer, but acts as an agent of the city, which is liable for his negligent failure properly to lay or keep in repair the water pipes maintained in the streets of the city. *McAvoy v. New York*, 54 How. Pr. 245.

A municipal corporation is not liable for the negligence of a board of water commissioners, resulting in the bursting of a water main, when the statutes make them a wholly independent board. *Ashby v. Erie*, 85 Pa. 286.

A city is not liable for the negligence of its board of education in the construction of the water arrangements in premises occupied for school purposes, whereby water flows down to the floor below, causing injury, where the board is in fact independent of the city government, and in its creation and in the exercise of its powers and duties is the instrument of the state government. *Ham v. New York*, 5 Jones & S. 458.

In the control of its fire department, a municipal corporation is a mere instrumentality for the administration of public government and the collection and disbursement of public moneys raised by taxation for public uses, and which cannot lawfully be applied to the liquidation of damages caused by wrongful acts of its officers. *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762.

So that in case an employee of such department is directed to thaw out a frozen hydrant, and does so in such a way as to cause injury to travelers in the highway, the municipality is not liable, where it might have been done without injury. *Ibid.*

A city is not liable for an injury sustained by a traveler whose horse was frightened by water falling from a hose pipe with which a member of the fire department was testing the hydrant, since the municipality is not liable for damage done by the fire department. *Edgerly v. Concord*, 59 N. H. 78.

A city, being authorized to establish a fire department, in doing so exercises a governmental function, and is not liable for damages caused to goods by water thrown on them in an attempt to extinguish a fire. *Davis v. Lebanon*, 22 Ky. L. Rep. 384, 57 S. W. 471.

A charter requiring notice to a municipal corporation of any defect in the condition of any bridge, street, sidewalk, or thoroughfare to render it liable for injuries caused by such defect does not apply to injuries caused by a defective water main. *Moran v. St. Paul*, 54 Minn. 279, 56 N. W. 80.

A provision in a statute relating to the water board of a city, requiring that before action is brought against the board the matter shall be submitted to it and rejected, is satisfied by a failure to act on the complaint within a reasonable time, which amounts to a rejection. *Eisenmenger v. St. Paul Water Comrs.* 44 Minn. 457, 47 N. W. 156.

An action against a municipal corporation to recover for damages to property arising from the erection of a standpipe must be commenced within five years from the time of its erection. *Doyle v. Sycamore*, 81 Ill. App. 589.

Where, in placing water pipes, a portion of an arch which supported a building was cut away, the cause of action accrued at the time

the arch was cut away, and the statute of limitations commenced to run at that time; although the injury to the building by the settling of a corner and cracking of the walls did not occur until several months after the arch was cut; and although the owner of the building did not discover that the arch had been cut until inquiry was made by him as to the cause of the cracking of the walls. As the cutting of the arch by the defendant was a wrongful act toward the owner of the building, the cause of action accrued at that time. *Houston Waterworks v. Kennedy*, 70 Tex. 233, 8 S. W. 36.

III. Contract for water.

a. Power of municipality.

A municipal corporation is authorized to provide the city with water by making a proper contract with an individual to erect waterworks and sell water to the city, as necessarily incident or implied and essential to the power granted by its charter to provide the city with water and erect hydrants and provide for the prevention and extinguishment of fires. *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249.

A city upon which was conferred by its charter the general powers prescribed for municipal corporations, and the power to provide for the erection of waterworks, is authorized to grant to a corporation a franchise to supply the inhabitants of the city with water. *Andrews v. National Foundry & Pipe Works*, 10 C. C. A. 60, 18 U. S. App. 458, 24 U. S. App. 81, 61 Fed. 782.

A city is authorized to rent hydrants for municipal purposes where its charter provides that it may construct waterworks, supply the city with water, and provide for the prevention and extinguishment of fires. *Austin v. Bartholomew*, 46 C. C. A. 327, 107 Fed. 349.

Under a power to provide for and conduct water into and through its streets a municipal corporation may enter into a reasonable contract for the performance of the service. *Anoka Waterworks, Electric Light & P. Co. v. Anoka*, 109 Fed. 580; *Humelstown v. Brunner*, 17 Pa. Co. Ct. 140.

A city of the second class in Kansas has power to contract with a private party for the construction and operation of waterworks and for the payment of rent for the use of hydrants, and to grant to such a party the use, not exclusive, of its streets for the purpose of laying pipes to conduct the water. *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

A statute authorizing cities to contract with and authorize any person, company, or corporation to erect and maintain a waterworks system for supplying water to the city and its residents, and to supervise and control such corporation, authorizes the city to grant a franchise to such company which includes the establishment of a reservoir outside the city limits, and the reservoir and pipes leading to the same will be under the control and supervision of the council. *State ex rel. Tarr v. Crete*, 32 Neb. 568, 49 N. W. 272.

A municipal corporation has the power, under a statute empowering it to authorize three or more persons to form an incorporated company to supply it with water, to authorize private persons to construct, maintain, and own the works, and contract with them for the municipal supply of water. *Vincennes v. Callender*, 86 Ind. 484.

The power of a city to provide for a water supply is not limited by the section of the statute providing that the city shall levy a special tax of a certain amount upon property benefited, but not exceeding 5 mills on the dol-

lar for any year; but if that fund is not sufficient to meet the obligation the deficiency may be met from the general revenues. *Creston Waterworks Co. v. Creston*, 101 Iowa, 687, 70 N. W. 739.

Section 8, chap. 78, of the acts of the 14th Iowa General Assembly, concerning the water supply of cities, it held to mean that, where the city or town operates its own waterworks the expense may be met by the rentals from consumers and a tax upon the taxable property in the city or town; when the right to operate the works is given to another, the city or town may contract for a supply for public uses at such price as may be agreed upon, which is to be paid out of the special tax from taxable property within the limits of benefit or protection, not to exceed 5 mills.

If a levy of less than 5 mills yields sufficient revenue to pay the price agreed upon, then the levy must be in that amount; but if the full amount of 5 mills is necessary, then it must be in that amount; and if the revenue thus collected is insufficient, the city or town may contract to and pay the deficiency out of its general revenues. *Ibid.*

A statute empowering municipalities to contract for a water supply for ten years for public use, and assess all property, real and personal, within its limits for it, authorizes a contract 'including a supply to private houses to commence *in futuro* and run ten years; and it is no objection to a tax levied therefor that every part of the municipality is not required to be served with water. *State, Van Glesen, Prosecutor, v. Bloomfield*, 47 N. J. L. 442, 2 Atl. 249.

Statutory authority to a municipal corporation to contract for the obtaining and furnishing of a supply of water to the municipality for the purpose of extinguishing fires, and for such other lawful use and purposes as may be deemed necessary or convenient, does not authorize a contract for the furnishing by the water company of water directly to the inhabitants, and receiving directly from them compensation therefor at prices to be fixed by the company. *Passaic Water Co. v. Paterson*, 65 N. J. L. 472, 47 Atl. 462; *Acquackanonk Water Co. v. Passaic*, 65 N. J. L. 476, 47 Atl. 464.

The power conferred upon a municipal corporation to authorize any incorporated company or association to construct waterworks for furnishing the municipality with water is not expressly or impliedly repealed by a later act authorizing cities to construct, maintain, and operate waterworks, which provides that all laws in conflict therewith are repealed. *Vincennes v. Callender*, 86 Ind. 484.

The execution of a contract by a municipal corporation, for a water supply for public use for a term of years is a ministerial act, which may be enjoined if in excess of the corporate authority. *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416.

But in a contract between a town and water company for the rental of fire hydrants the questions of how many hydrants are needed, and the amount to be paid for them, are questions to be determined by the board of trustees according to their best judgment, and their decision will not be controlled by the courts in the absence of bad faith. *Fidelity Trust & Guaranty Co. v. Fowler Water Co.* 113 Fed. 560.

A municipal corporation, endowed with the power to maintain waterworks and furnish water to private consumers may sue in an action of conversion for water clandestinely taken from its mains and never paid for, the same as an individual or private corporation. *Milwaukee v. Herman Zoehrlaut Leather Co.* 114 Wis. 276, 90 N. W. 187.
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b. Who to act for municipality.

Municipal officers acting under a legal charter are at least officers *de facto* with power to bind the city by contract as lessee to secure water. *Lake Charles Ice, Light & Waterworks Co. v. Lake Charles*, 106 La. 65, 30 So. 289.

But a corporate agency of the government having charge of a municipal water supply can only exercise such powers as are granted by the principal. *Welch v. District of Columbia*, 3 MacArth. 463.

Charter authority to a town "by its selectmen to enter into contract" for a water supply gives authority to the town itself to make the contract, which it may execute by its selectmen if it pleases. *Winterport Water Co. v. Winterport*, 94 Me. 215, 47 Atl. 142, 1045.

The supplying of water to a city which has no power to construct waterworks is public and governmental in its nature, and not merely local and private, for which the legislature may provide by an act for the appointment of water commissioners and the issuance by them of bonds in the name of the city, where it is the commercial center to which the citizens of the entire state resort for business, and contributes largely to the revenues of the state, the absence of a good water supply in which would therefore necessarily affect the interests of the state and public generally as well as the citizens of the city itself. *David v. Portland Water Committee*, 14 Or. 38, 12 Pac. 174.

The common council of a municipal corporation has the power and authority to issue a warrant on a claim for water supplied to the municipality by waterworks prior to the qualification of waterworks trustees under a statute committing to such trustees the management and control of all matters concerning the water supply, the collection of water rents, and the payment of expenses connected with the waterworks of the municipality, although it has no such power as to debts incurred after their proper instalment. *Connersville v. Connersville Hydraulic Co.* 86 Ind. 184.

Under an act authorizing the introduction of waterworks into a city, providing for the election of a board of water commissioners, and authorizing the exercise of their powers by the mayor and council until such election, the mayor and council may make a contract for the construction of the waterworks after the election of the water commissioners, but before their qualification, as the powers conferred do not vest in such water commissioners on their election, but remain in the mayor and council until they have duly qualified and entered upon the discharge of their official duties. *Wells v. Atlanta*, 43 Ga. 67.

A contract made by a waterworks committee of a city council, not ratified by any corporate act on the part of such city council, involving the expenditure of a large sum of money for the introduction of new improvements to the waterworks of such city, is not binding on such corporation in the absence of a general law or ordinance expressly giving such committee such power, and an ordinance providing that such committee shall not be prevented in case of emergency from making all necessary expenditures for repairs, etc., does not give it the power to bind the city except in such pressing cases as would not admit of such delay as would suffice to bring the matter before the council, and a failure on the part of the city council, within a reasonable time, to disaffirm such contract would not be a ratification thereof. *Nashville v. Hogan*, 9 Baxt. 495.

Where the charter confers no independent authority on the common council to raise money for waterworks, it is essential, before the bene-

fits of the act to enable cities to supply pure and wholesome water can be had, that the legal voters direct the sum to be appropriated for the purpose, even when they have formally assented to the act. *State, Hornby, Prosecutor, v. Beverly*, 48 N. J. L. 110, 2 Atl. 637.

While the approving vote of a majority of the voters of a city is necessary to empower the city council to authorize the erection of waterworks, the power to make the necessary contract and grant the necessary rights and franchises is exercised by the city council after the approval by the voters, and not directly by the voters. *Centerville v. Fidelity, Trust & Guaranty Co.* 118 Fed. 332.

Statutory provisions that, preliminary to the construction of waterworks, an estimate of the expense shall be made and the question submitted to a vote of the electors, do not deprive the common council of power to lease or purchase water for fire protection from individuals. *East Jordan Lumber Co. v. East Jordan*, 100 Mich. 201, 58 N. W. 1012.

Where the extension of an absolute franchise is forbidden without a submission to the vote of the people, the passage of an ordinance by the city council postponing a city's right to purchase at an appraised valuation the plant of a waterworks company furnishing it water under an exclusive franchise is *ultra vires*. *Poppleton v. Moores* (Neb.) 93 N. W. 747.

An ordinance delegating to the mayor of a city the power to purchase and maintain public water fountains is invalid, in the absence of any statutory authority for such delegation by the council. *Ampt v. Cincinnati*, 3 Ohio N. P. 223. But an injunction was refused as the application therefor came too late, the contract for the purchase thereof having been entered into and fully performed, and the answer denying any purpose to take further proceedings under the ordinance; the court saying that it was to be presumed that the mayor would perform his duty, which would be to take no further proceedings under the invalid ordinance.

Ordinances authorizing the issue of water bonds, directing the preparation of plans for a reservoir, and empowering the board of water commissioners to advertise for bids, do not authorize it to enter into the contract for its construction, or amount to the consent and direction of city councils which, by statute, they are required to obtain. *Continental Constr. Co. v. Altoona*, 35 C. C. A. 27, 63 U. S. App. 304, 92 Fed. 822.

An act of the legislature establishing a board of water commissioners to take entire charge, control, and management of existing waterworks of a municipal corporation for the purpose of supplying the city and its inhabitants with water is not unconstitutional upon the ground that it deprives the city of private property which it holds in its private character under the constitutional guaranties against the taking of private property without due process of law or without just compensation, since the city holds no property except for public use, and enjoys no rights or powers independently of, or in defiance of, legislature, and neither it nor the city council have any vested or constitutional rights as against the state to manage or control the waterworks of the city or to appoint agents or managers to control the same, the title not being divested, nor the use of the works diverted from the original purpose for which the same were established. *Coyle v. Gray*, 7 Houst. (Del.) 44, 30 Atl. 728.

Under a statute which empowered county commissioners to represent the county and have care of its property and interests in cases where no other provision was made by law, and to make all contracts necessary to the exercise of

its corporate and administrative powers, the county commissioners have power to contract with a water company, giving it the right to construct appliances for the purpose of supplying, and to supply, the inhabitants of the county and an unincorporated town with water. *Agua Pura Co. v. Las Vegas* (N. M.) 50 L. R. A. 224, 60 Pac. 208.

Where a charter conferred power on the city council to "erect, construct, build, operate, and maintain a water . . . system," and by a later provision charged the board of commissioners with the duty of supplying water to the city, the two provisions being in irreconcilable conflict, the later provision, vesting the power and duty in the board of commissioners, will control. *Austin v. McCall* (Tex. Civ. App.) 67 S. W. 192.

An act of the legislature creating a board of water commissioners as a department of the municipal government of a city, which invests the city with new and additional powers, is in effect an amendment to the charter of such city, and the mere fact that such board was given a corporate existence and invested with certain corporate powers does not have the effect of making such board an independent corporation, created by an independent law, with power to act independently of the city council. *Springfield Water Comrs. v. People*, 137 Ill. 660, 27 N. E. 698.

The organization of a city under a general law which provides that all laws in conflict with the provisions of that act which had theretofore been in force in a city or village should be no longer applicable will result in the repealing of an act creating a board of water commissioners for such city, having the control and regulation of waterworks thereof, where the general incorporation law provides that the control and regulation of such waterworks shall be in the city council. *Ibid*.

Neither the commissioner of water supply of the city of New York nor the board of public improvement has power to make a contract for the additional water supply provided for by Laws 1897, chap. 378, except as authorized by the municipal assembly. *Press Pub. Co. v. Holahan*, 29 Misc. 684, 62 N. Y. Supp. 872.

c. Form of contract.

Where the Constitution of a state contains a method to be adopted by municipal corporations for acquiring a system of waterworks, such method is exclusive. *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322.

A charter power "to provide a public water supply" must be exercised in a legal manner; so that, if the Constitution provides that an expenditure therefor must be approved by popular vote, that requirement must be observed. *Edgerton v. Goldsboro Water Co.* 128 N. C. 93, 48 L. R. A. 444, 35 S. E. 243.

The steps necessary to clothe the officers with power to act must, in general, be strictly followed; so that, if elections are to be held, or bids called for, such things must be done.

Notice of election is necessary to render valid a special election upon the question whether or not the provisions of a general statute with regard to a municipal water supply shall be made applicable in the city where the election is held, where, by the terms of such statute, affirmative vote by the electors is necessary to its applicability. *State, Morgan, Prosecutor, v. Gloucester City*, 44 N. J. L. 137.

But a contract between a water company and a city, which was ratified by its electors, and under which services have been performed and accepted for a number of years, cannot be defeated on the ground that the election was held

at a single voting place as was customary, instead of at separate places, or because ballots cast at the election were defective. *Crebs v. Lebanon*, 98 Fed. 549.

And a vote of a town for a supply of water for extinguishing fires is not within the meaning of a statute providing the method of contracting for a supply of water to the inhabitants. *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782.

So, under the authority of a statute providing that incorporated cities and towns may erect waterworks, but that they shall not be erected or authorized until a majority of the owners at a general election vote or approve the same, the city may, in advance of the vote, determine by ordinance upon the kind of waterworks, the probable cost thereof, and the amount of tax to be levied, and the like. *Taylor v. McFadden*, 84 Iowa, 262, 50 N. W. 1070.

A grant of a franchise to a water company by a municipality to erect waterworks therein and supply water to its inhabitants for a term of years is void where bids therefor were not received publicly as required by a constitutional provision; and a contract for water supplies to such municipality entered into at the same time, not being separable from the franchise, is also void. *Nicholasville Water Co. v. Nicholasville*, 18 Ky. L. Rep. 592, 36 S. W. 549, 38 S. W. 430.

But a village desiring to contract for a water supply from a private corporation organized for that purpose is not compelled to go through the form of a letting to the lowest bidder, when, in the nature of things, competition is improbable or impossible. *Hurley Water Co. v. Vaughn* (Wis.) 91 N. W. 971.

The fact that a municipality advertised for bids for a franchise to furnish it with water before the plans and specifications were ready, and for that reason was unable to show them to a prospective bidder who inquired for them, did not show a chilling or cutting off of bids, where the municipality readvertised for thirty days, during which time the specifications were in the council chamber. *Johnson v. Rock Hill*, 57 S. C. 371, 35 S. E. 568.

An ordinance providing for the construction of the system of waterworks, including distributing pipes, is not void as providing for two improvements because provision is made for the payment of the cost of constructing the reservoirs and works by general taxation, while the mains are to be paid for by special assessment. *Hughes v. Momence*, 163 Ill. 535, 45 N. E. 300.

An ordinance for a connected system of waterworks for the whole village, necessitating the laying of water pipes in many streets, is not invalid as embracing separate and distinct improvements, but is in fact but one improvement. *People v. Sherman*, 83 Ill. 165.

It is unnecessary to pass an appropriation ordinance prior to the passage of an ordinance providing for the rental of hydrants from a waterworks company. *Cain v. Wyoming*, 104 Ill. App. 538.

No appropriation for the entire contract period is required by a statute which provides in one section that no contract shall be made by any city council unless an appropriation shall have been previously made concerning such expense, "excepting as hereafter provided," where other sections authorize a contract for a water supply for a term not exceeding twenty-five years, and direct the council within the first quarter of each fiscal year to pass an annual appropriation bill for expenses to be incurred during the current year, since the power to contract for a series of years implies the power to provide for payments as they accrue, and a requirement of an antecedent appropriation for the whole term would defeat the right to con-

tract in advance for furnishing water for a series of years. *North Platte v. North Platte Waterworks Co.* 56 Neb. 403, 76 N. W. 906.

Recovery may be had upon a contract for municipal water supply within the power of a corporation to make, and in the making of which statutory restrictions have not been ignored, although there are informalties in the proceedings, where a municipal corporation has had the benefit of performance by the other contracting party, and has from time to time ratified the contract and audited the bills presented. *East Jordan Lumber Co. v. East Jordan*, 100 Mich. 201, 58 N. W. 1012.

A resolution of a city council, requesting water commissioners to suspend the laying of a water pipe, has not the force of law so as to revoke a previous ordinance authorizing the laying of such water pipe. *Young v. St. Louis*, 47 Mo. 492.

The actual form in which the contract is embodied is not of so much consequence, although it would often save trouble if care were taken to have the contract written out and executed in the same way as contracts between individuals should be.

But in the absence of a statute prescribing the mode in which a municipal corporation may contract, the municipality is bound by a contract, within its corporate powers, for the placing and use of fire plugs, when the contract may be deduced from corporate acts. *Ephrata Water Co. v. Ephrata*, 16 Pa. Super. Ct. 484.

Under the Missouri statutes, a contract for a municipal water supply need not be made in duplicate and subscribed by both parties thereto; but it is sufficient if the ordinance setting forth the terms of the contract, and approved by the necessary vote, is accepted in writing by the person proposing to do the work. *Saleno v. Neosho*, 127 Mo. 627, 27 L. R. A. 769, 30 S. W. 190; *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946.

A contract is constituted by an ordinance granting certain persons and their successors the privilege of constructing a waterworks and furnishing pure water for a stated period in consideration of certain stipulated rates, and the right of the city to maintain an equitable action to cancel the contract and annul the franchise upon the grantee's failure to furnish pure water does not necessarily rest upon the express terms of forfeiture set out in the ordinance, but upon the inherent nature of the contract obligation. *St. Cloud v. Water, Light, & Power Co.* (Minn.) 92 N. W. 1112.

A contract for a municipal water supply sufficiently satisfies the statute of frauds if its terms are embodied in an ordinance which is accepted by the water company. *Greenville v. Greenville Waterworks Co.* 125 Ala. 625, 27 So. 764.

A municipal corporation has entered into contractual relations with a water company by implication, when it accepts their facilities, makes itself dependent thereon for fire protection, and without protest sees the company, in view of such contract, enlarge its works. *Tyrone Gas & Water Co. v. Tyrone*, 195 Pa. 566, 46 Atl. 134.

A city which for a number of years has acted under a contract made by its council with a water-supply company cannot question the authority of the council to enter into the contract because there is no record of the adoption of a resolution declaring it expedient to have waterworks constructed and the inexpediency of their construction by the municipality as required by statute, where the contract recites the passage of such resolution, and the company has made large expenditures on the strength of the contract. *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558.

The presentation to a city council in open session by a private party named as grantee in a defeated ordinance of a written acceptance of the terms of the ordinance, and a bond to construct waterworks accordingly, the construction of the work and location of the hydrants by such grantee under direction of the city council, the actual acceptance and use of the works by the city when completed, and the passage by the council of a formal resolution accepting such works,—constitute a binding contract for the construction and operation of the works according to the terms of such ordinance between the city and the grantee therein. *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

A water company, the only evidence of whose contract with the city is a city ordinance not signed by the company, as long as it enjoys the franchise cannot escape the burden it imposes on a plea of the statute of frauds. *Graves County Water & Light Co. v. Ligon*, 23 Ky. L. Rep. 2149, 66 S. W. 725.

A water company which, in pursuance of resolutions passed by the trustees of a village, has installed its water system in the streets, and is deriving a revenue from the use of its plant, cannot repudiate its agreement therein to connect hydrants with its system on the ground that the grant of its franchise was unauthorized. *Bolivar v. Bolivar Water Co.* 62 App. Div. 484, 70 N. Y. Supp. 750.

d. Construction.

Contracts on the part of a municipality for the supply to it and its citizens of water are not made in the exercise of the governmental powers vested in the municipal council, but of its proprietary or business powers; and such contracts are governed by the same rules that govern contracts of private individuals and corporations. *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663.

The reservation, in an ordinance of a municipal corporation authorizing the construction of waterwork by a private company, of the right to approve the location of the water supply does not include the right to approve the location of the standpipe. *Carlyle Water, Light, & P. Co. v. Carlyle*, 31 Ill. App. 325.

A contract requiring a corporation to lay pipes in the streets of a municipal corporation for the purpose of supplying the town and its inhabitants with water obliges the contractor to furnish the water, where the contract was entered into in pursuance of a proposition by the contractor to supply the water. *Nicoll v. Sands*, 131 N. Y. 19, 29 N. E. 818, *Affirming* 39 N. Y. S. R. 16, 14 N. Y. Supp. 448.

The provision of a contract ordinance under which a water company is to construct a system of waterworks for a city, that the company shall lay a certain number of feet of pipe within the city, should be construed with reference to the amount of pipe necessary to reach the company's reservoir which is without the city limits, but the location of which beyond the bounds of the city was necessary to satisfy another provision of the ordinance that the reservoir should be at a certain altitude. *State ex rel. Tarr v. Crete*, 32 Neb. 568, 49 N. W. 272.

In case of extensions of a waterworks system made upon informal applications and orders which fail to describe the efficiency of the service required or the time or terms for which it is to be rendered, the original contract must be looked to for such terms and conditions. *Illinois Trust & Sav. Bank v. Arkansas City Water Co.* 67 Fed. 196.

A provision in a contract between a municipality and a water company for hydrants that 61 L. R. A.

the company shall furnish sufficient 6-inch pipes and connect up all said fortified hydrants located as aforesaid and all such additional hydrants in such manner that none of said hydrants shall come on pipe smaller than 6 inches in diameter, will require all additional hydrants to be on 6-inch pipe, notwithstanding a general provision in the contract that all hydrants are to be so piped as to receive an abundant and sufficient circulation of water among and in all of the same. *Belfast Water Co. v. Belfast*, 92 Me. 52, 42 Atl. 235.

A contract by which it was agreed to construct certain specified parts of a waterworks for a municipality for the purpose of supplying a stated amount of water for its distributing reservoir merely called for an extension and adaptation of the then existing waterworks, and did not require the duplication of any of the existing works. *Columbia Water Power Co. v. Columbia*, 5 S. C. N. S. 225.

A person constructing a municipal water plant under a contract requiring a plant of a specified capacity and a sufficient water power to force into the distributing reservoir the number of gallons of water required by the city daily need not furnish a water power sufficient to force water to the maximum capacity of the plant, but it is sufficient if it at all times furnishes sufficient for daily consumption. *Ibid.*

Under a contract providing for the construction of specified parts of a municipal water plant of a capacity sufficient to force a stated amount of water into the distributing reservoir, and that the means of filtration shall be sufficient for purifying the water from the river if such water is required to constitute part of the supply, does not necessitate the construction of a filter of a capacity greater than the daily consumption of river water. *Ibid.*

A city is not liable to a water company for hydrant rental under a provision of an ordinance granting to the company a franchise to furnish the city and its inhabitants with water, and providing that the city shall pay a stipulated rental for a certain number of hydrants, where no hydrants have actually been put in, and, assuming that it is the duty of the city, under the terms of the grant, to furnish the hydrants, it does not appear that the company ever called upon the city to furnish them, and direct where the same should be placed. *Ellensburg Water Supply Co. v. Ellensburg*, 13 Wash. 554, 43 Pac. 531.

A city ordering additional hydrants under a contract with a water company by which the latter is to furnish and keep in working order a certain number of hydrants for a fixed period at a specified annual rental, the city to have the right at any time during the term of the contract to take additional hydrants at a certain rental which is less than that for the original number of hydrants,—is liable for the rent for the remainder of the term of the contract, and not from year to year, with the option of rescinding at the end of any yearly period. *State ex rel. Kaiser Water Co. v. Phillipsburg*, 23 Mont. 16, 57 Pac. 405.

A city is not liable for additional hydrants, as upon an extension of the line, under a contract to pay a certain amount for the use of a specified number of hydrants upon the original line of pipes of a water company, and an additional rate for a certain number of hydrants to the mile on extensions of the line which it requires to be made, where, for the sole purpose of reaching the original number of hydrants contracted for, it requires a longer line of pipes to be laid than contemplated by the plan of the water company. *Capital City Water Co. v. Montgomery*, 92 Ala. 366, 9 So. 343.

A contract by which a water company, in

consideration of the right to supply water to the inhabitants of a municipal corporation, agrees, during the continuance of the contract, upon the request of the city, to furnish water for public use for a stipulated sum per annum, does not obligate the city to take water continually during the entire period, but only for such time as it may request water to be furnished to it. *Gold v. Peoria*, 65 Ill. App. 602.

The compensation provided in an ordinance creating a contract for water supply, requiring the water company, if so directed, to sprinkle such streets of the city as it may direct by means of wagons and teams, and declaring that "for such services" the company shall receive a certain amount per month for each two-horse sprinkling cart, is intended as compensation for the entire service, including the water used, to be measured by the number of sprinkling carts so employed. *Montgomery v. Capital City Water Co.* 92 Ala. 376, 9 So. 337.

Under a contract evidenced by a municipal ordinance, that the city shall pay a water company hydrant rent during the first five years of the contract at a certain sum for each hydrant constructed as provided therein, and a reduced sum for each succeeding five years, the five-year period will begin to run with the date of the ordinance, and not at a subsequent time when the city begins to pay rent for hydrants. *Davenport Water Co. v. Davenport*, 64 Iowa, 55, 19 N. W. 886.

The obligations of a city and a new company to which a contract for a water supply has been assigned are correlative, and the right to require payment from the city for water furnished places the transferee under an obligation to furnish it. *Austin v. Bartholomew*, 46 C. C. A. 327, 107 Fed. 349.

The receiver of a water company cannot claim on its behalf and from a city payment of the rent for 100 hydrants furnished, and at the same time demand payment for 25 additional hydrants which were to be furnished free on condition that the 100 hydrants were paid for. *Ibid.*

An agreement by a village to take from a spring as much water as it may need or desire for any and all purposes is not a contract requiring the village to take its entire water supply from the spring, when at the time of entering into the contract it had a partial supply from another source, which it was then using and afterwards continued to use for fire purposes and to supply a brewery and livery stables. *Gregory v. Lake Linden (Mich.)* 9 Det. L. N. 70, 90 N. W. 29.

Payment, or tender of payment, by a city for improvements made is essential as a condition of its right to the possession of waterworks, under an instrument by which it agrees to give immediate possession to a water company of a small line of wooden pipes which it owns and agrees to allow, and requires the company to build new waterworks throughout the city as necessity demands, with covenants on the part of the water company that it will change what little the city has in the way of waterworks into better ones, and will create new works as fast as the demands of the city require; that the water company shall have the right to do this and collect water rates for a period of thirty years in consideration of the covenants entered into by it; and that, on the expiration of such term, the city shall pay the company for all the works which it shall have created; and that upon payment therefor the water company shall deliver possession to the city of all the waterworks as they shall exist at the end of the period,—even if it be considered as a lease. *Los Angeles v. Los Angeles City Water Co.* 124 Cal. 368, 57 Pac. 210, 571. 61 L. R. A.

A city having no right in the contracts of a water company with rate payers, and no right to the possession of waterworks because of its failure to pay for improvements made by such company under a contract requiring such payment as a condition of the city's right of possession at the termination of the contract, is not entitled to an injunction restraining the collection of rates by the water company, and to the appointment of a receiver to collect them. *Ibid.*

e. Subject-matter.

Under a contract permitting the organization of a water company which may contract to furnish a supply of water to a municipal corporation, the municipality may undertake by the contract to furnish its hydrants and pay for putting them in. *Utica Waterworks Co. v. Utica*, 31 Hun, 427.

In granting a franchise to a water company a city may impose such conditions and enforceable penalties as it deems necessary to secure the object sought, and may provide what rates or rentals the company may charge and under what circumstances it may charge them, since the business of the water company is one affected with a public interest; and, although penalties be incorporated, they may be enforced, even if not enforceable in private contracts. *State Trust Co. v. Duluth*, 70 Minn. 257, 73 N. W. 249.

Municipal authorities have power to contract for the use, in their waterworks system previously established, of the slack water above a milldam for fire-department and sewer purposes in consideration of an annual payment of a specified sum, unless the dam is abandoned by the owners thereof, under a statute authorizing them to make contracts for the construction of waterworks and for "all necessary purposes" to the full and efficient management and construction of waterworks. *Fremont v. June*, 8 Ohio C. C. 124.

So, an injunction will be granted at the suit of a municipal corporation to restrain a subsequent purchaser, or prior mortgagee in possession to whose lien its rights are subject, from partially tearing out a milldam unless it has determined to abandon the same, whereby it is deprived of the use of the slack water above such dam, under a contract for which it pays a valuable consideration annually, unless the dam is abandoned, and to the use of which it has adapted and maintained its waterworks for several years, although he had no notice of the contract at the time of the conveyance to him, where such removal, although made in a reasonable manner for the purpose of repairs, and not for the purpose of abandonment, was made without due preparation for the prompt and speedy reconstruction thereof, and the evidence tends to show that the purpose of such failure was to coerce the municipality into the purchase of the mill. *Ibid.*

f. Consideration.

When a water company provides for payment of bills fixed as to amount by the rates established by its rules and regulations for ordinary private uses, it does not have in view a special contract with the municipal corporation for the supplying of water to its fire plugs. *Holly Water Co. v. Mt. Holly Springs*, 10 Pa. Super. Ct. 162.

In determining the amount due from a city to a waterworks company for the use of hydrants for fire purposes, the basis of computation, in the absence of better data, is the interest and depreciation upon the cost of a plant sufficient to furnish water supply; and from the

time the city acquired such a plant an allowance should be made on the basis of the amount of water actually furnished. *Grand Haven v. Grand Haven Waterworks*, 119 Mich. 652, 78 N. W. 890.

In an action against a town for the specific performance of a contract for the payment of water rents to a water company, a court of equity may declare the validity of the contract; but it has no jurisdiction to compel the town to make a levy, since the remedy in such a case is by mandamus. *Raton Waterworks Co. v. Raton*, 9 N. M. 70, 49 Pac. 898.

Where an ordinance provides for hydrant rentals at not more than a certain sum, in the absence of an express agreement as to the amount of rentals the water company may recover the value of the use of the hydrants,—that is, a reasonable rental. *Valparaiso v. Valparaiso City Water Co.* (Ind. App.) 65 N. E. 1063.

The service upon a water company of a resolution providing that the city would pay a certain sum as a reasonable rental for hydrants, will not preclude the water company from deciding as to what is a reasonable rental, in a subsequent attempt by it to recover hydrant rentals, when it made no response to such resolution, but continued to furnish the hydrants with water. *Ibid.*

A waterworks company is entitled to receive from a city the amount of a tax levied to meet the expenses of a contract with it for water so far as the tax has been collected. *Lake Charles Ice, Light, & Waterworks Co. v. Lake Charles*, 106 La. 65, 30 So. 289.

From the claim of a waterworks company for water furnished by it under contract, the amount of taxes levied to meet the expense of the contract, and which the company had agreed to receive in part payment, will be deducted although the city is unable to collect them because of errors of form in the manner of attempting to enlarge the limits of the city. *Ibid.*

The law in force when the franchise is granted a waterworks company in which the annual rental of fire hydrants is fixed and the extension of the system with new hydrants required will control as to the proportion of the assessed valuation of property in the city which shall be paid as hydrant rents, and not a statute passed subsequently as to the additional hydrants, although the later statute was passed before these were put in. *State ex rel. City Water Co. v. Kearney*, 49 Neb. 325, 68 N. W. 533, Affirmed in 49 Neb. 337, 70 N. W. 255.

The custom has prevailed somewhat generally to attempt to obtain water for the necessary public purposes in return for the taxes to which the company would otherwise be subject.

It has been held that a city cannot exempt a waterworks company from taxation in consideration of the furnishing by it to the city of water at a reduced rate. *Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75.

But a city, in consideration of the furnishing for its use of water for certain purposes by a water company, may agree, not to exempt the water company from taxation, but to save it harmless from certain taxes by payment thereof being made by the city. *Alpena City Water Co. v. Alpena* (Mich.) 9 Det. L. N. 141, 90 N. W. 323.

A municipality may, for a reasonably adequate consideration, in the way of service rendered to it for municipal purposes, agree to make compensation therefor, for a term of years not unreasonably long, either in whole or in part, by reimbursing the company, in whole or in part, the amount that the company performing the service may be obliged to pay as

taxes assessed upon its property; and such a contract will not constitute an exemption from taxation. *Maine Water Co. v. Waterville*, 93 Me. 586, 49 L. R. A. 294, 45 Atl. 830; *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558; *Bartholomew v. Austin*, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359.

A municipal corporation may, in consideration of a water supply, agree to pay the water company a portion of the taxes which shall be assessed against its property each year. *Utica Waterworks Co. v. Utica*, 31 Hun. 427.

A city which, in part consideration of a water supply, contracts to pay the taxes assessed against the water company in excess of a certain amount, does not thereby confer a monopoly on the company, although the latter acquires an advantage over others desiring to do business of a like nature. *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558.

Public policy will not avoid a contract by a municipality to pay for a reasonable length of time a portion of the taxes assessed against a water company as part consideration for a water supply, merely because the gross and annual amounts to be paid are uncertain and the return to be received is also uncertain, where the contract is limited to the taxes assessed on the property owned by the company at the time of its execution, and on pipe lines, hydrants, and fixtures thereafter laid. *Maine Water Co. v. Waterville*, 93 Me. 586, 49 L. R. A. 294, 45 Atl. 830.

A provision in a contract between a municipal corporation and a waterworks company that tax assessments against the property of the waterworks company shall be refunded in consideration of supplying public buildings, fountains, sprinkling streets, etc., merely provides for the payment of a varying sum for the services mentioned, and will be enforced if sufficiently definite thereto. *Monroe Waterworks Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685.

But in Minnesota it has been held that a contract with a water company by a city whereby the company is to furnish the city a certain quantity of water in consideration of the city's paying all taxes assessed against the waterworks for city purposes is in violation of a constitutional provision that all taxes shall be as nearly equal as may be, that all property on which taxes are levied shall have a cash valuation, and that laws shall be passed taxing all real and personal property according to its true value in money. *Little Falls Electric & Water Co. v. Little Falls*, 74 Minn. 197, 77 N. W. 40.

g. Validity.

1. In general.

The provisions of an act to provide cities with waterworks, which authorizes the city to contract with a person or corporation for the enlargement, improvement, or addition to its existing waterworks, such enlargements or additions when completed to belong to such person or corporation, and for the leasing of the whole to the city upon terms to be agreed upon with such person or corporation, are in conflict with a constitutional provision prohibiting cities from raising money for, or loaning its credit to, or in aid of, any company, corporation, or association. *Alter v. Cincinnati*, 56 Ohio St. 47, 35 L. R. A. 737, 46 N. E. 69.

A contract by which a city agrees to take and pay for a specified amount of water per month for a designated term at an agreed price if a water company introduces water into the city is void where the laws under which such company is incorporated require it to furnish water

to the city free of charge in case of fire or other great necessity, and authorize the furnishing thereof for family use at reasonable rates, to be fixed by a board of commissioners, as the company has no right to charge or contract for water supply in any other mode than that so prescribed, and the city's charter power to provide for water for municipal purposes is subordinate to the laws for the incorporation of water companies, and gives it power to enter into a contract for obtaining water supply only where none has been provided. *San Diego Water Co. v. San Diego*, 59 Cal. 517.

A contract between a municipal corporation and a water company, by which the corporation is made to subscribe for a certain number of shares of the capital stock of such water company, and agrees to rent a certain number of fire hydrants from such company for a fixed period at a stated price, is beyond the authority of the city council to make, as imposing burdens upon the citizens provided against in the charter of such water company; and is, therefore, void, where such water company, by its charter, is granted the exclusive privilege of furnishing water to such city and its inhabitants, and, in consideration of such privilege, it is obliged to supply such city free of charge with water for hospitals, public offices, police stations, and for the extinguishment of fires. *Memphis v. Memphis Water Co.* 8 Baxt. 587.

A contract between town trustees and other parties for a water supply is void, both by the common law and the statutes of California, where one of the trustees was jointly interested with those with whom the contract was made. *Santa Ana Water Co. v. San Buenaventura*, 65 Fed. 323.

When by statute a member or officer of a municipal corporation forfeits his office and is guilty of a misdemeanor if he is in any way interested in a contract for the sale of supplies to the municipality, a contract between a water company and the municipality is void if made when a majority of the council are stockholders in the water company. *Milford v. Milford Water Co.* 124 Pa. 610, 3 L. R. A. 122, 17 Atl. 185.

A municipal contract with a water company is not void because the mayor and one member of the council had formerly been stockholders, but at present have no further connection therewith than the constitutional liability for unpaid subscriptions, operative in the event of insolvency, and then only after the exhaustion of corporate assets. *Broken Bow v. Broken Bow Waterworks Co.* 57 Neb. 548, 77 N. W. 1078.

That commissioners who sign a contract in behalf of the town for a water supply are to receive pay for their services in superintending the laying of the pipe does not of itself render the contract void,—especially where no talk upon that subject took place until after the contract was signed. *Nicoll v. Sands*, 131 N. Y. 19, 20 N. E. 818.

The grantees by ordinance of the right to construct and operate waterworks and acquire the necessary land, and who are required to furnish pure water and to repair gas pipes and sewers disturbed in laying their pipes, are not liable, because the ordinance did not constitute a binding contract, upon a bond conditioned for the faithful performance of their contract during the construction of the works, although they have failed to construct, or to begin to construct, them, where there was no money consideration, and no bond was required by the ordinance, but such bond was demanded after its passage. *Moffett v. Goldsborough*, 3 C. C. A. 202, 8 U. S. App. 160, 52 Fed. 560, Reversing 49 Fed. 213.

61 L. R. A.

A municipal corporation is not estopped to deny the validity of a contract for a municipal water supply as contrary to public policy and the laws of the state, in an action against it by the water company to enjoin the collection of taxes in violation of a stipulation therein to except public drinking fountains from payment of municipal taxes for a specified period, by its answer in a previous action brought by freeholders and taxpayers against the water company and the city, complaining of the contract because of such stipulation, where there was no issue raised between the water company and the city in that action, and no verdict and judgment was rendered on any issue joined by one of such defendants against the other. *Cartersville Waterworks Co. v. Cartersville*, 89 Ga. 689, 16 S. E. 70.

A contract made by a city for a water supply should be considered with reference to the conditions existing at its date; and the fact that the contract, because of the rapid growth of the city, has proved largely remunerative to the water company, does not make it unconscionable. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

An ordinance of a municipal corporation granting a person the right to construct waterworks for the exclusive supply of water to it and its inhabitants for a term of years, and the exclusive use of its streets for laying water pipes, and fixing the compensation the city shall pay for the use of the water supplied to it, may be void as to the grant of an exclusive use and as to the compensation to be paid for its water, as creating an indebtedness in excess of the constitutional limit, and yet be valid as to the right of the grantee to construct the waterworks and lay his mains and pipes in the streets for the purposes of the grant. *Quincy v. Bull*, 106 Ill. 337.

The reservation, by a town, in an ordinance granting a company the right to construct waterworks, of an option to buy the waterworks within a certain time after its completion, subject to a mortgage, although the town had no lawful power to make such purchase, does not render invalid other parts of the ordinance, including a contract to pay hydrant rentals. *Fidelity Trust & Guaranty Co. v. Fowler Water Co.* 113 Fed. 560.

A person constructing certain waterworks for the purpose of supplying the distributing reservoir of a municipality with water under a contract by which the municipality agreed to pay an annual compensation for a term of years, and to appropriate for that purpose the water rents collected by it, will not be denied the right to maintain an action to compel the municipality to perform its part of the contract upon the ground that a provision of the contract which does not affect the questions involved, and which will not be executed until the time fixed for the termination of the contract, lacks mutuality in that its enforcement is to be determined by arbitrators. *Columbia Water Power Co. v. Columbia*, 5 S. C. N. S. 225.

When a city has authority to make a contract for the construction and maintenance of a system of waterworks, and to provide therein for the payment of hydrant rentals, such lawful provision is not affected by other stipulations made therein by the city which are beyond its authority and unlawful. *Valparaiso v. Valparaiso City Water Co.* (Ind. App.) 65 N. E. 1063.

The invalidity of the exclusive grant by a city of the right to use its streets to conduct water to its inhabitants is no defense to an action for rent which the city has promised to pay the grantee for the use of hydrants after the works have been constructed according to the contract,

and have been accepted by the city. *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

2. Term.

Few subjects have given the courts more trouble than the attempts by municipal corporations to enter into long-term contracts for a water supply. Such contracts have been attacked as violating the debt limit, as granting monopolies, as unreasonable, as contracting away legislative power, and as generally beyond the authority of the municipality to enter into.

The cases dealing with the question of debt limit may be found in the *note* to *Ottumwa v. City Water Supply Co.* (C. C. App. 8th C.) 59 L. R. A. 604.

In many cases the statute expressly authorizes contracts for a term of years and in most of the cases where the question has arisen the courts have upheld such provisions. In a few cases they have not been upheld.

In *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, the court held that a contract by which a municipal corporation, already indebted to its limit, binds itself for a period of twenty years to take its water supply from waterworks to be erected by an individual at a fixed annual rental per hydrant for a stated number of hydrants, which will amount in the aggregate to the entire fund which can be raised by taxation for the fire department, is *ultra vires* as binding the city for an unreasonable time.

That decision may be upheld under the peculiar circumstances of the case.

So, *Dawson v. Dawson Waterworks*, 102 Ga. 594, 29 S. E. 755, held that a water company suing a municipal corporation for a year's water supply under a contract covering a period of years, whose right of recovery depends upon the validity of the contract, in order to be entitled to recover must show that when the contract was made the municipality had, in the manner prescribed by the Constitution, made due and lawful provision for the payment of the yearly sums.

So, a city of the second class is without power, under the laws of the state of Kansas, to grant the exclusive right and franchise to a corporation to furnish water for public and domestic use within the city for a period of twenty-one years, since it is in the nature of an attempt to create a monopoly,—a power which the council never possess unless it is delegated in clear and unmistakable terms. *Illinois Trust & Sav. Bank v. Arkansas City Water Co.* 67 Fed. 196.

Those decisions do not deny the validity of term contracts.

But in *Brenham v. Brenham Water Co.* 67 Tex. 542, 4 S. W. 143, the court held that a city ordinance, which grants to a water company the exclusive right to furnish the city and its inhabitants with water at specified rates for the period of twenty-five years, is void under the Constitution of Texas, which declares that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."

And that where a city charter provides that the city shall "be capable of contracting and being contracted with" and shall have power "to provide the city with water; to make, regulate, and establish wells, pumps, cisterns, hydrants, and reservoirs in the city streets or elsewhere within said city or beyond the limits thereof, for the extinguishment of fires and the convenience of its inhabitants;" and a general law of the state provides that any city is authorized to contract with a water company to

supply with water the streets and public places in the city,—a city has no power to make a contract giving to a water company the exclusive right to furnish the city and its people with water at a fixed rate for twenty-five years. In the absence of express authority in its charter, a city has no power to cede away or embarrass its legislative or governmental powers, either through the agencies of by-laws or contracts with others, so as to disable it from the performance of public duties. *Ibid.*

But in a later case in the Federal court the court held that a decision of a state court declaring the grant of a privilege to a waterworks company to construct and maintain its works to be an exclusive one and void as granting a monopoly will not be followed by the Federal court, where the transactions in controversy occurred before the decision was rendered; but the Federal court will place its own construction on the statute. *Bartholomew v. Austin*, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359.

And the court held that a grant to a water company of the right to construct and operate a system of waterworks for the supply of a city with water on specified terms and conditions for a period of twenty-five years, but which does not in terms confer an exclusive privilege, is not within the prohibition of the provision of the Texas Constitution prohibiting monopolies. *Ibid.*

And that decision expresses the general rule on the subject. See *infra*, V. b, VI. a.

A municipal contract for a supply of water for a term of years is not void as an attempt to barter away the police power of the state. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

A contract for municipal water supply extending beyond the terms of office of the members of the council authorizing it is not invalid as a restriction upon, or suspension of, the legislative powers of the council. *Higgins v. San Diego*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.

A municipal corporation has the power to contract for a supply of water for a period of twenty years, and such contract will not be void as a surrender of legislative power. The power to execute a contract of that character is neither a judicial nor a legislative one, but purely a business power. *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416.

The rule that the members of the legislative body of a city may not so act or contract as to deprive their successors of the unimpaired exercise of the legislative or governmental power does not apply to the exercise of the business or proprietary powers of the municipality, such as the power to contract for waterworks; but, in the exercise of such power, the city is governed by the same rules as a private corporation or individual, and may contract for terms longer than the duration of the terms of office of the members of its legislative body. *Illinois Trust & Sav. Bank v. Arkansas City*, 34 C. C. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

That the common council, under its power to contract for a water supply for ten years, may tie up the revenues of the city for that period for the exclusive benefit of the water fund, to the detriment of all other needs and liabilities of the city, raises a legislative, rather than a judicial, question. *Monroe Water Co. v. Heath*, 115 Mich. 277, 73 N. W. 234.

A contract for water supply to run for thirty years is not so great as to length of time as to be, as matter of law, unreasonable. *Oconto City Water Supply Co. v. Oconto*, 105 Wis. 76, 80 N. W. 1113; *Hurley Water Co. v. Vaughn* (Wis.) 91 N. W. 971; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663.

A contract of a municipal corporation giving

a water company the exclusive right to supply it with water for twenty-one years is not void because *ultra vires*, as interfering with the legislative power of the city, but is simply voidable so far as such contract is executory. *Carlyle Water, Light, & P. Co. v. Carlyle*, 81 Ill. App. 325.

A court cannot declare void a contract for the term of twenty-one years, made by a city in the exercise of discretionary power given by the legislature to determine the length of the term of such contract. *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

A contract for water supply, made by a city of 5,000 population and with an assessed valuation of \$2,250,000, whereby the exclusive privilege of laying water mains is given for thirty years; and further providing that the city shall be furnished with fifty hydrants at an annual rental of \$80 each, and, may at its option, purchase the plant at the end of ten years at a price commensurate with its productive value,—is not so unreasonable, oppressive, or contrary to public policy as to be declared void, where the city has for ten years enjoyed benefits thereunder without complaint. *Fergus Falls Water Co. v. Fergus Falls*, 34 L. R. A. 526, 65 Fed. 586.

When to declare an ordinance void, and therefore the contract with the water company, would be to render practically valueless the large investment which the water company has made, and deprive the city of its water supply, the court will not declare the contract void for unreasonableness, although the rates are for twenty-five years. *Creston Waterworks Co. v. Creston*, 101 Iowa, 687, 70 N. W. 739.

A thirty-year contract for hydrants at a fixed price per year need not be ratified by a vote of the electors, as required by Ohio Rev. Stat. § 2484, but is governed by the special act of May 4 and 12, 1885, limiting the time of such contracts to a term not exceeding twenty years; and such contract is valid for twenty years from its date. *Defiance Water Co. v. Defiance*, 90 Fed. 753.

Under an amendment to the charter of a city authorizing it to provide for a water supply by contract or otherwise, and to grant franchises to a water company for a term of years, the mayor and council may, by an ordinance granting a franchise or entering into a contract, bind the city during the term of such franchise or contract. *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 657.

A city of the second class under the power given by Kan. Gen. Stat. 1889, § 7185, to contract for and procure the construction of waterworks, may contract for such construction and lease of hydrants for a term exceeding the single year during which the members of its council held office. *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

When a municipal charter confers in broad, unqualified terms power to provide a water supply, and to raise annually taxes to pay for it, a contract with a water company to supply five hydrants at a yearly charge perpetually until the municipality shall take the waterworks at a valuation is valid. *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24.

A contract by a city for a water supply, which exceeds its authority by attempting to bind the city for twenty-one years, will not be held void for that reason, where waterworks have been erected by the other party on the faith of the contract at great expense, and the contract was recognized and acquiesced in by the city for several years, but will be upheld for a reasonable time, when the circumstances and conditions of the city as to population and assessed valuation

are substantially the same, and no better facilities are offered upon more reasonable terms. *Columbus Waterworks Co. v. Columbus*, 48 Kan. 99, 15 L. R. A. 364, 28 Pac. 1097.

A statute authorizing municipal authorities to contract for supplying the city with water from year to year authorizes the city to enter into a contract for a period of twenty years. *Light, Heat & Water Co. v. Jackson*, 73 Miss. 598, 19 So. 771.

But when the municipal consent is required by law as an indispensable prerequisite to the incorporation of a water company purposing to supply water to the municipality, and there is attached to such consent a condition requiring the supply to continue, and binding the town to take it for twenty years at a stated rate, when the municipality is prohibited by statute from contracting for a longer term than ten years, the consent is a nullity, and all proceedings founded on it are void. *State, Davis, Prosecutor, v. Harrison*, 46 N. J. L. 79.

h. Breach.

A contract to furnish a city artesian well water is not satisfied by a supply of equally good or better water from other sources. *Foster v. Joliet*, 27 Fed. 899, Affirmed by divided court in 50 L. ed. U. S. 942.

When a water company contracts to supply water at a certain pressure at all times, "if required," it is not obliged to do so until after due notice or express demand by the municipal corporation. *Wilson v. Charlotte*, 110 N. C. 449, 14 S. E. 961.

Where a water company entered into a contract to provide a town with water for fire hydrants within a stated time, but did not accomplish the entire work within that time, the town, having itself been in default as to the performance of its agreements under the contract upon which the progress of the work depended, cannot arbitrarily rescind without notice to the water company, upon its default at the end of the time stated. *Ephrata Water Co. v. Ephrata*, 20 Pa. Super. Ct. 149.

An agreement by a water company to commence work "immediately" on a contract to supply a borough with water within a year, made in February, will be held to have been sufficiently complied with when, commencing work in the spring, by the following October the company had furnished all the pipe required, and had greatly increased its water supply by tunneling, and completed the construction of a reservoir whereby the capacity for water was increased from 70,000 to 700,000 gallons. *Ibid.*

A person constructing certain waterworks for the purpose of supplying a municipality, but failing to complete it within the time prescribed in the contract, will not for that reason be denied the right to maintain an action to compel the municipality to perform its part of the contract, where it was not prejudiced in any way by the delay. *Columbia Water Power Co. v. Columbia*, 5 S. C. N. S. 225.

Where a contract for a water supply is silent as to the source from which the water is to be taken, an illegal execution of the contract will not be presumed in aid of the argument that it will be unlawful to go outside of the state for such supply. *Brady v. Bayonne*, 57 N. J. L. 379, 30 Atl. 968.

The damages for breach of a contract to furnish a water supply to a city will not include money advanced on estimates for materials furnished in the construction of the plant, if there is no provision in the contract requiring the contractor to refund such payments in case of failure to furnish the supply. *Godfrey v. Beatrice*, 51 Neb. 272, 70 N. W. 914.

Injury to a street and an adjacent bridge by

the bursting of a water main will be no defense to an action upon the water supply contract for hydrant rentals, although the contract required the water company to restore and keep in repair streets through which its mains were laid, where the injury was not shown to have been due to the negligence of the water company, but may have been caused by vibration of the bridge consequent upon running cars over it. *Racine Water Co. v. Racine*, 97 Wis. 98, 72 N. W. 350.

A provision in a contract for a municipal water supply that, upon failure to furnish an adequate supply, the municipality shall pay no rent, does not apply to another clause by which the water company guarantees a certain pressure of water at the fire hydrants. *Wilson v. Charlotte*, 108 N. C. 121, 12 S. E. 846.

1. Estoppel; liability for work or water accepted.

Although a municipal corporation cannot by estoppel bind itself by a contract which it has no power to make, estoppel may prevent its confiscating property which has been placed at its disposal without paying a fair value for it. And in most cases it will be required to pay for water which has been delivered to it and which it has used, although it has not made a valid contract to pay for it.

A city is estopped from declaring, in an action of mandamus by a water company to compel payment of water rents, that a contract granting the company an exclusive right to supply it and its inhabitants with water for a term of years at fixed hydrant rates is void because the grant was a monopoly, or for an unreasonable length of time at fixed rates, or unwise on the part of the city, where the waterworks had been erected in pursuance thereof, bonds had been issued and sold, and water furnished and paid for by the city for a number of years, and the city is not seeking to infringe this exclusive grant, nor does it desire the supply stopped, but merely insists upon lower rates. *State ex rel. Great Falls Waterworks v. Great Falls*, 19 Mont. 518, 49 Pac. 15.

Statutory provisions requiring the consent of a city to authorize the formation of a corporation to exercise a franchise as a water company, and the appointment and report of inspectors concerning the source of the proposed water supply, are for the protection of the city; and when they have been substantially, though not technically, complied with, and the company has been formed, and has proceeded, with the full consent of the city authorities, to erect its plant and furnish the city with water in accordance with the contract embodied in the franchise, the city cannot defend against payment therefor on the ground of informality in compliance with such requirements. *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 657.

A city is estopped to defeat a recovery for rent of hydrants as against bondholders who loaned money on a mortgage of the plant and income of waterworks built under the direction and accepted by formal resolution of the city council and completed according to the terms of a defeated ordinance, where the city has paid rents without protest for fourteen months,—either on the ground that there was no contract, or that it had no power for the term mentioned in the ordinance to grant the exclusive right to the use of its streets for water pipes. *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

But a municipal corporation is not estopped, as against purchasers of the bonds of a water company, from rescinding its contract to take water from the company by reason of the fact

that it passed a resolution setting forth that the contract had been complied with, and accepting the works, where the statements extended only to the physical existence of the plant, and the company has proved itself unable to furnish the required supply. *Farmers' Loan & T. Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573, 10 Sup. Ct. Rep. 816.

Where a town council, without any statutory power, grants to a waterworks company the exclusive right to lay water pipes in the public highway, the town is not estopped from taking advantage of the invalidity of the contract, although the waterworks company has in good faith performed its part of the contract, since the company is bound to know the extent of the authority of the town council and of the town in making the contract. *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526.

When a municipal corporation has made full compensation according to its contract for services by a waterworks company without protest and knowing that the company claimed full performance, it waives any counterclaim because of alleged partial performance by the company. *Monroe Waterworks Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685.

A city having passed an ordinance apparently regular, and subsequently approved by all the members of the city council, giving an individual the right to furnish water, and agreeing to pay for a number of hydrants; and having used the hydrants for about a year after accepting the waterworks, constructed at a large expense in pursuance of such ordinance by a corporation which in good faith purchased the rights of such person,—cannot repudiate the agreement, and refuse to pay the rent of the hydrants because of the bribery of members of the council by the original party, and their fraud and conspiracy in securing the passage of the ordinance. *Burlington Waterworks Co. v. Burlington*, 43 Kan. 725, 23 Pac. 1068.

A city which has for many years recognized and accepted a waterworks system as fully complying with a contract cannot afterwards repudiate such recognition, and claim damages for failure to comply with the contract. *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

That waterworks are not completed at the time called for in the contract will not prevent an action for the hydrant rentals due under the contract if the works were accepted by the board of aldermen. *Neosho City Water Co. v. Neosho*, 136 Mo. 498, 38 S. W. 89.

But the mere fact of occasional use by a city of water actually furnished by a water company for public purposes under a contract for a supply of well-settled and wholesome water does not necessarily constitute an acceptance; nor is acceptance implied by mere receipt and consumption of the water; but there must be a fair opportunity for examination and rejection before acceptance can be inferred from receipt. *Winfield Water Co. v. Winfield*, 51 Kan. 104, 33 Pac. 714.

Under a contract for a water supply for a municipal corporation, the machinery connected with which should be sufficient to reach certain results, the acceptance by the city of the work will not relieve the company from liability to put down larger mains if those which were put down do not fulfil the conditions. *Light, Heat, & Water Co. v. Jackson*, 73 Miss. 598, 19 So. 771.

Acceptance of water.

A city which accepts the services tendered by a water company is liable to pay the contract price for water furnished, although the or-

dinance granting the water franchise failed to receive the requisite number of votes, where both the city and the county assumed that it had been properly passed. *Illinois Trust & Sav. Bank v. Arkansas City Water Co.* 67 Fed. 196.

A waterworks company may recover from a city the value of water furnished it for municipal purposes under an agreement that the sum should be offset against the taxes assessed against it if the contract be declared void, as granting an exemption from taxation. *Bartholomew v. Austin*, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359.

A municipal corporation possessing power to make contracts for a water supply may, in the absence of express contract, be bound to pay for water furnished under an implied one. *Port Jervis Waterworks Co. v. Port Jervis*, 71 Hun, 66, 24 N. Y. Supp. 497.

A water company may recover the value of water used by a municipal corporation even after its formal rescission of the contract therefor for failure to furnish the stipulated amount, when neither the thing to be furnished, nor the consideration to be paid, was single and indivisible. *United States Waterworks Co. v. Dubois*, 176 Pa. 439, 35 Atl. 251.

Where a contract by which a waterworks company agreed with a city to furnish water for domestic and certain public purposes, and to keep a number of fire hydrants ready for service, has been substantially performed except as to the hydrants, and the city has voluntarily received the benefit of its performance as to the part of the contract knowing that the other part has not been fully performed,—it is precluded from insisting on performance of the residue as condition precedent to payment for benefits received. It must rely on its claim for damages as to the part unperformed. *Sykes v. St. Cloud*, 60 Minn. 442, 62 N. W. 613.

A municipality whose contract of lease of a water company's plant and for water supply is invalid because of an agreement for the subsidizing of a railroad may, nevertheless, be liable to pay the reasonable value of the use thereof, to the extent to which the claims thereof accrued when there were unappropriated revenues to meet them; but such claims accruing when there were no unappropriated revenues to meet them are void. *Higgins v. San Diego*, 118 Cal. 324, 45 Pac. 824, 50 Pac. 670.

Under a statute authorizing cities to contract for the supply of water, and pay therefor such sum as the contracting parties may agree upon, a city may render itself liable for the whole amount contracted for, and judgment may be rendered against it, although the special tax for water of not over 5 mills on the dollar for one year, authorized thereby, is not sufficient to meet the amount so agreed to be paid. *Ft. Madison v. Ft. Madison Water Co.* 52 C. C. A. 204, 114 Fed. 202.

Under a statute providing for supplying water to a city for public and private uses, by a board of water commissioners, whose duty is to construct all necessary buildings and appliances to furnish a full supply of water for public and private use, with power to construct hydrants for public use at such locations as they deem expedient, the city cannot be held liable for water used in sprinkling streets, as that is a public use to be met by the board of water commissioners, which, by so doing, would also recognize the propriety of a return to the public for the aid furnished by it, in erecting the water plant and for a subsequent loan and annual tax, and protection from the control of the common council and demands of other boards and departments. *Detroit Water Comrs. v. Detroit Citizens' Street R. Co.* (Mich.) 9 Det. L. N. 209, 90 N. W. 657, 61 L. R. A.

A lessee of city waterworks for the sale and delivery of water to the inhabitants of a city "for domestic purposes," whose lease provides that it shall only take from the river water necessary for such domestic purposes, and shall not dispose of any water for the purpose of irrigation, is not entitled to recover for surplus water diverted from the river over and above that necessary for domestic purposes and which it had no right to divert, taken from its pipes by the city for street sprinkling, which is an irrigation purpose, within the meaning of the lease, for which the lessee has no right to dispose of the water or make charges. *Los Angeles Water Co. v. Los Angeles*, 55 Cal. 176.

A new municipal corporation formed by an extension of the limits of a former corporation is liable for legitimate debts contracted in furnishing water to the city within the old limits to the extent furnished, although the amendment to the city charter extending the limits is illegal, since the amendment does not place the city in a situation to deny its indebtedness. *Lake Charles Ice, Light, & Waterworks Co. v. Lake Charles*, 106 La. 65, 30 So. 289.

That a water company to which a city is indebted for a water supply, and which has passed into the hands of a receiver, was without corporate existence either *de facto* or *de jure*, is not a valid defense on behalf of the city in an action by the receiver to recover water rentals, since in that case the contracts remained the property of the original grantees who attempted to form the water company, where their rights are represented by the receiver. *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 657.

In *Brenham v. Brenham Water Co.* 67 Tex. 561, 4 S. W. 143, it was held that recovery could be had for water furnished prior to the time when the contract was repudiated by the municipality; but, so far as that holding applied to a void contract, it was questioned in *Edwards County v. Jennings*, 89 Tex. 618, 35 S. W. 1053.

A municipal corporation which holds itself in readiness to use water furnished for fire plugs in case of need is liable therefor at the contract price, although its common council has passed a resolution expressing a determination to pay nothing for its water until satisfied with the quantity and quality thereof, but has not given notice not to continue the supply. *Montgomery v. Montgomery Waterworks Co.* 77 Ala. 248.

A municipal corporation is liable for the water received by it from a water company and used for municipal purposes, especially as its charter authorized it to provide against fires and obtain water for public purposes, although such company was operating under a void franchise, and the contract between it and the city was also for that reason void, and the Constitution prohibits a city from paying "any claim created against it under any agreement or contract made without express authority of law." *Nicholasville Water Co. v. Nicholasville*, 18 Ky. L. Rep. 592, 36 S. W. 549, 38 S. W. 430.

Recovery may be had of the contract price of water supplied to, and used by, a municipality, although the contract is by its terms to be exclusive for a period beyond the power of the municipality to grant. *Greenville v. Greenville Waterworks Co.* 125 Ala. 625, 27 So. 764.

In *Ephrata Water Co. v. Ephrata*, 16 Pa. Super. Ct. 484, where the ordinance creating the contract was invalid because not properly authenticated, the contract was fully performed to the satisfaction of the municipal authorities; and the court said that to permit the municipality to escape wholly from liability for the services rendered at its instance before any notice was given to discontinue the service would be grossly inequitable and unjust. It would not be permitted in the case of an individual or a

private corporation, and we are not required to hold that an equal obligation to do justice does not rest upon a municipal corporation.

The court thereby reversed 18 Lanc. L. Rev. 353, where the court held that, while a water corporation may recover the reasonable value of water used from its mains for municipal fire protection on a *quantum meruit*, it having no existing contract therefor, it is not entitled to compensation at the rate fixed in a contract duly made but not put in force.

A municipal corporation is liable for water actually supplied and used without objection for fire and sanitary purposes, although the contract under which it was supplied is *ultra vires* so far as it is executory, because made for an unauthorized length of time. *Montgomery v. Montgomery Waterworks*, 79 Ala. 233.

But the same court held that the receiving of benefits by a municipal corporation under a contract for water supply which is void because not made in compliance with constitutional requirements will not prevent the municipality from setting up the defense of the invalidity of the contract in an action to enforce it. *Dawson v. Dawson Waterworks Co.* 106 Ga. 696, 32 S. E. 907.

So, a municipal corporation is not liable upon an implied contract for the value of water furnished it by a ditch company under a statutory provision prohibiting a municipality from making any contracts or doing any act binding or imposing upon itself any liability to pay money until a definite appropriation is made therefor, and that such contract shall be null and void as to the city in the absence of such appropriation. *Smith Canal or Ditch Co. v. Denver*, 20 Colo. 84, 36 Pac. 844.

A town is not liable for water furnished it by a corporation under a void contract which the town by statute had no power to make, as the corporation must be charged with a knowledge of the statute. *People ex rel. Tupper Lake Water Co. v. Sisson*, 75 App. Div. 138, 77 N. Y. Supp. 376.

The use of water by a municipal corporation under a void contract without intending to pay for it is not a fraud which will create a liability in tort. *Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768.

A city is not obliged to pay for services rendered to it by a water company in flooding its sewers in the absence of a contract therefor made by some person entitled to bind the city. *State Trust Co. v. Duluth*, 104 Fed. 632.

The claim of a water company for the reasonable value of the use of its plant by a municipality, the lease of which is void, is not payable out of a street fund established by charter for the sprinkling, cleaning, and repairing of streets, or out of a street-sprinkling fund established by ordinance, in the absence of anything to show that water furnished from the plant was used for street-sprinkling purposes. *Higgins v. San Diego*, 131 Cal. 294, 63 Pac. 470.

j. Change or enforcement.

Modification.

An act does not impair an existing contract for supplying water to a municipality which provides that the city shall buy the plant of the water company if it desires to sell rather than act under a law authorizing it to construct a municipal system. *Newburyport Water Co. v. Newburyport*, 113 Fed. 677.

If the mayor and council of a city, defendants in a mandamus proceeding, by their answer insist on a literal compliance with the provision of the city's ordinance contract with a water company, in behalf of whose assignee, an 61 L. R. A.

improvement company, the relator's debtor constructed a waterworks system, concerning the laying of a certain main and the erection of a hydrant, although in lieu of that main and hydrant another was laid at the request of the president of the improvement company to which the waterworks franchise was assigned and without objection by the city or property owners, although the hydrants and mains were to be substantially as shown on the plan accompanying the ordinance,—the main and hydrant must be constructed as the ordinance requires. *State ex rel. Tarr v. Crete*, 32 Neb. 568, 49 N. W. 272.

The impairment of a contract for a water supply is not taken out of the constitutional provision by the fact that the municipality makes the contract and takes the action which impairs it in its proprietary capacity, and not as an agency of the state. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Rescission.

Where a city by an ordinance enters into a contract with a water company whereby it grants to the company the exclusive right to furnish water to the city and its inhabitants for the period of twenty-five years, and the contract is invalid as not being authorized by the city charter and general laws, the city council may declare the contract null, and refuse to comply with it. *Brenham v. Brenham Water Co.* 67 Tex. 542, 4 S. W. 143.

Notice to a water company of defects in its system and demands for the improvement thereof so as to furnish a supply of well-settled and wholesome water, and the giving of a reasonable time to comply with its contract, must be shown before a court of equity will cancel a contract between such company and a municipality for a supply of well-settled and wholesome water for its use and the use of its inhabitants on the ground of a failure to supply the quality of water required by the contract, after the construction and use for a long period of time of its system of waterworks. *Winfield v. Winfield Water Co.* 51 Kan. 70, 32 Pac. 663.

A forfeiture clause in a contract, that, in case a party fails to construct and maintain waterworks as agreed, the rights and franchises granted to him by the municipality shall cease and determine, cannot be enforced by an *ex parte* act of the city council declaring the contract forfeited. *Foster v. Joliet*, 27 Fed. 899, Affirmed by divided court in 30 L. ed. U. S. 942.

A proposition offered by a water company, which has entered into an agreement to supply a town with water for hydrants and is in default, upon the same terms as the old contract except as to price, does not create an estoppel, nor operate as a rescission of the old contract, but is at most an offer to rescind the old contract upon the terms of the new one; and upon such offer not being accepted the old contract is still in force. *Ephrata Water Co. v. Ephrata*, 20 Pa. Super. Ct. 149.

The fact that a city at times delayed properly to apply a water tax, and that it required a water company at times to lay pipes in streets where there was no sufficient demand for them, will not excuse the water company from complying with its contract to filter the water,—particularly when the company has eventually received the water tax, and has in many instances failed to comply with the order concerning the laying of the mains. *Burlington v. Burlington Water Co.* 86 Iowa, 266, 53 N. W. 246.

Corporate action as evidenced by the records and minutes of the council's proceedings is nec-

essary to terminate a contract for a municipal water supply. It is not sufficient that members of the council instructed the fire marshal to notify the water company to discontinue the supply. *Greenville v. Greenville Waterworks Co.* 125 Ala 625, 27 So. 764.

Forfeiture of a contract, whereby a party agrees with a city to construct waterworks, and is given exclusive rights and privileges, will not be decreed on the ground of delays due to the acts of both parties, and because of experiments authorized by the city, where time is not made the essence of the contract; but a reasonable time will be allowed for completion of the works. *Foster v. Joliet*, 27 Fed. 899, Affirmed in 30 L. ed. U. S. 942.

Where a water company exercises its reserved right to revoke an offer of free water to a city, the city is thereafter bound to pay for whatever water it uses. *Spring Brook Water Co. v. Pittston*, 203 Pa. 223, 52 Atl. 249.

Ratification.

A contract for a water supply, made by a city, if within the power of the legislature to have originally authorized, may be subsequently ratified by it. *Los Angeles Water Co. v. Los Angeles*, 88 Fed. 720.

Ratification by the legislature of an ordinance confirming the contract made by a town for a water supply does not ratify an undisclosed fraud arising from the fact that one of the trustees voting for the ordinance was jointly interested with those with whom the contract for the water supply was made. *Santa Ana Water Co. v. San Buenaventura*, 65 Fed. 323.

Although a contract whereby a village corporation agrees to purchase a waterworks system is *ultra vires* at the time it is made, it became valid by its subsequent ratification by act of legislature. *Mayo v. Dover & F. Village Fire Co.* 96 Me. 539, 53 Atl. 62.

A vote of the electors of a village authorizing the making of a contract for a water supply does not relate back to and validate a contract already entered into, where, by the statute, a favorable vote of the electors is a condition precedent to the right to make the contract. *Squire v. Preston*, 82 Hun, 88, 31 N. Y. Supp. 174.

But a void contract between a municipal corporation and water company cannot be ratified by a subsequent council qualified to contract with the water company, although it receives the benefits sought to be contracted for, as there is no contract to ratify. *Millford v. Millford Water Co.* 124 Pa. 610, 3 L. R. A. 122, 17 Atl. 185.

Enforcement.

It is not only the right, but the duty, of a municipality to maintain an action, not only on its own behalf, but on behalf of its citizens, to enforce the terms of a contract entered into by it with a water company for a supply of well-settled and wholesome water for its use and for the use of its citizens, where the company has furnished both the city and its inhabitants with unsettled and unwholesome water. *Winfield v. Winfield Water Co.* 51 Kan. 70, 32 Pac. 663.

Mandamus may be employed to compel a water company to extend its mains in a city, where, under the contract between the city and the company, it is the duty of the company to make such extensions. *Topeka v. Topeka Water Co.* 58 Kan. 349, 49 Pac. 70.

A mandamus will lie to compel a city to audit and allow the claim of a water company for hydrant rental due, and issue a warrant therefor payable out of the water fund, and to collect 61 L. R. A.

sufficient tax to meet the same, where the city had entered into a contract to take its water supply of the company for a term of years at a fixed annual rental, and it was authorized by statute to levy annually a certain tax to provide a special water fund, and the right of the water company thereto had become vested by the construction of the waterworks and the furnishing of water to the city at the contract rates for a number of years. *State ex rel. Great Falls Waterworks v. Great Falls*, 19 Mont. 518, 49 Pac. 15.

Mandamus will lie to compel a city to audit and pay hydrant rental due a water company under a contract by which it agreed to take its water supply from the company for a period of years at a fixed annual rental. *State ex rel. Kaiser Water Co. v. Phillipsburg*, 23 Mont. 16, 57 Pac. 405.

The rule that personal contracts will not be specifically enforced, but the parties will be left to their remedies at law, will not be applied in an action to compel a municipality to perform its part of a contract under which the plaintiff has constructed certain waterworks to be used in connection with the municipal water plant for the purpose of supplying the distributing reservoir of the defendant with water, for which it agreed by the terms of the contract to pay an annual compensation, and appropriate for that purpose the water rents collected by it. *Columbia Water Power Co. v. Columbia*, 5 S. C. N. S. 225.

An injunction will be granted in favor of a city to restrain the summary shutting off of the supply of water for public purposes, by a water company which threatens, in violation of its duty to the public assumed by its contract with the city, to shut off the water furnished thereunder in case of default in payments by the city, declared by it to be forfeited under the contract for failure to furnish an adequate supply for fire purposes. *Blenville Water Supply Co. v. Mobile*, 112 Ala. 260, 33 L. R. A. 59, 20 So. 742.

Apprehension that such illegal action may be taken by a municipality as will impair the franchise and contract rights of a waterworks company with whose predecessor the city has contracted for a municipal water supply entitles the company to maintain a suit for equitable relief in advance of any actual proceedings on the part of the city to impair the company's rights under the contract. *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 583.

Equity has no jurisdiction to enforce the payment of water rentals past due from a municipal corporation, although it has power to require it to levy and collect a tax to make future payments as agreed in its contract and authorized by law. *Eau Claire v. Payson*, 48 C. C. A. 608, 109 Fed. 676.

An action by a city to compel a water company authorized by ordinance to lay its pipes in the public streets to comply with its covenants under the contract contained in the ordinance does not involve the company's franchise. *Denver v. Denver Union Water Co.* 26 Colo. 413, 58 Pac. 594.

k. Collateral contracts.

A water company leasing land together with a spring situated thereon for a definite term under an unconditional promise to pay rent is liable therefor during the entire term, although the water becomes polluted and useless for the purpose intended, and this whether the contract be treated as a lease or as a purchase of the water privileges for such term; as, if a person contracting to do a prescribed thing wishes to protect himself from inevitable accident, he must

do so by express agreement. *Jones v. Springfield Waterworks Co.* 65 Mo. App. 388.

Where a company owning springs of water covenanted with a water company to take from it the entire supply of water it might require for certain purposes, and that it would not supply any places with water from its springs which the water company was authorized to supply, it violates the agreement by afterwards leasing a portion of its premises through which its own stream of water runs, and from which the lessees supply themselves with water. *Hartlepool Gas & Water Co. v. West Hartlepool Harbor & River Co.* 12 L. T. N. S. 386.

An agreement of a city, in a contract with a water company, to pay to the company's bondholders the money due or to become due for hydrant rentals, or as much thereof as is necessary to pay interest on the bonds, and the signing on behalf of the city of a certificate to that effect on the back of the bonds, is not a loan of the city's credit in violation of an act of Congress prohibiting such act. *State ex rel. Great Falls Waterworks v. Great Falls*, 19 Mont. 518, 49 Pac. 15.

Where a city in a valid contract for the supply of water, and to pay hydrant rentals and levy and collect a special tax therefor, agreed to pay such tax direct to a trustee of the bondholders under a mortgage to be placed on the waterworks plant, such last agreement was proper; and, after the completion and acceptance of the plant by the city, the rights and obligations of the city, water company, and trustee became fixed, and the right of the trustee to enforce payment of the tax for the benefit of the bondholders was not affected by another clause in the contract giving the city the option to purchase the plant within a certain time, whether valid, or whether acted on or not. *Centerville v. Fidelity Trust & Guaranty Co.* 118 Fed. 332.

A contract between corporations organized to distribute and furnish water to consumers in a county and city, one of which owns a supply of water and a pipe line ending in the city limits, and the other a distributing plant within the city, for co-operation in supplying water in the city, and providing a method of determining the price of water, is not in violation of public policy as a combination to create a monopoly, since the California Constitution reserves to municipal corporations the power of regulating water rates. *San Diego Water Co. v. San Diego Flume Co.* 108 Cal. 549, 29 L. R. A. 839, 41 Pac. 495.

Such a contract is not *ultra vires*, because one officer of each corporation is appointed a trustee, and they together given general charge of the operation of the works, and of keeping the accounts of receipts and expenses, with a limited power of determining what shall be charged to the account of operating expenses, and with other powers and duties simply executory and such as could not be discharged by any board of directors otherwise than through an agent. *Ibid.*

IV. Rights of taxpayer.

The taxpayer has the same control over proceedings of the municipality looking to the procurement of a water supply that he has over the making of public improvements generally.

No citizen can be heard to contend that the laws and ordinance under which a municipal water supply has been created and regulated are invalid because his individual and personal views have not been formally obtained and considered. *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

But a taxpaying citizen of a municipal corporation may enjoin the making of an illegal

contract by the city for the purchase of a waterworks plant. *Austin v. McCall (Tex.)* 68 S. W. 791.

A taxpayer may maintain an action for the cancellation of bonds unlawfully issued by the municipal corporation to raise funds for a municipal water supply, where they would necessitate an increase of taxation, and subject his property to liability to sale for failure to pay taxes levied against him. *Nalle v. Austin (Tex. Civ. App.)* 21 S. W. 375.

Taxpayers can maintain an action to enjoin the misapplication of public funds by municipal officials under a contract for a city water supply on the ground that their burden of taxation will thereby be wrongfully increased. *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249.

Citizens and taxpayers of a municipality may maintain an action to enjoin the purchase of waterworks by the city council where they may be ultimately liable to taxation therefor, because, although the income of the works is made a special fund for the payment of interest and creation of a sinking fund, the bondholders' remedy is not limited to such fund. *Avery v. Job*, 25 Or. 512, 36 Pac. 293.

A resident taxpayer of a city may maintain an action to have declared invalid a contract with the city for the construction of waterworks and to prevent action thereunder, and for the return of bonds improperly issued by municipal officers; and a demand upon the municipal authorities to bring such action is not a necessary condition precedent where such a demand would be useless; nor is such taxpayer disqualified by ulterior motives. *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826.

A taxpayer can maintain an action to enjoin a municipal corporation from issuing and selling its bonds for the erection of waterworks, where the proceedings therefor are unauthorized and void either from the want of power or from its unlawful exercise; and it is not necessary to wait until the fund is actually raised ready for expenditure before instituting suit. If the proceedings will result in a misapplication of the public money, they may be arrested by injunction at any stage before consummation. *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374, 49 N. E. 335.

A taxpayer may maintain a suit to restrain a municipal corporation from illegally expending money in the construction of waterworks, where her interest in the subject-matter of the suit exceeds \$100, and is thus sufficient to confer jurisdiction upon the court. *Savidge v. Spring Lake*, 112 Mich. 91, 70 N. W. 425.

The failure of a taxpayer to object to illegal expenditures of money by the common council does not deprive her of the right to maintain a suit to restrain an illegal expenditure for the construction of waterworks. *Ibid.*

A taxpayer cannot maintain a suit against a city authorized to construct waterworks to enjoin it from so doing and incurring a bonded indebtedness therefor on the ground of increased taxation, or although it would thereby violate contract rights of an existing water company which alone can complain of such action. *Moore v. Walla Walla*, 60 Fed. 961.

A taxpayer and water user has the right to enjoin the mayor and council from passing an ordinance postponing the city's right to purchase at an appraised valuation the plant of a waterworks company furnishing it water under an exclusive franchise; such an ordinance materially affecting the interests of citizens, and being a violation of statute. *Poppleton v. Moores*, 62 Neb. 851, 88 N. W. 128, and 93 N. W. 747.

A taxpayer cannot maintain a suit to set aside a city's water-supply contract although it

is void for granting a monopoly, unless he shows injury to himself as a taxpayer,—as, that he is thereby compelled to get water from the grantee, or is prevented from getting it on better terms. *Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75.

An injunction to restrain the execution of a contract for water supply will not be granted at the suit of a taxpayer who fails to show that there is any imminent danger of his rights being violated, or that the contract is a wasteful one. *Keator v. Dalton*, 29 Misc. 692, 62 N. Y. Supp. 878.

A private citizen and elector of a town cannot restrain the person with whom the town has a contract for water supply from polluting the water, where the plaintiff does not show any special damage to himself, and does not even show that he is a user of the water supplied. *Bosworth v. Norman*, 14 R. I. 521.

Courts of equity will not restrain municipal governments in the exercise of their functions from an act that is even *ultra vires*, unless the complainant shows the act to be an injury to him or his property, and one against which he has no adequate protection. Hence, where a resident of a city seeks to enjoin the performance by it of an illegal contract to furnish water, by means of its waterworks, to a gin company outside the city, an allegation in the petition that such furnishing of the water diminishes the protection of plaintiff's property against fire, and that the pressure when the water tank is full is scarcely sufficient to afford fire protection, is not sufficient to show a cause of action. It being nowhere averred that the tank is not, or cannot be, kept full when the gin company is being furnished with water. *Wood v. Victoria*, 18 Tex. Civ. App. 573, 46 S. W. 284.

Equity will not enjoin the threatened execution of a resolution of a common council looking toward the letting of a contract for a municipal water supply at the suit of the taxpayer before anything has been done under it which will injure the taxpayer. *Pedrick v. Ripon*, 73 Wis. 622, 3 L. R. A. 269, 41 N. W. 705.

A private citizen and elector in a town has no right to restrain the cutting of ice on a reservoir owned by a person with whom the town has a contract to be furnished with water, on the ground that such contract, made under a state statute, does not authorize the cutting of ice, as the complainant in such a case cannot be regarded as a party to the contract. *Bosworth v. Norman*, 14 R. I. 521.

It is immaterial to one liable for the expense of constructing a water main that the pipe was old, second-hand, and bad, since the costs and repair or substitution would not fall on him, but on the city. *Swain v. Philadelphia (Pa.)* 22 W. N. C. 120, 13 Atl. 545.

The execution of a contract for water supply will not be enjoined at the suit of a taxpayer on the ground that it is the result of a fraudulent political combination, where such fact is averred on information and belief unsupported by any statement of the sources of the information or of the grounds of the belief. *Keator v. Dalton*, 29 Misc. 692, 62 N. Y. Supp. 878.

An injunction will not be granted at the instance of citizens and taxpayers to restrain a city from paying, and a water company from collecting, the amount due for water already supplied and consumed, whether the contract between the city and such company for the full period contemplated thereby was valid and binding upon the city or not. *Dawson Waterworks Co. v. Carver*, 95 Ga. 565, 20 S. E. 502.

A taxpayer cannot, in an action brought under Laws 1892, chap. 301, compel restitution of an amount paid under a judgment confessed 61 L. R. A.

by the city in settlement of a claim of a water company, unless waste or injury to the public fund is shown, in that the city was not justly indebted to the water company in the amount of the judgment. *Bush v. Coler*, 60 App. Div. 56, 69 N. Y. Supp. 770.

A taxpayer may not properly raise the question in a suit against the city that the city has no authority to grant a foreign corporation the exclusive right to construct waterworks in the city. Such question can be raised only in a conflict between the waterworks company and some person or corporation also claiming the right from the city to construct and operate waterworks. *Dodge v. Council Bluffs*, 57 Iowa, 360, 10 N. W. 886.

Citizens of a town have an interest in the matter in litigation of such a direct and immediate character as to entitle them to intervene, under the Code, for the purpose of contesting the exclusive privilege asserted by a water company to furnish the town and its inhabitants with water, in an action by which such water company seeks to enjoin another water company from furnishing the inhabitants of the town with water on the ground of such exclusive privilege. *Wood v. Denver City Waterworks Co.* 20 Colo. 253, 38 Pac. 239.

V. Use of highways.

a. Right of public to use.

The laying of pipes for the distribution of water through the territory of a municipal corporation is one of the uses contemplated by the dedication or condemnation of land for a city street, so that they may be laid without the consent of, or compensation to, the abutting owner. The rule is not the same, however, with respect to common highways. They are not regarded as having been charged with such use, and the right to lay pipes in them must be acquired from the owner.

A municipal corporation has the right to have water pipes sunk in the streets, and to give permission to a water company for the sinking thereof. *Peoria v. Walker*, 47 Ill. App. 182.

A municipal corporation having the power of exclusive control over its streets, and the power to supply or authorize its inhabitants to be supplied with water, may pass an ordinance granting to a contractor the right of way in all its streets and alleys for the laying of water pipes therefor. Such use of the streets being one of the public objects for which they are held, and being necessary to the construction of waterworks, the power to contract for the construction of the latter includes, as a necessary incident, the power to contract for the use of the streets for that purpose. *Quincy v. Bull*, 106 Ill. 337.

The authority vested by statute in the board of trustees of an incorporated village to contract for the delivery of water through hydrants or otherwise for the extinguishment of fires and for sanitary and other public purposes, empowers them to grant to individuals the privilege of installing a water system in the streets and using existing hydrants, on condition that they, with others to be erected, shall be connected with such water system; which grant further provides for the payment by the village to the company of a specified sum annually. *Bollivar v. Bollivar Water Co.* 62 App. Div. 484, 70 N. Y. Supp. 750.

An abutting owner is not entitled to damages for the laying by a city of water pipes in a street of which it owns the fee. *Re Newton*, 42 N. Y. S. R. 952, 16 N. Y. Supp. 950.

The laying of water mains in a city street to supply the inhabitants of the city with water

does not impose an additional burden so as to entitle abutting owners to extra compensation. *Crooke v. Flatbush Waterworks Co.* 29 Hun, 245.

A city may, without the consent of the dedicators, permit a waterworks company furnishing the municipal water supply to place its pipes under land dedicated for public streets by a map and plat duly acknowledged, certified, filed, and recorded, in accordance with a statute providing for the dedication of land for public purposes, and declaring that the fee shall vest on compliance therewith, although by a note on the map and plat the dedicators attempted to limit the dedication to a simple easement or right to travel, and to reserve all other rights and privileges, as such reservation, being contrary to the terms of the statute, is inoperative and void as against public policy. *Wood v. National Waterworks Co.* 33 Kan. 590, 7 Pac. 233.

Water pipes laid in the streets of an unincorporated village for the purpose of supplying the inhabitants with water and affording fire protection do not impose an additional burden on the fee; nor is the owner entitled to maintain ejectment for their removal. *Witcher v. Holland Waterworks Co.* 66 Hun, 619, 20 N. Y. Supp. 560.

The laying of water pipes in the streets of an unincorporated village by a stock company organized for the purpose of supplying water is for a public use or purpose, although no contract has been made with the municipality to supply it with water. *Ibid.*

The owners of the soil of a turnpike, an easement for which for that purpose belongs to a turnpike company, can recover damages from a water company for digging up such turnpike for the purpose of laying its pipes therein, notwithstanding the work was done under an authority conferred upon it by such turnpike company, which authority is void because it was an attempt to confer on another a right not existing in itself; and such owners cannot be compelled to look to the turnpike company for the damages thus done. *Covington Reservoir v. Hopp*, 12 Ky. L. Rep. 140.

The court will not confine the owner of the soil of a highway to his action at law against a water company constructing pipes in the highway without his consent, on the ground that the pipes have already been laid, and that the injunction, if issued, must be mandatory in its effect. *Goodson v. Richardson*, L. R. 9 Ch. 221, 43 L. J. Ch. N. S. 790, 30 L. T. N. S. 142, 22 Week. Rep. 337.

Where water pipes are laid in a highway without the consent of the owner, the court will grant an injunction mandatory in effect which restrains the continuance of the pipes. *Ibid.*

While not distinctly a measure of damages, in a proceeding for damages from the construction of a water conduit in the highway, it is proper for the jury to consider the possible future leaking or breaking of the pipe as an element of depreciation, as it is such an element, and yet cannot be recovered in any other proceeding. *Darlington v. Allegheny City*, 28 Pittsb. L. J. N. S. 381.

The right of the owners of land abutting a highway to compensation for the laying of water pipes therein by a municipal corporation for its water supply, being one to be tried on appeal in the condemnation proceedings, cannot be determined in a suit for injunction. *Bass v. Ft. Wayne*, 121 Ind. 389, 23 N. E. 259.

Under a power to lay its pipes in any highway, a public water supply company may enter upon a turnpike road to lay its pipes upon filing a bond to secure damages, the turnpike franchise not being injured beyond a temporary inconvenience. 61 L. R. A.

Philadelphia, B. & B. M. Turnp. Co. v. Bryn Mawr Water Co. 16 Montg. Co. L. Rep. 115.

An injunction will not be granted at the suit of a turnpike company to restrain the laying of water pipes in the highway for the purpose of municipal water supply by consent of the abutting owners, where such company has merely an easement therein for highway purposes, and does not own the fee, the location thereof is such as not to interfere with travel on or the drainage of the improved part of the roadway, and the work will occasion only a temporary disturbance of the surface of such roadway. *Spring Grove Ave. Co. v. St. Bernard*, 1 Ohio N. P. 85.

A water company is not liable to the owner of abutting property when it has laid its pipes under the sidewalk under a license from the municipal corporation, and thereby prevents him from building steps, doors, etc., to the front of his basement, in exercise of his qualified or permissive interest in soil under the footwalk by virtue of the ordinances. *Provost v. New Chester Water Co.* 162 Pa. 275, 29 Atl. 914.

The erection by a municipal corporation of a water tank in the center of a street, and the erection and operation of a steam engine in connection therewith, for the purpose of supplying the city and the residents thereof with water, are not one of the uses of a street, as such, for which the ground may be appropriately used under a dedication thereof as a street; and the owner of an abutting lot may recover for the injury his property has sustained thereby. *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77.

A city has no right to erect a standpipe, used in connection with its waterworks system, in one of the public streets, although such street belongs to it in fee simple. *Barrows v. Sycamore*, 150 Ill. 588, 25 L. R. A. 535, 37 N. E. 1096, Reversing 49 Ill. App. 590.

The owner of land may recover from a city for injury to his property by an obstruction to the light thereof caused by the unlawful erection by it of a standpipe in a public street. *Ibid.*

But he cannot recover for injury thereto from the erection by a municipal corporation of a standpipe in the street near his premises, unless he shows special damages in excess of those sustained by the public generally, although the placing of such standpipe at that place was an unlawful use of the street. *Ibid.*

Mere apprehension that a standpipe erected by a city in connection with its waterworks will, by falling, or being blown down, or by bursting, destroy or damage an owner's property, is not such a showing of special damages as will entitle such owner to recover from the city for the unlawful placing of such standpipe in the public street. *Ibid.*

An abutting owner with the fee of a highway, subject to the public easement, cannot complain of an officially constructed cistern in the road to be used for street sprinkling, extinguishing fires, and other public purposes. *West v. Bancroft*, 32 Vt. 367.

b. Right of water company.

The rights of a water company in a street depend upon the terms of its grant. It has no right, without authority from the legislature, either directly or indirectly through the municipality, to enter upon and occupy the streets.

The right to dig up a street for the purpose of laying water pipes is a franchise that can only be granted by the legislature, or by a municipality under legislative authority. *Wheat v. Alexandria*, 88 Va. 742, 14 S. E. 672; *State ex rel. Atty. Gen. v. Portage City Water Co.* 107 Wis. 441, 83 N. W. 697.

A water company may be authorized by the legislature to lay its pipes in a municipal highway without the consent of the local authorities. *Forty Fort v. Forty Fort Water Co.* 9 Kulp, 241.

The legislature may grant a water company the right to lay pipes in the streets of one village which are necessary for its use in furnishing a water supply to an adjoining village, for which purpose it is organized. *Pelham Manor v. New Rochelle Water Co.* 143 N. Y. 532, 38 N. E. 711, *Affirming* 67 Hun, 98; 21 N. Y. Supp. 1110.

A municipal water corporation formed under the New Jersey act of 1876 does not derive its right to lay its pipes in public ways from the municipality where it is located, but from that statute; and the municipal corporation can only prevent an unnecessary obstruction of public travel in the use of the franchise. *Atlantic City Waterworks Co. v. Consumers Water Co.* 44 N. J. Eq. 427, 15 Atl. 581.

It is quite customary, however, for the legislature to require the consent of the municipality to the laying of pipes in its streets.

And where the consent of a municipal corporation to the use of its streets for the laying of pipes for a municipal water supply is required by statute, it may maintain a suit to enjoin the laying of pipes without its consent. *Franklin Twp. v. Nutley Water Co.* 53 N. J. Eq. 601, 32 Atl. 381.

A water company is not entitled to tear up the streets of a village and install its water system without any authority or grant from the village. *Bollivar v. Bollivar Water Co.* 62 App. Div. 484, 70 N. Y. Supp. 750.

But a city cannot require a water company first to obtain its consent before laying down pipes in the public streets, when, under its charter, such water company is authorized to lay its pipes under any highway, street, or wharf, provided the same is done in a proper manner so as not to obstruct travel unnecessarily, and such street or highway is restored to as good a condition as before,—especially where such company has exercised such right, and the same has been acquiesced in by such city for a period of thirty years. *Louisville v. Louisville Water Co.* 105 Ky. 754, 49 S. W. 766.

A statute providing that the board of public works shall have exclusive control over the construction, improvement, and use of all streets, etc., does not repeal by implication a charter granted a water company many years previous, allowing it to lay its mains in the public streets of the city, without expressly providing that the consent of the proper city authorities be first obtained. *Ibid.*

A constitutional provision that no water company shall be permitted to lay its pipes along the public streets of a municipality without first obtaining the consent of the proper city authorities; but that, when charters had been previously granted conferring such rights, and work in good faith had been begun thereunder, the section should not apply,—does not repeal a charter granted a water company many years before, allowing it to lay its mains in the streets of a city without expressly providing that it must first obtain the permission of the proper city authorities. *Ibid.*

When a municipal corporation has authority either to construct a waterworks system, or to contract with a private corporation for a water supply, and then lawfully joins a private corporation in the business by the purchase of stock and having a fixed representation in the directorate, the municipal corporation has "constructed" its waterworks within the meaning of a law requiring a subsequently chartered water company first to obtain municipal consent 61 L. R. A.

to lay its pipes in the streets of a municipality which had already constructed a waterworks system, the intent of the law being to protect municipal investments. *Carlisle Gas & Water Co. v. Carlisle Water Co.* 182 Pa. 17, 37 Atl. 821.

Under a statute enacting that a water company may open up streets within its district for the purpose of laying pipes, conduits, and other works necessary for supplying water to the inhabitants of the district, after which the pavement must be filled in and made good, the water company may place stop valves covered with guard boxes on the surface of the ground, as the existence of such appliance is not inconsistent with a substantial reinstatement of the street to its former condition. *East London Waterworks Co. v. St. Matthew*, 55 J. L. Q. B. N. S. 571, L. R. 17 Q. B. Div. 475, 54 L. T. N. S. 919, 35 Week. Rep. 37.

A mineral-spring company will be restrained by injunction from laying pipes through the streets of a village for the purpose of conducting spring waters to a city under an ordinance granting it the power to lay pipes therein for that purpose, where such ordinance was effectually reconsidered, either before it took effect or thereafter, in accordance with the by-laws, and before the company had accepted the ordinance and made expenditures on the faith of it. *Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 475, 53 N. W. 675.

The right of a water company to occupy the streets of a city, under Rev. Stat. 1895, art. 705, is derived from the consent of the city, and not from the state, so that the city can revoke it for sufficient cause. *Palestine Water & P. Co. v. Palestine*, 91 Tex. 540, 40 L. R. A. 204, 44 S. W. 814, *Affirming* (Tex. Civ. App.) 41 S. W. 659.

Imposition of conditions by municipality.

Municipal regulations on the laying of water mains in its streets do not apply to a water corporation so far as inconsistent with the essential rights conferred by the company's charter. *Wheat v. Alexandria*, 88 Va. 742, 14 S. E. 672.

A municipal corporation may require a water corporation to take out a permit, paying a reasonable fee therefor, which issues as a matter of course, to tear up a pavement for repairing its mains, although the water company was not required to obtain such consent under its charter, or had entered upon and was in the lawful use of the streets prior to the incorporation of the municipal corporation. *Landsdowne v. Springfield Water Co.* 16 Pa. Super. Ct. 490.

A water corporation must conform to a reasonable municipal regulation requiring payment of a fee of \$5 for a permit to make an excavation in a street, such permit only to issue on filing a surety bond that it will be refilled and left in as good condition as before, within ten days of opening, each permit to cover only 300 feet of excavation. *Springfield Water Co. v. Darby*, 199 Pa. 400, 49 Atl. 275.

Under an act authorizing a city to regulate or prohibit the excavating or opening of the city streets for public or private purposes, and to regulate the laying of gas pipes, water pipes, or drains, the control given the municipality over the laying of water pipes by a company holding an earlier charter which authorized it to open the ground in any street of the city for the purpose of laying and repairing its water pipes is one of regulation merely, and, while the city may require the payment of a reasonable license fee for permission to open a street, such fee must not be greater than the cost of issuing the license, and cannot be based upon the

length of pipe or the nature of the street as a paved or unpaved street. *New Haven v. New Haven Water Co.* 44 Conn. 105.

Where the statute under which a water company was incorporated required, first, consent to its incorporation from the town it purposed to supply, and, second, like consent to the laying of its pipes in the public streets, which it was with such consent entitled to do free from all charge,—a preliminary injunction against laying the pipes without such consent will be denied, when it is made to appear that consent was withheld until the company paid for the privilege. *Saddle River Twp. v. Garfield Water Co.* (N. J. Eq.) 32 Atl. 978.

A municipal corporation has no power, under its police powers over roads, to enact that an incorporated water company shall be annually licensed and registered and pay to the city for police purposes a specified amount without regard to the amount or character of its use of the streets, or its proportionate share of the burden which such use casts on the city. *Wilkes-Barre v. Crystal Spring Water Co.* 7 Kulp, 31.

A water company will not be restrained from laying its water mains on the east side of a street because of noncompliance with a municipal ordinance passed after the work was lawfully commenced, requiring it to be laid on the other side, when it appears that there is no urgent reason why the main should not be laid on the west side in preference to the other. *Forty Fort v. Forty Fort Water Co.* 9 Kulp, 241.

Continuing to lay water pipes in a street under legislative authority after the municipal corporation enacts reasonable police regulations relative thereto, without knowledge of the pendency of the ordinance, and neglect to apply a second time for a permit for which the council had exacted a clearly unwarranted concession, does not constitute an irreparable injury, or entitle the municipal corporation to specific relief, the ordinance itself providing for a penalty by fine. *Ibid.*

Where a municipality under legislative authority has designated the place and street where the water company may erect and maintain a hydrant, the burden is upon the company of showing that the hydrant is in the place designated, in case it is found to be a dangerous obstruction to lawful travel in the street. *Bean v. Maine Water Co.* 92 Me. 469, 43 Atl. 22.

Neither a grant by a municipal corporation to an individual of the right to construct waterworks and to lay down water pipes in the streets for the supply of water to it and its inhabitants for a term of years, nor an injunction restraining it from preventing such individual from laying the pipes in the street in the manner as granted, will interfere with the police power of such municipality over its streets, so as to prevent it from making reasonable regulations as to the manner of making use of the right of way. *Quincy v. Bull*, 106 Ill. 337.

Municipal interference with pipes.

A water company which has laid its pipes in the streets of a city, under its authority, in the place and manner directed by the city, does not acquire such a vested property right to an undisturbed possession of the location as will render the city liable for so constructing a sewer in the interest of public health as to interfere with and compel the relaying of the water pipes, where the conduct of the city is not unreasonable or malicious. *National Waterworks Co. v. Kansas*, 28 Fed. 921.

The municipal corporation may require a water company to lower its pipes when reasonably necessary to accommodate a proposed sewer, 61 L. R. A.

when the right of a water company to use the highways is subject to such regulations as the municipal corporation may adopt in regard to grades or for the protection and convenience of public travel over the same, the water company having laid its pipe at the existing depth with the knowledge and consent of the municipality. *Bryn Mawr Water Co. v. Lower Merion Twp.* 15 Pa. Co. Ct. 527.

A water company having a franchise to lay its pipes through the streets of a city "in such manner as not to obstruct or impede travel thereon" has no remedy for loss sustained by reason of proper and suitable repairs made to said road by the city, the effect of which is to expose the pipes to frost. *Rockland Water Co. v. Rockland*, 83 Me. 267, 22 Atl. 166.

A water company authorized by the legislature to use the soil under the public highways for the construction of their works, having laid their pipes across the streets of a city, will be compelled to lower them to conform to a new grade established by the municipal authorities. *Jersey City Water Comrs. v. Hudson*, 18 N. J. Eq. 420.

A water company which exercises the franchise of laying its pipes in a city street acts subject to the right of the municipality to change the grade of its streets when desirable, and must bear the cost of relaying the pipes, if necessary, because of such change, and is not relieved of such burden by a contract requiring it to lay a certain amount of pipe; and, in case additional pipe becomes necessary, the municipal corporation may order it to be laid at any time, provided that, if it shall be required to lay pipes in an ungraded street, whenever such street is graded the city shall pay the cost of relaying such pipes with proper reference to the established grade. *Stillwater Water Co. v. Stillwater*, 50 Minn. 498, 52 N. W. 893.

A city is not, after the location of the pipes of a waterworks company under a contract created by ordinance for the construction of waterworks, reserving to the city the right to determine such location, prevented from requiring a change of location in the exercise of its power over streets, where the pipes as laid interfere with sewers. *Montgomery v. Capital City Water Co.* 92 Ala. 361, 9 So. 339.

A water company lays its pipes in a street subject to the right of the municipality to change the established grade of such street, and cannot, on a subsequent change of the grade, complain that its property has been damaged or taken for a public use. *National Waterworks Co. v. Kansas*, 20 Mo. App. 237.

Where a municipality enters into a contract with a water company to establish, maintain, and operate a water system, wherein it reserves the right to designate on what streets the water pipes shall be laid, a further provision declaring that the company shall not be required to lay pipes on any street the grade of which has not been established does not impair the right of the municipality subsequently to change the grade of a street in which the pipes had been laid. *Ibid.*

But where the pipes of a water company, laid in a street of a municipality, were injured by a change in the grade of such street, the company was entitled, under a charter provision that any person damaged by the altering of a street may recover compensation therefor, to compensation for such damages as it may have suffered, together with the expense of lowering the mains. *Paris Mountain Water Co. v. Greenville*, 53 S. C. 82, 30 S. E. 699.

The state is not a necessary party to a suit by a city which has the exclusive control of streets, to revoke the right of a water company to use them. *Palestine Water & Power Co. v.*

Palestine, 91 Tex. 540, 40 L. R. A. 204, 44 S. W. 814, Affirming (Tex. Civ. App.) 41 S. W. 659.

Extent of company's rights.

A franchise to use a street for the laying of water pipes and mains, when granted, is one of the feeblest character, and, from its nature, subject at all times to control. *Brenham v. Brenham Water Co.* 67 Tex. 542, 4 S. W. 143.

A company incorporated to distribute water, and authorized to lay pipes, is entitled to use the streets therefor so as to obtain access to all private property, provided it exercises the right in harmony with the public convenience; and it is the duty of the city to adopt such regulations in that respect as will prevent injury to other interests without interfering with the reasonable exercise of the right. *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749.

A water company lawfully conducting business in one town, and which made a contract to supply other towns with water, may, for that purpose, lay its pipes through the streets of an intervening town under a statute authorizing such a corporation to lay its pipes in the streets of any adjoining village, and another one conferring such right upon companies which have contracted to supply other localities with water. *Tarrytown v. Poconitico Waterworks Co.* 15 N. Y. S. R. 316, 1 N. Y. Supp. 394.

An injunction restraining a water company from laying a water main in the streets of a village is properly dissolved where the resulting damage is not irreparable, and the company is not insolvent. *Ibid.*

Exclusiveness of right.

In *Brenham v. Brenham Water Co.* 67 Tex. 542, 4 S. W. 143, it was said that some cases have decided that there can be no monopoly in the use of a street to lay down water mains or pipes because it is not a matter of common right to use streets for such purposes; but, when such use is but a means to the exercise of an exclusive right to sell water and to compel a city or its inhabitants to buy it, it is difficult to separate the means from the end intended to be accomplished.

That was followed in *Edwards County v. Jennings*, 89 Tex. 620, 35 S. W. 1033, which held that a grant of the exclusive right to lay pipes in a highway is void as creating a monopoly.

Neither a town nor a town council has power to grant an exclusive right to lay and maintain water pipes in the public highways of the town, unless such power is conferred by the legislature in express terms or by necessary implication. *Smith v. Westerly*, 19 R. I. 437, 35 Atl. 526.

And where a city has no power by statute to grant to a water company the exclusive right to use the public highway for the purpose of laying water pipes, the city cannot validate the grant by an act of ratification. *Ibid.*

Under a statute authorizing the common council of a city to contract for a water supply for a period not exceeding ten years, the council is not authorized to grant the use of the streets for a period of thirty years to one who has contracted to furnish the water supply. *Sullivan v. Bailey*, 125 Mich. 104, 83 N. W. 996.

But the general rule is that a grant of the right to use the streets may be made exclusive. See also *supra*, III. g. 2; *infra*, VI. a.

The grant by a city to a waterworks company of the exclusive privilege of using its streets and alleys for a term of years for the purpose 61 L. R. A.

of supplying water to the city is an exercise of its legislative power, and an attempt to annul the water company's contract without a hearing is in contravention of the provisions of the Constitution of the United States, and within the jurisdiction of a Federal court. *American Waterworks & Guarantee Co. v. Home Water Co.* 115 Fed. 171.

The common council of a city having the power to contract for a supply of water to the city and its inhabitants may lawfully grant by ordinance such franchises in respect to the occupation and use of its streets and public grounds as are necessary or convenient for the construction, maintenance, and use of the waterworks, and such grant or franchise is a contract protected by the Constitution of the United States against impairment by state legislation, which includes legislation by municipal bodies. *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663.

An ordinance of a municipal corporation granting the right to a party to construct waterworks at his own expense to supply the municipality with water, with the right to lay water pipes in the streets and alleys thereof, which grant is accepted and the work partially performed, creates a grant under an express contract for an adequate consideration, and is binding as such, and is not a mere license revocable at the pleasure of the city council; and a court of equity will enjoin such municipality from denying such contractor the right to lay water pipes in the streets by virtue of an ordinance subsequently passed repealing the former ordinance. *Quincy v. Bull*, 106 Ill. 337.

A grant to a waterworks company of the right to lay and maintain pipes in the streets of a city, for the purpose of conveying water to another city, in consideration of a specified sum, made under the authority of an act of the legislature, is not limited as to time by a subsequent section in the act providing that pipes may be maintained for a local water system as well as for conveyance to other cities, followed by a section providing that no grant made thereunder shall continue more than twenty years, and may be revoked after ten years, and that the city may acquire title to the waterworks property; since the limitation relates only to the local water supply, and the grant as to the supply of other cities, having been accepted and acted upon, cannot be revoked. *National Waterworks v. Kansas City*, 65 Fed. 691.

Occupancy and use for over eighty years of a system of conducting water to a village under the surface of the streets ripens into a perfect and complete title as against the village, which is without right to destroy it while putting in a system of its own. *Boyer v. Little Falls*, 5 App. Div. 1, 38 N. Y. Supp. 1114.

No one who does not infringe, or threaten to infringe, the exclusiveness of a grant of the right to use the streets of a city for water pipes can be heard to allege its invalidity because of its exclusiveness after the works have been constructed and the contract has been substantially performed by the grantee. *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

VI. Rights and duties of water company.

a. Exclusiveness of franchises.

1. Right to confer.

The character of the business of supplying water to a municipality is such that, to induce individuals to engage in it, they must be assured of freedom from competition for such time

as will enable them to save the invested capital from destruction. The plant is utterly valueless unless it can be made to produce a revenue by supplying the water which it was designed to furnish so that unless that can be done the money invested in the plant is lost. Rivalry in the business, especially that coming from the municipality itself, is disastrous.

As said in *Tyrone Gas & Water Co. v. Tyrone*, 195 Pa. 566, 46 Atl. 134, the construction of a municipal water plant in competition to a private plant already occupying the same ground and supplying the same needs is a virtual confiscation, without compensation, of the private property.

In view of this situation, the only alternatives possessed by a municipal corporation desiring to secure a supply of water are to furnish the supply itself or assure private enterprise of an exclusive occupancy of the field for a reasonable time. If it is not in position to furnish the supply itself, and the law is construed to forbid exclusive privileges, it is in a serious situation. This is offset by the opportunities for extortion which exist when the grant is made exclusive, so that, in determining whether or not exclusive grants were permissible, courts have been swayed by the particular evil which was most prominent at the time, and decisions are to be found on both sides. The obstacles in the way of securing a supply through private enterprise, created by holding that exclusive privileges cannot be granted, are almost insurmountable, while provisions in the contract may readily prevent extortion and abuse on the part of the company. Consequently, unless positively forbidden by the Constitution, policy would seem to require the upholding of exclusive contracts. The constitutional provisions which have usually defeated such contracts are those against monopolies and the conferring of special privileges. Such provisions would doubtless nullify general statutory provisions for exclusive rights, but they do not seem applicable to ordinary contracts. Why should a contract for a water supply be void as a monopoly any more than a contract for any other commodity? While a contract for any supply exists it usually occupies the entire field. The only limitation is that the contract must not be an unreasonable one, and the reasonableness will be determined, not only by the convenience of the public, but by the term necessary to secure a reasonable return upon the investment in the enterprise.

There are cases which condemn exclusive contracts entirely.

A grant of an exclusive franchise to a municipal water company is within a constitutional inhibition of perpetuities and monopolies. *Thrifty v. Elizabeth City*, 122 N. C. 31, 44 L. R. A. 427, 30 S. E. 349.

A contract with a county to erect waterworks for supplying water for county purposes, in consideration of an agreement by the county to pay a sum of money and to grant an exclusive right of way to lay pipes for supplying a specified town with water, is void, as tending to create a monopoly, under a constitutional provision that "perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed;" and such a contract is not merely *ultra vires*. And it makes no difference in such a case that part of the consideration is valid, for a promise made upon several considerations, one of which is unlawful, no matter whether the illegality be at common law or by statute, is void. The contract being void, a bond executed to secure it is also void. *Edwards County v. Jennings*, 89 Tex. 618, 35 S. W. 1053.

In view of a constitutional prohibition of 61 L. R. A.

legislation granting any exclusive privilege or franchise, that part of a general law for the incorporation of waterworks companies is void which authorizes but a single corporation in any of the municipalities included in the act. *Atlantic City Waterworks Co. v. Consumers Water Co.* 44 N. J. Eq. 427, 15 Atl. 581.

In the great majority of the cases, however, the contracts have been assumed to be valid, if not directly held to be so.

The grant of exclusive powers to a private water company to erect and maintain waterworks, for a term of years, within a city, conferred by an act of legislature, is a valid and constitutional exercise of the power of the legislature to revoke the power its charter had previously given such city, to erect waterworks for the same purpose, and is within the proviso to the constitutional clause prohibiting the legislature from granting rights, etc., to one not by the same law available to others able to bring themselves within its provisions, allowing such legislature to grant such charters of incorporation as they may deem expedient for the public good, and is not the creation of a monopoly within the constitutional provision forbidding perpetuities and monopolies, and is effective to prevent such city from erecting waterworks during the term of such grant. *Memphis v. Memphis Water Co.* 5 Helsk. 495.

Most of the cases in which the question has directly arisen have turned upon the authority of the municipality; and those that have been condemned have been so because the municipality exceeded its authority.

A contract for the construction of waterworks, entered into by a village council in pursuance of charter authority, and accompanied by a grant to the company of the right to use the streets, is not void, although creating a monopoly to the extent of the power delegated to the council. *Lewick v. Glazier*, 116 Mich. 493, 74 N. W. 717.

That a city attempted, in excess of its powers in its contract with a water company, to confer upon the latter an exclusive right to furnish water to the city, does not nullify other portions of the contract not connected with the illegal provision. *Kimball v. Cedar Rapids*, 100 Fed. 502.

A grant by a municipal corporation of an exclusive waterworks franchise which is *ultra vires*, but neither *malum in se* nor *malum prohibitum* is not void *in toto* unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void. *Monroe Waterworks Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685.

The grant to a water company of the right to furnish the water supply of a city "for twenty-five years and an equal right thereafter with all others" does not operate to extend the grant of a franchise beyond the period of twenty-five years, but is simply an undertaking that the water company shall have an equal opportunity with others in competing for a new franchise when the original grant for twenty-five years has expired. *Cedar Rapids Water Co. v. Cedar Rapids* (Iowa) 91 N. W. 1081.

Express legislative authority is necessary to permit a municipal corporation to make an exclusive contract for a water supply, and grant exclusive privileges in its streets for mains, pipes, and hydrants for that purpose. *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 516, 22 N. E. 381.

Where the charter of a municipal corporation does not contain express authority to grant an exclusive privilege to furnish water to a water company, such authority will not be implied. *Kirkwood v. Meramec Highlands Co.* 94 Mo. App. 637, 68 S. W. 761.

The grant by a city council of the exclusive right of selling to the city all the water required by it for sewerage and fire purposes for a term of years at a minimum rate, although not preventing others from selling water to private citizens, is a monopoly, and therefore void as beyond the authority of the city council, in the absence of express legislative power. *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249.

A city with power to provide for itself a water supply cannot contract to give a water company the exclusive right to furnish such supply for a term of years. *Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75.

In the absence of express power conferred by its charter, a city is not authorized to enter into a contract by which a monopoly for a long series of years in supplying water is conferred upon a waterworks company. Such authority cannot be inferred from general powers over the subject-matter of the contract. *Greenville Waterworks Co. v. Greenville (Miss.)* 7 So. 409.

Statutory authority vested in towns to make "any contract" for a water supply, and to grant the right to lay pipes and erect reservoirs, does not empower the town to grant an exclusive privilege to construct and maintain waterworks. *Westerly Waterworks v. Westerly*, 75 Fed. 181, 80 Fed. 611.

Legislative authority to a municipal corporation to provide a system of waterworks, to grant the right to a private corporation to establish such a system and to supply the municipality with water, and to contract therefor, does not confer upon the municipality the power to grant an exclusive franchise so as to disable the municipal corporation from establishing its own waterworks for thirty years. *Long v. Duluth*, 49 Minn. 280, 51 N. W. 913.

The legislature repeals an unused power in a municipal corporation to provide a supply of water for the use of its inhabitants by subsequently granting to a private corporation exclusive authority to do so, as the municipal corporation is merely a governmental agency, and has no vested right in its powers. *Gas & Water Co. v. Downingtown*, 175 Pa. 341, 34 Atl. 799.

An injunction restraining a city council from extending an absolute franchise to a water company does not restrain it from making any authorized changes in the terms of the franchise not affecting its duration. *Poppleton v. Moores (Neb.)* 93 N. W. 747.

A provision that, upon failure of a municipal corporation to purchase waterworks at the expiration of twenty years, the franchise shall be renewed for a like period, is not a violation of a statute prohibiting a municipality from granting an exclusive privilege for a longer period than twenty years so as to be wholly void; but it may be upheld for the period allowed by law. *Neosho City Water Co. v. Neosho*, 138 Mo. 498, 38 S. W. 89; *Lamar Water & Electric Light Co. v. Lamar*, 140 Mo. 145, 30 S. W. 768.

A city which has granted in excess of its powers an exclusive franchise to a water company for a term of years is not bound to accept the services tendered by the water company for any definite period of time, but is liable for the stipulated price so long as it accepts the services offered in pursuance of the contract. *Illinois Trust & Sav. Bank v. Arkansas City Water Co.* 67 Fed. 196.

An ordinance being void on account of a grant of an exclusive privilege to a water company unauthorized by charter, the town cannot enforce that part of the ordinance providing for the giving of a bond by the water company, as, the contract between them being void, there is no consideration for the bond. *Kirkwood v.* 61 L. R. A.

Meramec Highlands Co. 94 Mo. App. 637, 68 S. W. 761.

2. When conferred.

The mere granting of a right to a water company for a certain time to lay pipes in a street and supply the inhabitants of the municipality with water does not create a monopoly, nor prevent the granting of like rights to another company. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

A contract by a municipal corporation with a water company for a water supply does not prevent the town from making a like contract with another corporation, unless the contract expressly forbids it. *Re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983, Affirming 73 Hun, 499, 26 N. Y. Supp. 198, and Affirmed in 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718.

A grant of a franchise to a water company, without any words of exclusion or of limitation upon the right of the city, does not preclude the city from subsequently establishing waterworks of its own, although the result may be to destroy the value of the franchise. *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 47 L. R. A. 214, 58 Pac. 773; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 516, 22 N. E. 381; *Re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983; *Mobile v. Bienville Water-Supply Co.* 130 Ala. 379, 30 So. 445.

The exclusive right to supply water to a town is not acquired by a water company organized under a statute which simply provides for the organization of such companies, when its contract with the town gives simply a privilege of laying mains in the street with a covenant for the payment of hydrant rentals, without any words of exclusion. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1163, 17 Sup. Ct. Rep. 718, Affirming 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983, 73 Hun, 499, 26 N. Y. Supp. 198, which Reversed 80 Abb. N. C. 36, 24 N. Y. Supp. 807, where Judge Pratt held that a contract made between a village and a water company organized in pursuance of a statute authorizing villages to establish a contract with such companies for a water supply implies an exclusive privilege for the term at least of the contract, if not of the charter of the company, for the furnishing of water to the inhabitants of the village through pipes laid in its streets.

A municipal corporation is not prevented from establishing a waterworks system by a previous grant to a waterworks corporation of the right to have and enjoy the franchises and privileges of such incorporation within the locality exclusively, when the act indicates that the first grant was exclusive only as to competition from private corporations, by providing that no other corporation shall be chartered to operate in the same locality until the first has paid certain dividends. *Lehigh Water Co.'s Appeal*, 102 Pa. 515, Affirmed in 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

An implied contract that a village will not construct its own waterworks, or provide itself therewith otherwise than by purchase or condemnation of the works of an incorporated water company, after the expiration of a contract for the supply of water by such company for a term of years, does not arise from the consent of the village to the incorporation of the company, and its construction of waterworks under a franchise that is not exclusive and which does not require the village to take water of that company, where the statutes give the village merely the right, without imposing

upon it any express liability, to condemn such waterworks, and also preclude it from making an express contract for a water supply for more than five years without a vote of the electors. *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400. Affirming 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562, where the court held that the power of the legislature to authorize a municipality to acquire and maintain an independent system of waterworks, as well as to grant a franchise for such business to another private company, is reserved on the granting of a franchise which is not made exclusive; Affirming 83 App. Div. 642, 54 N. Y. Supp. 1115.

The presumption that a franchise for the business of a municipal water supply is exclusive does not arise from the fact that one company is sufficient to supply the needs of the community, and that more than one cannot maintain an existence. *State, Atlantic City Waterworks Co., Prosecutor, v. Consumers Water Co.* 51 N. J. L. 420, 17 Atl. 824.

The right of a town to construct waterworks is not abridged by a grant by the town council to a waterworks company of the use of the highways for their pipes as long as the inhabitants shall be reasonably supplied with water, and conferring upon the company a right to exemption from taxation for twenty-five years, and exacting from it an obligation to supply water to the town and to sell its works to the town. *Westerly Waterworks Co. v. Westerly*, 80 Fed. 611.

An ordinance granting a franchise for the construction and maintenance in a city of a water plant for a term of years, and by which the city contracts to pay rental for a certain number of fire hydrants during the term, does not grant an exclusive privilege, and does not prevent the city from granting a similar franchise to others, or making a similar contract with them. *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 657.

A grant of a franchise to supply water to residents within a municipality, with the stipulation that no other company shall be organized for that purpose, will not prevent the municipal corporation or a private individual from supplying themselves and others, as the grant will be construed strictly. *Freeport Waterworks Co. v. Prager*, 129 Pa. 605, 18 Atl. 560, 561.

A city is not precluded from constructing waterworks of its own because it had previously granted a private party a franchise to construct works to supply the city with water, under a statute authorizing cities to purchase or erect waterworks, or to authorize the erection of the same by others, as that statute vests cities with entire discretion as to the use of any or all of the means specified therein to supply them with water; and, although it may impair the value of the other franchise by establishing competition, from which the city had not contracted to protect it, it would not destroy the franchise, as the owner can still continue to collect from the city all that the latter obligated itself to pay during the life of the contract. *Thomas v. Grand Junction*, 18 Colo. App. 80, 56 Pac. 665.

A statute authorizing a city to create a system of waterworks does not, by implication, annul or amend the charter of an existing company engaged in furnishing the city with a water supply. Where no exclusive privileges are given to either, there can be no repugnancy. *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749.

Under a statute which provides that "the town council of any town, or the city council of any city, may grant to any person or corporation the right to lay water pipes in any of the 61 L. R. A.

public highways of such town or city to supply the inhabitants of such town or city with water; and may consent to the erection, construction, and the right to maintain a reservoir or reservoirs within said town or city, for such time and upon such terms and conditions as they may deem proper, including therein the power and authority to exempt such pipes and reservoirs, and the land and works connected therewith, from taxation," where a town council, in a contract made with a water company for supplying the town with water, grants to the company "the exclusive right to use the public highways and public grounds" of the town for the purpose of laying and maintaining water pipes therein for the period of twenty-five years, it exceeds the authority conferred upon it by the statute, and the town is not bound by the contract. *Smith v. Westerly*, 19 R. I. 487, 35 Atl. 526.

A charter of a water company organized to furnish a municipal water supply is not exclusive if it does not declare that the contemplated powers and privileges to supply water to the city are exclusive, nor deny to the state the right to make other similar grants for that purpose. *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 516, 22 N. E. 381.

Where a city ordinance provides "that there is hereby given and granted to" a water company "the right and privilege, for the term of twenty-five years from the date of the adoption of this ordinance, of supplying the city . . . and the inhabitants thereof with water for domestic or other uses and for the extinguishment of fires," and by the same ordinance the city obligates itself to pay the company a yearly rental for the use of the company's hydrants for the term of twenty-five years; and the company contracts to extend its mains if requested to do so by the city, and to erect a specified number of hydrants to the mile,—such ordinance confers upon the water company the exclusive right to furnish the city and its inhabitants with water for the period specified. *Brenham v. Brenham Water Co.* 67 Tex. 542, 4 S. W. 143.

The above contract was, however, declared void for granting a monopoly.

The facts that a waterworks company to which the right to lay its pipes has been granted under certain conditions was permitted, without action on the part of the town, to construct its works, and that at town meetings, the notices for which contain no mention of a ratification of a contract, resolutions were passed looking to the purchase of the water plant under the agreement between the town and the company,—do not show an exclusive privilege on the part of the waterworks company, or amount to a ratification of the alleged contract for such a right, or prevent the town from thereafter constructing waterworks of its own. *Westerly Waterworks Co. v. Westerly*, 80 Fed. 611.

One granted the sole privilege of supplying a city with water from a specified source does not acquire a sole privilege in respect to all available sources of supply, although the grant confers, so far as consistent with its terms, the rights and powers theretofore enjoyed by companies not limited in regard to source of supply, where such powers are necessary to bestow the right to lay and repair pipes in the highways and streets. *Stein v. Blenville Water-Supply Co.* 34 Fed. 145.

Exclusive franchises to the first corporation formed are not conferred by a statute for the construction of waterworks for the purpose of supplying municipalities with water, which provides that a number of persons may form a corporation for that purpose, and that the municipal

pal authorities are required to give their assent to the occupation of the streets with mains. *State, Atlantic City Waterworks Co., Prosecutor, v. Consumers Water Co.* 51 N. J. L. 420, 17 Atl. 824.

The grant of an exclusive privilege to supply a city with water for a term of years is to be strictly construed against the grantee. *Stein v. Blenville Water-Supply Co.* 34 Fed. 145.

A grant of the exclusive right for a term of years of supplying a municipal corporation with water drawn by a system of pipes from a particular stream or river does not preclude the granting within a time limited of the right to another person to furnish an additional supply from another source. *Stein v. Blenville Water-Supply Co.* 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892, Affirming 34 Fed. 145.

Under a grant of the exclusive right of supplying water to a municipality and territory adjacent thereto, the exclusive right only exists within the municipality, and the balance of the description is too indefinite to create a monopoly. *Armstrong Water Co. v. Rayburn Water Co.* 24 Pa. Co. Ct. 13.

Where a charter to lay pipes in a city and supply it with water showed a legislative intention to confirm an *ultra vires* franchise granted by the municipality, and to grant one of the same exclusive nature, the charter will be so construed, although containing a clause subjecting it to modification or repeal, where such clause was followed by another providing for its forfeiture upon the failure to comply with the terms of the corporate grant, as such provision modified and controlled the one subjecting the charter to amendment or repeal. *Citizens' Water Co. v. Bridgeport Hydraulic Co.* 55 Conn. 1, 10 Atl. 170.

Conceding than an exclusive franchise to lay pipes in streets and supply a city with water, granted by the municipality, is *ultra vires*, yet, where it is followed by the incorporation of a company for the same purpose to which the franchise was assigned, a provision in the charter of the corporation providing for its forfeiture upon the failure to comply with the terms of the municipal franchise shows the intention of the legislature to confirm the municipal grant, and to give a charter of the same exclusive nature; and, although such provision is preceded by one subjecting the charter to amendment or repeal, as such clause is controlled and modified by the one fixing the grounds of forfeiture, therefore a second franchise granted to another corporation for the same purpose is void. *Ibid.*

An act passed by the legislature legalizing an invalid attempt by a city ordinance to extend the term of years in a franchise granting the right to furnish water to the city, when the term originally granted was for the full limit allowed by statute, is void, being an attempt to release the city in question from the operation of a general statute which remains in full force against all other municipalities of the state. *Cedar Rapids Water Co. v. Cedar Rapids (Iowa)* 91 N. W. 1081.

A grant by a town to a waterworks company of an exclusive privilege cannot be subsequently ratified where the grant is not conditioned upon the payment of a specified tax on the gross earnings as required by statute. *Westerly Waterworks v. Westerly*, 75 Fed. 181.

3. Protection of rights.

A contract for a water supply for a series of years is protected against violation by the Constitution of the United States.

A provision in the charter of a waterworks company conferring upon it the exclusive right 61 L. R. A.

to supply a city with water constitutes a contract with the city and state which is protected from impairment by the state legislature by the United States Constitution. *New Orleans Waterworks Co. v. St. Tammany Waterworks Co.* 4 Woods, 134, 14 Fed. 194.

The provision of La. Const. 1879, § 258, abolishing the monopoly features in the charter of any existing corporation save railroads, impairs a contract obligation, and is void as respects a water company vested by its charter with the exclusive right of supplying a city with water for a term of years. *Ibid.*, Affirmed in 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 374, 29 L. ed. 523, 6 Sup. Ct. Rep. 273.

A grant by the state of the exclusive privilege of laying water mains in a municipal street precludes the municipal corporation from thereafter granting any such privilege to any other person. *Freeport Waterworks Co. v. Prager*, 3 Pa. Co. Ct. 371.

A contract with a municipal corporation whereby a lessee of waterworks is given the exclusive privilege of supplying water to the inhabitants thereof for a certain period is a grant of the right to carry on the business of the waterworks within the municipality, which cannot, during the continuance of the contract, be interfered with by an ordinance requiring the payment of license taxes for the privilege of carrying on business therein. *Stein v. Mobile*, 49 Ala. 362, 20 Am. Rep. 283.

An exclusive right acquired by a water company under a statute to furnish water to the inhabitants of a village for the term of its contract or charter is not repealable, and the legislative recognition of such right in a subsequent statute, although repealable, will not affect such right. *Re Long Island Water Supply Co.* 30 Abb. N. C. 36, 24 N. Y. Supp. 807.

The absolute power of the Alabama legislature to revoke the exclusive feature of the franchise of a water company, under Ala. Const. art. 1, § 23, declaring that the legislature shall pass no act "making any irrevocable grants of special privileges or immunities," is not limited to cases where no injustice will thereby be done to the corporators, by art. 14, § 10, giving the general assembly power to alter, amend, or revoke a charter, "whenever in their opinion it may be injurious to the citizens of the state, in such manner, however, that no injustice shall be done to the corporators." *Blenville Water-Supply Co. v. Mobile*, 186 U. S. 212, 46 L. ed. 1132, 22 Sup. Ct. Rep. 820.

An exclusive grant of the right of maintaining waterworks in a municipal corporation is not impaired by a prior statute giving the municipality power to construct such works for its own use. *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

When the legislature has not expressly conferred upon a municipal water corporation an exclusive right to supply the inhabitants of a municipality with water (such a power not being presumed), the corporation cannot interfere with the sale of water from lawfully constructed private supplies. *Freeport Waterworks Co. v. Prager*, 3 Pa. Co. Ct. 371.

A municipal corporation which for nearly thirty years has allowed a water company to divert from a stream an amount of water greatly in excess of a contract between them, and to expend vast sums of money upon the faith of the continuance of the right to take such water, cannot, during the life of the contract, withdraw its consent to a continuance of the taking of the larger quantity. *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736, Affirming 88 Fed. 720.

But in England, where there is no constitutional protection, it has been held that where a water company constructed its works and used the water of a river pursuant to statutory authority, a subsequent statute providing that nothing contained in the original act should extend to authorize the company to take any water or any rights in respect thereof, belonging to the Duke of Cornwall, without his consent, is retrospective in its operation, and prevents the company from taking, as above, the water of a river located in the Duchy of Cornwall. *Atty. Gen. v. Bristol Waterworks Co.* 10 Exch. 884, 3 C. L. Rep. 726, 24 L. J. Exch. N. S. 205.

A water company's aqueduct has a right of support in the land; and, if the owner of the fee subsequently opens a quarry under it, and destroys that support, he is liable for damage incurred in erecting and maintaining a new support, or making a new location of the aqueduct, as may be reasonably necessary. *Rockland Water Co. v. Tillson*, 75 Me. 170.

When a water company's aqueduct has been deprived of its support in the ground, it is not for the company, but for the jury, to say what method of restoration is judicious and practicable, and what is the expense of it. *Ibid.*

Remedy.

A municipal corporation authorized by statute to provide a public water supply for its inhabitants cannot be restrained by equity from exercising that power at the suit of a private corporation then supplying that territory, but without entering into contractual relations with the municipality. *Hughes v. Parnassus*, 23 Pa. Co. Ct. 196.

A water company which has erected and maintained its works without a grant of exclusive privileges, in territory subsequently included in a municipal corporation with which it never contracted, either by being induced to expend money on its plant or otherwise, cannot restrain the municipal corporation from exercising an unused power of securing a supply of water by instituting a municipal waterworks system. *Centre Hall Water Co. v. Centre Hall*, 186 Pa. 74, 40 Atl. 153.

A person claiming the exclusive right to furnish a borough with water has an adequate remedy at law against a person infringing such right, either by an action of trespass or on the case. *Whitchurch v. Hilde*, 2 Atk. 391.

A person claiming to be in possession of the exclusive right to supply a borough with water will not be given an injunction restraining the defendant from encroaching upon his right by raising engines and laying pipes until the plaintiff shall have established his right at law. *Ibid.*

A mortgagee of the property of a waterworks company has such an interest therein, independent of the trustees named in the mortgage, as entitles him to bring suit to restrain threatened injury to the property. *Benson v. San Diego*, 100 Fed. 158.

Equity will not restrain the construction of a water-supply plant upon a petition which does not show the violation of an older exclusive franchise in the petitioner. Probable depreciation in the value of an existing plant from competition is not ground for injunction. *Chester v. New Chester Water Co. (Pa.)* 6 Cent. Rep. 706, 8 Atl. 400.

A water company whose franchises are not exclusive is not entitled to an injunction restraining a city from constructing and operating a water plant to supply itself over and above the water which it has contracted to receive from, and pay for to, the company, 61 L. R. A.

where the construction of the new plant would not infringe the rights of the water company. *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663.

A city will not be restrained, at the suit of a water company, from building, under statutory authority, a system of waterworks, on the ground that such action would violate an existing contract between the city and company, where the latter was granted no rights or privileges whatever, and did not agree to furnish water for domestic purposes, but undertook to provide a certain number of fire hydrants in consideration of a specified rental, and further agreed that the water rates should not exceed a designated maximum; and the city has not failed to make the stipulated payment for hydrant rentals. *Blenville Water-Supply Co. v. Mobile*, 95 Fed. 539, Affirmed in 186 U. S. 212, 46 L. ed. 1132, 22 Sup. Ct. Rep. 820.

In a suit by one claiming the exclusive right to supply a city with water, a competing company will not be restrained by injunction *pendente lite*, where it is doubtful whether the complainant can furnish the city such a supply as is demanded by the public health and public safety; but the defendant will be enjoined from interfering with, or injuring, any of the pipes, mains, or conduits constructed by the complainant. *Stein v. Blenville Water-Supply Co.* 32 Fed. 876.

Equity will not restrain the establishment of rival waterworks when the existing water company has lost its exclusive franchise, merely to protect its capital stock from depreciation because of competition. *Phillipsburg Water Co. v. Citizens' Water Co.* 189 Pa. 23, 41 Atl. 979.

When a municipality discriminates against the patrons of a private water company in the assessment of sewer charges, and in favor of the patrons of the municipal waterworks, the private water company can maintain a bill to restrain the municipal corporation from the unjust discriminations, for the due protection of its rights and privileges. *Mobile v. Blenville Water-Supply Co.* 130 Ala. 379, 30 So. 445.

Where an exclusive water franchise has not been expressly granted, one is not to be inferred from the fact that no other company has been chartered to operate in the same territory; and the chartered company has no standing to restrain another company from operating within its territory, even *ultra vires*, when its only loss will be through competition, from which equity will not protect it. *Rayburn Water Co. v. Armstrong Water Co.* 9 Pa. Dist. R. 24.

The exercise of the legislative discretion of a municipal corporation acting within the scope of its statutory authority, to enter into a contract with or authorize a water company to supply the city with water, will not be interfered with by a court of equity by way of injunction, although such contract may be in violation of a grant previously given another company of the exclusive privilege of furnishing the city and its inhabitants with water. *Lewis v. Denver City Waterworks Co.* 19 Colo. 236, 34 Pac. 993.

But the Federal court has held that a city will be enjoined from constructing waterworks or issuing bonds therefor on the ground that it will thereby impair the obligation of a contract, where, in pursuance of authority vested in it, it had granted to a corporation the right to erect waterworks, and stipulated that it would not erect competing waterworks for a term of twenty-five years; and it reserved the right to purchase or condemn the plant at any time. *Walla Walla Water Co. v. Walla Walla*, 60 Fed. 957, Affirmed in 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

After a town authorized by statute to con-

struct waterworks, or to contract with persons or corporations for a water supply, has pursued the latter course, and the water company has constructed a plant and is prepared to comply with its contract, a vote of the town to construct a plant for itself is under the authority of the statute, and, as such, an act of the state impairing the obligation of a contract, contrary to the United States Constitution, so as to authorize the issuance of an injunction against the town, restraining its officers and agents from constructing the proposed waterworks. *Westerly Waterworks v. Westerly*, 75 Fed. 181.

The measure of damages which a private water corporation may recover by reason of the wrongful establishment of a municipal waterworks is the proportion of the municipal receipts it would have received but for the wrong; and when the company is to receive a certain sum for all necessary fire hydrants, it may recover that amount for each hydrant placed by the municipality which is reasonably necessary. *Bennett Water Co. v. Millvale*, 200 Pa. 613, 50 Atl. 155.

A water company whose pipe line has been injured by excavations on land subject to its easement may recover in damages the cost of restoration and the increased cost of support, made necessary by the trespass. *Rockland Water Co. v. Tillson*, 69 Me. 255.

The damages which may be recovered by a water company when its aqueduct has been deprived of its support in the soil are such as to enable it to supply an equivalent support, or to pay for the entire injury. They must not be measured by what the company has done, or omitted to do, in the way of repairing the injury. *Rockland Water Co. v. Tillson*, 75 Me. 170.

In an action by a water company to recover damages for injuries sustained by the erection of a waterworks by a borough, evidence is not material, in mitigation of damages, which tends to show that the water company had neglected to extend its mains to all parts of the borough territory, and that, therefore, some of the consumers of the borough waterworks were reached by it on account of plaintiff's neglect, unless evidence was also offered to show that the borough, before it violated the contract, had requested plaintiff to extend its mains into new territory, and that it had neglected or refused so to do. *Bennett Water Co. v. Millvale*, 202 Pa. 616, 51 Atl. 1098.

The grantor of a quarry under a deed of warranty as free from encumbrances is not liable for damage caused by his grantee to the easement of a water company whose aqueduct is deprived of its support in the soil. *Rockland Water Co. v. Tillson*, 75 Me. 170.

4. What is infringement.

The charter rights of a water company supplying water to a city are not impaired by the subsequent adoption of a city charter providing that the city might extend mains into territory previously occupied by the water company after purchasing or condemning the rights of said company; nor are such rights impaired by a statute which makes a certain district in which said water company had rights under its charter a part of the city, and which provides that, before the city should lay any water pipes in streets previously included in said water company's system, it must, if the water company desires to surrender its pipes, pay the fair value thereof. *Baltimore v. Baltimore County Water & Electric Co.* 95 Md. 232, 52 Atl. 670.

A grant by a city to a waterworks company of the exclusive privilege of supplying the city and its inhabitants with water from a river does not deprive the city of the right to grant

to a consumer the privilege of laying water pipes from its factory to the river for his own use and purposes. *New Orleans Waterworks Co. v. Louisiana Sugar Refinery Co.* 35 La. Ann. 1111.

A consumer of water will not be enjoined from taking it from the river in pipes at the suit of a waterworks company, to whom an exclusive right has been granted, where such company either has no mains on the streets on which the consumers' property is situated, or, wherever there are mains, they are of a size inadequate to furnish the amount of water required. *New Orleans Waterworks Co. v. Ernst*, 32 Fed. 5.

A "contiguous person," within the meaning of a charter granting to a waterworks company the exclusive right of laying pipes to the river, but reserving such privilege to persons contiguous thereto, is one whose property actually fronts on the river, or is separated from it only by a public highway, or, possibly, on a block or square so situated. *Ibid.*

The common council of a city has no power, in the absence of an express statutory delegation thereof, to alter, repeal, or impair the franchise of a water company granted by a municipal ordinance under statutory authority which creates a contract for municipal water supply, by the company's acceptance of the conditions of the franchise by an ordinance reducing the water rates fixed by the prior ordinance. *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818.

The bringing in of salt water from a harbor by manufacturers for their works, and the laying down of pipes in the streets of a city for that purpose, will not be enjoined on the application of a water company as being in violation of their contract with the city providing for an exclusive privilege to supply "pure and wholesome" water to the town at a certain rate. *Shaw's Water Co. v. Greenock*, 2 Macq. H. L. Cas. 151.

A contract whereby one is granted the exclusive right, without let, molestation, or hindrance, to supply a city with water from a specified source, and given the use of the streets free of charge, for the purpose of laying pipes, is not impaired by the grant to another company of the right to lay its pipes in the streets for the purpose of furnishing water from other sources of supply. *Stein v. Blenville Water-Supply Co.* 34 Fed. 145.

A municipal corporation has a right to erect waterworks, no matter at what cost to private water companies whose franchises are held subject to such right. *Howard's Appeal*, 162 Pa. 374, 29 Atl. 641; *Fingal v. Millvale*, 162 Pa. 393, 29 Atl. 644, *Affirming* 14 Pa. Co. Ct. 82.

But a village which, in the construction of a system of waterworks in pursuance of statutory authority, injures and destroys the property of an existing system for supplying water which had lawfully carried on its business for over eighty years, is liable in trespass therefor. *Boyer v. Little Falls*, 5 App. Div. 1, 38 N. Y. Supp. 1114.

By constructing waterworks of its own, a municipal corporation will not destroy the franchise of an existing water corporation, which shows no contract with the state which is impaired. *Lehigh Water Co.'s Appeal*, 102 Pa. 515, *Affirmed* in 121 U. S. 358, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

A municipal corporation whose power of supplying its citizens with water has been exhausted by a contract with a private corporation for the performance of that service is liable for the loss to the private corporation consequent upon the erection of a municipal plant. *Bennett Water Co. v. Millvale*, 200 Pa. 613, 50 Atl. 155.

An unconstitutional impairment of the franchise of an existing water company, though it is not an exclusive one, is made by a statute which provides that a village establishing its own system of waterworks may impose rates for fire protection on all real property abutting on the mains or within 200 feet of the hydrants, or on such real property so abutting or within such distances as the boards may deem beneficial, upon which real property the water is not used by the owners or occupants for domestic or manufacturing purposes; since such statute would authorize the taxation of the company's property to pay for competing municipal waterworks, and authorize such a discrimination against the company's patrons as would absolutely destroy its business. *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562.

A statute permitting a city supplying its inhabitants with water to establish a scale of rates for the use of water, and also rates for fire protection, to be assessed on all real property abutting on the mains or within 200 feet of the hydrants, or on such real property so abutting or within such distance as such boards may deem beneficial, upon which real property the water is not used by the owner or occupant thereof for domestic or manufacturing purposes,—discloses an intent to assist water commissioners in securing customers from the patrons of adversaries by means of discriminating taxes, thus violating that article of the Federal Constitution forbidding the passage of a law impairing the obligation of a contract. *Warsaw Waterworks Co. v. Warsaw*, 161 N. Y. 176, 55 N. E. 486.

b. Duty as to furnishing water.

1. As to quantity and quality.

(a) In general.

A water-supply company is bound to comply with its contract in a reasonable manner. It must furnish water adequate to the needs of the municipality and its inhabitants, unless the terms of its contract do not require it to do so.

In some cases the source of supply has been specified in the contract, and then, unless that source is wholly inadequate, obtaining the supply therefrom is a compliance with the contract.

Therefore, equity will not relieve a municipal corporation from a contract with a water company for "an adequate supply of pure, wholesome water," to be taken from a specified source, because that source proves inadequate, when the stipulation resulted from mutual mistake, and the parties cannot be put *in statu quo*. *DuBols v. DuBols City Waterworks Co.* 176 Pa. 430, 34 L. R. A. 92, 35 Atl. 248; *United States Waterworks Co. v. DuBols*, 176 Pa. 439, 35 Atl. 251.

And a contract between a town and water company requiring the water to be taken from a certain river to be of good quality, filtered, or settled and fit for domestic use, is not violated by the fact that the water is at times discolored when the river is high, if the filtering is done by the method usually adopted for filtering water in large quantities. *Grand Junction Water Co. v. Grand Junction*, 14 Colo. App. 424, 60 Pac. 196.

So, the lessee of waterworks, who supplies unwholesome and poisonous waters under a contract with the municipality to supply water from a designated creek, but containing no stipulation as to the quality of the water, is not guilty of a breach of his duty to the public under the contract, for which he may be indicted, if the water in the creek is unwholesome and poisonous. *Stein v. State*, 37 Ala. 123. 61 L. R. A.

But inability of a water company, through fault of a municipality, to procure water from a source designated in its contract will not relieve the company from liability to consumers for injuries caused by its knowingly furnishing them with contaminated water, and deceiving them into the belief that it is wholesome. *Green v. Ashland Water Co.* 101 Wis. 258, 43 L. R. A. 117, 77 N. W. 722.

The company that undertakes to supply a municipality with water does not perform its duty to the public unless it provides, not only for ordinary seasons, but for long summer droughts. *State, Olmsted, Prosecutor, v. Morris Aqueduct*, 46 N. J. L. 495.

A waterworks company whose absolute charter duty is to supply pure, wholesome, deep-well water cannot justify its failure to supply water of that character on the ground that to do so would entail the expense of additional wells, for which the city would not have to pay if it purchased the works, as it has the right to do, and of its intention to do which it has notified the company. *Capital City Water Co. v. State*, 105 Ala. 408, 29 L. R. A. 743, 18 So. 62.

A drought is not an "accident," nor is a failure of a water company to bore wells, shown to be necessary to an adequate supply of pure, wholesome, deep-well water in seasons of drought, chargeable to an "unforeseen or inevitable accident," within the meaning of a contract providing that such an accident, and the time rendered necessary for repair, shall not be construed as a breach of the contract which can be asserted as a defense to a quo warranto proceeding to forfeit the company's charter for failure to perform its charter duty to constantly supply sufficient wholesome, deep-well water to a city and its inhabitants. *Ibid.*

A water company is bound in an emergency, such as the breaking of its pump and three days' delay in repairing it, to procure water from other sources for its customers, where it can be done without undue expense; as when it can obtain water from the municipal supply at the same rate that it receives from its customers. *Brace Bros. v. Pennsylvania Water Co.* 32 Pittsb. L. J. N. S. 169.

In an action by a water company in which no claim on *quantum meruit* is made, but only for the contract price of water furnished to a city at hydrants under an entire contract with it to supply well-settled and wholesome water both to the city itself for fire and other public purposes and to its inhabitants for domestic purposes, no recovery can be had without proof of substantial compliance with the contract, not only as to the quantity, but as to the quality, of the water furnished. *Winfield Water Co. v. Winfield*, 51 Kan. 104, 33 Pac. 714.

A guaranty of a specified amount of water to be furnished by waterworks to be constructed for a town is not modified by the fact that the town, for the information of bidders, in its specifications, stated the depth and thickness of the water-bearing strata, with the requirement that the wells should be sunk to a certain depth. *Eagle Iron Works v. Guthrie Center*, 37 Iowa, 128, 66 N. W. 81.

Where a city, by ordinance, granted a water company the privilege of maintaining a system of waterworks within its limits, reserving the right to buy the works at the end of a stated time, it cannot, after electing to purchase, complain of the bad condition of the water furnished before its option to buy was accepted, and when it has recognized the source of the water supply by ordinances. The election of the city to take advantage of its option to buy the waterworks is a contract to purchase capable of enforcement by specific performance, and such election cannot be rescinded on the ground

of temporary failure of the water supply subsequent to the election. *Cherryvale Water Co. v. Cherryvale* (Kan.) 69 Pac. 176.

A municipal corporation, which has received the benefit of a contract for water supply fairly and lawfully made, should not be permitted to shirk the burden by refusing technically to accept water it is perfectly willing actually to use. *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946.

A city, in an action by a water company for the rent of hydrants furnished under an agreement for the furnishing of water to it and its inhabitants and for the use of certain hydrants, cannot set up as a full, complete, and absolute defense to payment of anything therefor that the water furnished was not good, where it appeared to be good, was believed to be good, and was received by the city and its inhabitants without objection for about a year. *Burlington Waterworks Co. v. Burlington*, 43 Kan. 725, 23 Pac. 1068.

An issue as to the impurity of the water, which was complained of only since the breach of contract, cannot be raised by a borough in an action by a water company to recover damages for injuries sustained through the erection of a waterworks by the borough. *Bennett Water Co. v. Millvale*, 202 Pa. 616, 51 Atl. 1098.

Under an ordinance constituting a contract between a city and a water company, by which the water company agrees to furnish water, and the city agrees to pay for hydrants, the city council may, in good faith and for the best interest of the city, waive strict compliance as to the quality of the water furnished, so as to prevent inferior quality being a defense to an action for hydrant rents. *Creston Waterworks Co. v. Creston*, 101 Iowa, 687, 70 N. W. 739.

Where a water company agrees to furnish to a town a supply sufficient to fill a certain number of hydrants at the same time, and afterward the town accepts and uses the supply, paying the rental for several years, it cannot refuse thereafter to pay any rentals because the supply is not equal to the amount agreed; but the remedy is to recoup the difference in value between the amount furnished and that contracted for. *Wiley v. Athol*, 150 Mass. 426, 6 L. R. A. 342, 23 N. E. 311.

The lapse of thirty-two years since the expiration of the five years' limitation within which a water company was to be ready to supply consumers bars a prosecution for forfeiture, especially where it does not appear that anyone during that time made demand upon the company which was unreasonably refused. *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749.

A city which has granted the right to construct and maintain waterworks for a term of years may maintain an action to set aside such contract against a corporation to which it had been assigned, and which had failed to meet its requirements, although the common council, by ordinance, declared a test made upon completion of the works satisfactory; and the city may assume possession of its mains, which were to be paid for in water rents, but should make reasonable compensation for such water as was furnished it. *Galesburg v. Galesburg Water Co.* 34 Fed. 675.

The rule applicable to the law of sales, that, under a contract for an article to be furnished pursuant to contract requiring it to be of a certain quality, the buyer must object to its quality within a reasonable time after its receipt, or the law will treat the receipt as a final acceptance, is applicable to water furnished a municipality under a contract for a water supply. *Lamar Water & Electric Light Co. v. Lamar*, 140 Mo. 145, 39 S. W. 768.
61 L. R. A.

Eighteen months' trial of a waterworks system is reasonable for the municipal corporation to await the compliance by the owner with his contract to furnish a supply; and, in case he fails to do so within that time, the municipal corporation will be justified in rescinding its contract for the supply. *Farmers' Loan & T. Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573, 10 Sup. Ct. Rep. 316.

An action for breach by a municipality of a contract for water supply cannot be maintained against it where it does not appear that conditions therein as to the discovery and development of a sufficient supply of clean, sweet, and wholesome water suitable for drinking purposes, within a designated time, have been complied with. *Henry v. Sacramento*, 116 Cal. 628, 48 Pac. 728.

A provision in the charter of a water company that the grant shall become void unless the work is completed within a year does not apply to additions to the plant made necessary by the growing necessities of the town or its inhabitants. *West Springfield v. West Springfield Aqueduct Co.* 167 Mass. 128, 44 N. E. 1063.

(b) *Quality.*

A water corporation fulfils its charter duty to supply pure water when it furnishes what is commonly recognized as pure water, free from injurious substances, and reasonably clear. If by a reasonable expense it can filter the water when the river is high and muddy, it must do so. *Brace Bros. v. Pennsylvania Water Co.* 7 Pa. Dist. R. 71.

It is sufficient if a water company required to supply pure water supplies water that is ordinarily and reasonably pure and wholesome, although not chemically pure. *Wilkes Barre v. Spring Brook Water-Supply Co.* 4 Lack. Legal News, 367; *Brymer v. Butler Water Co.* 172 Pa. 489, 33 Atl. 707; *Com. v. Towanda Waterworks*, 1 Monaghan, 500, 15 Atl. 440.

Contaminated water.

A water company is not an insurer. As said in *Green v. Ashland Water Co.* 101 Wis. 258, 43 L. R. A. 117, 77 N. W. 722, a mere distributor of water for compensation is not liable as a guarantor of its quality.

So, a municipal water-supply corporation, required by statute to keep in the pipes laid down by it a supply of pure and wholesome water, is not thereby rendered liable for lead poisoning caused by the water being contaminated by the lead service pipes laid down by it, and connecting the water mains with the premises occupied by the person injured, where the corporation allowed the occupier of the house to specify the kind of service pipes to be used, and he selected the lead ones. *Milnes v. Huddersfield*, L. R. 12 Q. B. Div. 443, 53 L. J. Q. B. N. S. 12, 32 Week. Rep. 265, Affirming L. R. 10 Q. B. Div. 124, 52 L. J. Q. B. N. S. 64, 47 L. T. N. S. 697, 31 Week. Rep. 568, and Affirmed by L. R. 11 App. Cas. 511, 56 L. J. Q. B. N. S. 1, 55 L. T. N. S. 617, 34 Week. Rep. 761, 50 J. P. 676.

So, a city is not bound to make a chemical examination of the water of free public wells, maintained by it, for the purpose of ascertaining whether or not it is pure and wholesome, where it has no notice that it is unwholesome, and furnishes a supply of running water in addition to the wells. *Danaher v. Brooklyn*, 119 N. Y. 241, 7 L. R. A. 592, 23 N. E. 745.

And it is not liable for injuries caused by drinking unwholesome water from a well maintained by it, in the absence of wilful misconduct or culpable negligence on its part with reference to the water. *Ibid.*, Affirming 51 Hun. 563, 4 N. Y. Supp. 312.

Indictment does not lie against one for supplying and selling unwholesome and poisonous water, in the absence of any knowledge on his part of its unwholesome and poisonous quality. *Stein v. State*, 37 Ala. 123.

A water company is not liable for a failure to know that a case of typhoid fever existed on property over which it had no control, near a mountain stream which emptied into the same stream whence its supply was derived, a mile and a half below, and that the water supplied its patrons might be infected thereby. *Buckingham v. Plymouth Water Co.* 142 Pa. 221, 21 Atl. 824.

But the company is not wholly absolved from responsibility for the quality of water furnished by it. It cannot furnish water which it knows, or ought to know, will be dangerous to life or health.

Thus, a distributor of water under a public franchise will be liable for injury to consumers without fault on their part from using the water furnished, if it knows, or from the situation ought to know, that the water it is distributing is dangerous for domestic use for some cause not discoverable ordinarily by the use of reasonable care, and it fails to disclose such danger to them. *Green v. Ashland Water Co.* 101 Wis. 258, 43 L. R. A. 117, 77 N. W. 722.

But it cannot be held liable for injuries caused to consumers from failure to exercise ordinary care to procure a pure water supply from the source designated by its contract, if the evidence does not show that pure water could be procured there. *Ibid.*

And if the source of supply be contaminated with sewage for a long period of time, causing epidemics of typhoid fever annually in the community for several years, and the facts in that regard be there notorious and a matter of common knowledge, the presumption is that members of such community of ordinary intelligence have notice of that situation; and, in the absence of evidence to the contrary, that presumption will prevail and preclude a recovery by a person injured by the use of such water on the ground of his contributory fault. *Ibid.*

Therefore, if one drinks water furnished by a water company with knowledge, or reasonable means of knowledge, that it is dangerously polluted with sewage, he takes upon himself the risk, and if he die there may be no recovery on the ground of deceit or negligence. Notice may be implied from a general knowledge of the facts in the community. *Ibid.*

(c) Quantity.

A water company required by its franchise to furnish a municipal corporation a sufficient supply of water for the extinguishment of fires must furnish so much as may be necessary for such purpose. It does not meet the case to say that furnishing some water, i. e., 1 gallon, fulfils the requirement of the act. *Easton v. Lehigh Water Co.* 97 Pa. 554.

Where a person contracts with a city to construct waterworks but fails to construct works of the capacity contracted for, he cannot evade liability for the damages resulting from breach of the contract by requiring the city to prove that it could have used the amount of water the works would have furnished if constructed according to contract and run to their full capacity. *Sherman v. Connor*, 88 Tex. 35, 29 S. W. 1053.

One who has undertaken to furnish a water supply to a city, and demonstrate by practical means that the quantity of water complies with the requirement of the contract, cannot recover the contract price until he has made the demon-

stration. *Burns v. Fairmont*, 28 Neb. 886, 45 N. W. 175.

An ordinance by which a city grants a corporation the right to supply the city and its inhabitants with water is not to be construed in the same manner as a contract between individuals with respect to its provision that, if there be a suspension of supply of good and wholesome water for domestic and other purposes for a period exceeding sixty days, the company shall forfeit its exclusive franchise and a suspension of water rentals during the failure of supply, unless it be caused by act of God, unavoidable accident, or the public enemies. *State Trust Co. v. Duluth*, 70 Minn. 237, 73 N. W. 249.

An agreement to furnish a "supply" of water for fire hydrants implies that the water from those hydrants shall be of sufficient force and volume to be reasonably effective for the purpose for which the supply is to be made. *Waymart Water Co. v. Waymart*, 4 Pa. Super. Ct. 211.

A city council is justified in refusing to accept waterworks, where, upon the test, the company was unable to throw the water to the height agreed upon, and in making the test the water in the wells sunk by it was exhausted in twenty minutes, so that the company began to draw water from the river, which was unwholesome and not a proper source of supply. *Grand Haven v. Grand Haven Waterworks*, 99 Mich. 106, 57 N. W. 1075.

Under a contract for the construction of waterworks, and providing for the payment of a specified annual rental dependent upon the contractor furnishing water for thirty years unless the city sooner purchase the works, and stipulating that payment of the rental is not to begin until the completion and acceptance of the works, a further provision that the water be taken from wells and springs sufficient to supply all the inhabitants of the city with wholesome water does not require the contractor to have a supply of water sufficient to supply all the inhabitants the city may contain thirty years hence. Such provision is a condition subsequent to acceptance, and the covenant a continuing one, protecting the city from payment of rent in case the water is not supplied. *Adrian Waterworks v. Adrian*, 64 Mich. 584, 31 N. W. 529.

Under a contract to furnish a municipal corporation with an ample supply of water for the better protection of property therein against fire, the water company can only have a recovery of its compensation for such time as it furnishes water with proper pressure. *Hyndman Water Co. v. Hyndman*, 7 Pa. Super. Ct. 191.

If the assent of a municipal corporation to a contract with a water company for a supply for public purposes was given upon condition that it should not be compelled to pay the rent until after a test, satisfactory to them, should be made, and if it acted in good faith and without delay in expressing its dissatisfaction,—the decision of the municipal corporation cannot be questioned by court or jury. *Waymart Water Co. v. Waymart*, 4 Pa. Super. Ct. 211.

Where a person contracts with a city to construct a waterworks system of the capacity of 250,000 gallons of water per day, but the waterworks constructed are capable of furnishing only 50,000 gallons per day, and the city refuses to accept them, there is not a substantial compliance with the contract; and there is a breach of contract which prevents such person from recovering on the contract for the price stipulated. However, where the city takes possession of the works as constructed, he is entitled to recover the reasonable value thereof on the im-

piled contract of the city to pay therefor. *Sherman v. Connor*, 88 Tex. 35, 29 S. W. 1053.

Under a statute allowing the collection by a water company of water from a district, but binding it to supply not less than 25,000 gallons nor more than 75,000 gallons a day to a township at a certain rate, the township may, within the maximum amount, require the company to furnish a supply beyond its needs, and sell the excess at a profit to a neighboring township. *Halifax v. Soothill Upper Local Board*, 80 L. T. N. S. 513.

After the construction of a waterworks system by permission of a town council, conditioned to be completed within a certain time, which proves to be insufficient, and after the granting of permission to another company to construct an adequate system, further attempts by the first contractor to render his system adequate will not be considered in the nature of mere necessary repairs, but new works and part of the system conditioned to be completed within the specified time; and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town. *Chicoutimi v. Légaré*, 27 Can. S. C. 329.

2. As to consumer.

(a) General duty.

Although no express requirement is contained in a water company's charter that it shall supply all applicants, it is bound to do so on reasonable terms, where the terms of the incorporating act are such that it is plainly a grant for public purposes, carrying a right to condemn private property. *Olmsted v. Morris Aqueduct*, 47 N. J. L. 311, Affirming 48 N. J. L. 495; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244.

A water company engaged in supplying water to a municipal corporation is carrying on a business impressed with a public interest, and must serve all who apply on equal terms and at reasonable rates. *Carlyle v. Carlyle Water, Light, & P. Co.* 52 Ill. App. 577.

A water company operating under a charter investing it with the right to condemn private property for its needs, and requiring it to build works having sufficient capacity to furnish water to the city, and the inhabitants thereof, where it is located, is a public corporation, engaged in a public business under a public grant, and, as such, is charged with public duties, one of which is to furnish water to all the inhabitants of the city where it is located upon reasonable terms and without discrimination; and, upon a failure so to do, will be liable in damages to the inhabitants so refused for all injuries resulting as the approximate cause of the breach. *Crumley v. Watauga Water Co.* 99 Tenn. 420, 41 S. W. 1058.

When a water company has lawfully taken water from a stream for fire, domestic, and sanitary purposes, and for "other purposes," the renting or furnishing of water for polishing granite is not authorized by the charter, as it is not a like, public use. *Smith v. Barre Water Co.* 73 Vt. 310, 50 Atl. 1055.

One who has obtained permission to lay water pipes in the streets of a city, and has appropriated water for distribution and sale, and collected rates from the inhabitants for its use, may be compelled by mandamus to furnish water to any inhabitant paying the rate fixed therefor; as water appropriated for distribution and sale is a public use under the California Constitution, to which the public is entitled on payment of the rates fixed. *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264.

A water company required by its charter to 61 L. R. A.

furnish water to the public within certain boundaries is in duty bound to extend the service to all who may require it, having due regard for the needs of the customers, the rights of the inhabitants, and the sources of supply. *Hyndman Water Co. v. Hyndman*, 7 Pa. Super. Ct. 191.

A water company required by statute to furnish a water supply to individuals under a penalty for failure so to do will be excused from liability in case, without any fault on its part, it is unable to perform because of accidental causes. *Sheffield Waterworks Co. v. Carter*, L. R. 8 Q. B. Div. 645, 51 L. J. M. C. N. S. 97, 30 Week. Rep. 889, 46 J. P. 548.

A water company is relieved from liability for failure to supply an individual with water as required by statute, by the fact that the main in the street adjoining the complainant's premises had a fire plug attached to it as required by statute, and that at the time of the default such fire plug was open for the purpose of supplying water for extinguishing a fire. *Campbell v. East London Waterworks*, 26 L. T. N. S. 475.

The fact that a pipe laid by a water company along a street in the exercise of its franchise was laid under an agreement with certain persons, who paid the expense, that they should have the exclusive use of the water, and that the company should not tap the pipe without their consent, unless it first repaid them for the pipe, will not relieve the company from its obligation to supply water to all persons living on said street who may apply for it on reasonable terms. *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244.

(b) Free supply.

A statute requiring a water company receiving and accepting the privileges conveyed by the statute to furnish the city or town water for fire purposes and other great necessities free of charge is constitutional. *Bolsé City v. Artesian Hot & Cold Water Co.* (Idaho) 39 Pac. 562.

Where the school district of a city constitutes an independent corporation, its school buildings are not included in a contract by which a water company agrees with the city to supply water free of charge "for all public buildings and offices of said city." *National Waterworks Co. v. Kansas City School Dist.* 23 Mo. App. 227.

School buildings are public buildings of a city within an ordinance providing that a waterworks company shall supply water for use in all public buildings and offices of the city. This construction of the ordinance is not affected by a verbal agreement on the part of the school board to pay for water used in the schools. *National Waterworks Co. v. School Dist. No. 7*, 4 McCrary, 198, 48 Fed. 523.

An act authorizing district-school organizations in cities, which intends nothing more than the separation of the control of the public schools from general municipal affairs, and does not transfer the school property to such district, does not render the school board and the city such distinct corporations as to exclude school buildings from a water supply which by ordinance a waterworks company is to furnish to the "public buildings and offices of the city." *Ibid.*

But when a water company contracts to supply certain wards of a city, and maintain the same rates and assessments as does the municipal corporation in other wards, and the subject of exemptions was considered and provided for in the contract without an inclusion therein of schools and school districts in those wards, they will be liable for assessments equal to those charged by the municipal corporation before it

placed schools in the exempt class. *St. Clair School Dist. v. Monongahela Water Co.* 166 Pa. 81, 31 Atl. 71, Reversing School Boards v. Monongahela Water Co. 15 Pa. Co. Ct. 329.

A corporation which has contracted to supply a city free of charge with all water necessary for the extinguishment of fires and "other public purposes" is not required to furnish water without charge to the public schools, city offices, or municipal prisons and public institutions. *Commercial Bank v. New Orleans*, 17 La. Ann. 190.

Under an agreement whereby a water company is to erect twenty hydrants in the more thickly populated parts of a city, and supply water gratuitously thereto for fire and street-sprinkling purposes, it is not bound to supply water free to twenty other hydrants erected by the city, placed in other parts of the city for fire purposes; but it is entitled to be paid for such further supply of water. *Kingston v. Kingston Waterworks Co.* 19 U. C. Q. B. 490.

The court will not compel a water company to furnish water for fire purposes free to the city of its location, where the complaint does not allege that the company has been authorized by a city ordinance, or by a contract entered into between the city and the company, to furnish water to the city. *Boisé City v. Artesian Hot & Cold Water Co.* (Idaho) 30 Pac. 562.

The constitutional right given any individual or corporation to construct waterworks in any city where no public works are owned and controlled by the municipality, subject only to the condition that the municipal government shall have the right to regulate charges thereof, and making no provision for free water for municipal purposes, is a privilege and immunity within the meaning of a provision in the earlier acts for the incorporation of water companies, granting to all companies incorporated, or to be thereafter incorporated, under it all privileges and immunities thereafter granted to any individual or corporation, relating to the introduction of water into cities for use of the inhabitants; and *ipso facto* relieves a company organized under such act from the duty of supplying water free of charge for municipal purposes. *Spring Valley Waterworks v. San Francisco*, 61 Cal. 18.

A water company cannot refuse to supply a municipal corporation with a sufficient supply of water for the extinguishment of fires on the plea that it is an unjust burden, if imposed by its charter, which it accepted *cum onere*. *Easton v. Lehigh Water Co.* 97 Pa. 554.

A water company which has contracted to sluice the gutters of a city without charge, and which for several years has flushed sewers which performed the office of gutters without claim for compensation and until a change in the management of the company, is not entitled to recover therefor; since the conduct of the parties may be regarded as a construction of the contract by which such sewers were included within the contract designation of gutters. *State Trust Co. v. Duluth*, 104 Fed. 632.

A preamble, resolution, and order adopted by a board of supervisors, authorizing the making of connections by municipal authorities with the pipes and mains of water companies therein for the purpose of securing water supply, and providing a penalty for interference with the exercise of such authority, are attempts to make law, and not to render a judgment under existing law, and therefore not subject to review by certiorari, notwithstanding declarations therein of a right in the city to such water free of charge, without which such acts would have been equally effective. *Spring Valley Waterworks v. Bryant*, 52 Cal. 132; *San Francisco v. Spring Valley Waterworks*, 53 Cal. 608. 61 L. R. A.

A company organized to furnish water in a city under a general law which imposes on it only the obligation of furnishing water to the city free of charge in case of fire or other great necessity, cannot be restrained from preventing the city from taking water for all other municipal purposes, unless it pays therefor, by reason of the provisions of a special act conferring upon the corporation the right to introduce water therein on its organization under a general corporation law, and imposing upon it the duty of furnishing water free of charge for fire and all other municipal purposes, except street sprinkling; since such special act is invalid as in violation of the constitutional provision that corporations shall not be created by special act except for municipal purposes, such exception covering only governmental and police purposes. *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493.

Under a state statute requiring a waterworks company to furnish water to a city in case of fire or other great necessity free of charge, the company is required to furnish water free for irrigating the parks and squares and for municipal purposes, except when it is to be used by persons for domestic purposes. *Hawes v. Contra Costa Water Co.* 5 Sawy. 287, Fed. Cas. No. 6,235, Following *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493.

A corporation organized to introduce water into a city, which is the successor in interest of another similar corporation bound by its contract to furnish water to the city free of charge for fire and all other municipal purposes, except street sprinkling, is not thereby bound to furnish water for all municipal purposes free of charge in view of a further provision of such contract that no more favorable terms shall be granted to any other company receiving permission to introduce water into the city without extending the same terms to it, where such purchasing company was, by the law under which it was organized, required to furnish water only in case of fire or other great necessity; since, thereupon, the other company became entitled under its contract to the same terms, so that at the time of the purchase it was not under the original obligation imposed upon it of furnishing water free for all other municipal purposes. *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493.

A water company authorized by statute to charge for water supplied to inhabitants for family purposes at reasonable rates, and required to furnish water free to the city in case of fire "and other great necessity," is bound to furnish the city with water free, not only for fire purposes, but for all ordinary municipal purposes incident to the discharge by its officers of their direct duties as government agents, such as the irrigation of parks and squares, sprinkling streets, and flushing sewers; but not for drinking or other domestic purposes in public institutions, which are "family uses" for which it may charge. *Spring Valley Waterworks v. San Francisco*, 52 Cal. 111.

A church is entitled to water free of charge for the running of an organ motor, under a provision of the charter of a water company requiring it to furnish, free of charge, "all the water needed for use in the churches," where, at the time of the granting of the charter, such motors were in use in churches in other cities, although not in the place in question, and, subsequent to the putting in of the motor, both the water company and the church, for about seven years, treated such provision as giving the latter the right to the water without charge. *M. E. Church & Society v. Ashtabula Water Co.* 20 Ohio C. C. 578.

A water company is estopped to dispute the

right of a church to water, free of charge, for the running of an organ motor, under a charter provision requiring the furnishing, free of charge, of all water for use in the churches, where the church went to the expense of providing such water motor upon the strength of a statement by the superintendent of the company, who had full authority to act, that the charter provision covered such a use, and the water was thereafter furnished, free of charge, for about seven years, before any claim to the contrary was made by the company. *Ibid.*

A corporation organized under an act for the incorporation of water companies, requiring the furnishing of water free of charge for municipal purposes, the consideration for which was the privilege given the company of participating in the establishment of rates by the appointment of part of the commissioners to fix the same, is relieved from the duty of furnishing water for such purposes free of charge where such consideration is taken away by a subsequent constitutional provision changing the mode of fixing such rates so as to deprive the corporation of any participation therein. *Spring Valley Waterworks v. San Francisco*, 61 Cal. 18.

Where a water company is obliged to furnish a municipal corporation with water in consideration of its exemption from taxation, the withdrawal of the exemption will absolve it from its obligation, and it may thereafter charge for the water. *Louisville Water Co. v. Clark*, 143 U. S. 1, 35 L. ed. 55, 12 Sup. Ct. Rep. 346.

But a provision in the charter of a water-works company, that the latter shall furnish water free of charge for the use of all public buildings for the extinguishment of fires and other public purposes, in consideration whereof the company is to be exempt from taxation, does not make such exemption the sole consideration of the company's obligation to supply water, but the consideration embraces all the valuable privileges conferred by the charter; so that, if the city collects taxes from the company, there is but a partial failure of consideration, and only to the extent of the amount of the tax. The company, on payment of the taxes, can recover from the city an equal amount for water furnished. *New Orleans v. New Orleans Waterworks Co.* 36 La. Ann. 432.

A preliminary injunction should not be granted against the use by a municipal corporation of water for hydrants and watering places because it has failed to effect a continuation of a contract with the water company, where no irreparable injury will be inflicted upon the company, and the municipality is relying upon its former contract to guard against fire. *West Troy Waterworks Co. v. Green Island*, 32 Hun, 530.

A county is liable for water supplied to county buildings, where the provision of a town ordinance granting the franchises to furnish a village with water, that water should be supplied to such county buildings free of charge, was repealed by the omission thereof from subsequent town ordinances amending the former, as such provision was not revived by an ordinance adopted by such village after becoming a city, ratifying the previous town legislation in respect to the water supply. *Ashland Water Co. v. Ashland County*, 87 Wis. 209, 58 N. W. 235.

The fact that a water company gratuitously supplied a fountain erected by others in a highway with water, for the use of cattle driven to market and for horses on the road, does not amount to a general dedication to the public of such water. *Hildreth v. Adamson*, 8 Week. Rep. 470, 8 C. B. N. S. 587, 30 L. J. M. C. N. S. 204.

An obligation of a water company under a provision of its franchise to furnish water for a 61 L. R. A.

city electric-light plant at a stipulated rate extends to a lessee from the city of such plant. *Jenkins v. Columbia Land & Improv. Co.* 13 Wash. 502, 43 Pac. 328.

An injunction will not be granted a municipality to restrain a water company from shutting off a water supply for other than fire purposes claimed by the municipality without compensation, under a charter provision that it shall have the right to tap any pipes and connect hydrants for water for the extinguishment of fires, free of charge, until such time as water shall be introduced therein by some other person or persons, and thereafter shall furnish for "fire and other municipal uses" its quota or proportion of whatever water may be produced by it, or may be introduced by any other person or persons, where it is not alleged that water has been so introduced. *San Francisco v. Spring Valley Waterworks*, 39 Cal. 473.

A municipal corporation is liable for reasonable rents for water taken from the mains of a water corporation for extinguishment of fires, when a gratuitous supply was not secured by contract, although for many years it had been gratuitously supplied through fire plugs erected by the municipality, which have not been abandoned. *Carlisle v. Carlisle Gas & Water Co.* (Pa.) 3 Cent. Rep. 584, 4 Atl. 179.

c. *Kemedy for breach of duty.*

1. *Specific performance.*

A municipal corporation which has exhausted its power to secure a supply of water by contracting with a private corporation can secure redress for an inadequate supply only by a proper proceeding to require it to perform its contract, not by becoming judge of both law and fact and practically confiscating the plant by the establishment of a competing plant. *Troy Water Co. v. Troy*, 200 Pa. 453, 50 Atl. 259.

A city may have decree against a water company for the specific performance of the contract of the water company to filter the water to be supplied to the city. *Burlington v. Burlington Water Co.* 86 Iowa, 266, 53 N. W. 246.

Under the Pennsylvania act of 1874, the courts can require a water corporation so to alter its plant as to secure its patrons a sufficient supply of water, reasonably pure and wholesome. *Hinkson v. New Chester Water Co.* 8 Del. Co. Rep. 417.

A court authorized to investigate the efficiency of the system and the quantity and quality of the water furnished by a water company chartered to furnish "pure" water may make such order as may be necessary and just for the protection of the public; but, if found deficient in a pure supply, it cannot point out a possible supply at some other point, and require it to adopt it. *Brymer v. Butler Water Co.* 172 Pa. 489, 33 Atl. 707.

While the location of the plant and the selection of the water supply are for the water company to determine, the sufficiency and character of the supply may be investigated by the court, and the company may be required to meet fairly the public use it has undertaken to serve, or to cease to collect charges therefor. *Com. ex rel. McCormick v. Russell*, 172 Pa. 506, 33 Atl. 709.

That one who contracted to erect waterworks and supply wholesome water to a city, and failed to do so, subsequently sank sufficient wells for that purpose after the city had expended large sums in perfecting its own works, cannot avail him in a suit by the city to rescind the contract. *Grand Haven v. Grand Haven Waterworks*, 99 Mich. 106, 57 N. W. 1075.

The fact that, for a period of fifteen years, a city has been served unwholesome water does

not estop it from requiring that a water company shall comply with its contract to furnish pure water, in view of the fact that notices were served upon the company to comply with their duty in that respect. *St. Cloud v. Water, Light, & Power Co. (Minn.) 92 N. W. 1112.*

Peremptory mandamus will lie to require a water company to supply a municipal corporation sufficient water for the extinguishment of fires, when the legal obligation to do so is apparent. *Easton v. Lehigh Water Co. 97 Pa. 554.*

2. Forfeiture of franchise.

The most effective remedy for breach by a water company of its duty is a proceeding to forfeit its franchise.

The charter and franchise of a waterworks corporation will be forfeited when it appears that they were granted on the condition that such corporation would furnish pure and wholesome water to a city, at no higher rates than those charged the city for its water supply at the time the corporation was created, and that those conditions have been deliberately and persistently violated. *State v. New Orleans Waterworks Co. 107 La. 1, 31 So. 395.*

The right of the state by quo warranto to forfeit the charter of a water company for failure to perform its duty and furnish a sufficient supply of pure, wholesome water is not precluded by the right given the municipality to rescind its ordinance contract on notice for failure to furnish a water supply, as such right of rescission does not impart any power to vacate the company's charter, or disturb its corporate existence, but only to avoid the contract. *Capital City Water Co. v. State, 105 Ala. 406, 29 L. R. A. 743, 18 So. 62.*

A defense to a quo warranto proceeding to forfeit the charter of a water company for failure to perform its contract with the municipality must allege facts showing performance of its obligation; and it will not be sufficient simply to allege conclusions of law that it has been performed. *State ex rel. Macdonald v. Capital City Water Co. 102 Ala. 231, 14 So. 652.*

Flagrant disregard by a water company of its obligation to furnish clear and wholesome water, and the furnishing of water which endangers the health and lives of the people, ignoring remonstrances, are sufficient grounds for forfeiting its franchise. *Palestine Water & Power Co. v. Palestine, 91 Tex. 540, 40 L. R. A. 204, 44 S. W. 814, Affirming (Tex. Civ. App.) 41 S. W. 659.*

Where a franchise granted to a water company by a city provides that, upon the failure of the company for more than sixty days to furnish wholesome water, the franchise shall be forfeited; and a contract is entered into between the company and the city in which the ordinance granting the franchise is embodied,—the right of the city to forfeit the franchise is not waived by reason of a provision in the ordinance that, upon the failure of the company to furnish water as provided therein, "all water rentals shall be suspended." *Palestine Water & Power Co. v. Palestine (Tex. Civ. App.) 41 S. W. 659, Affirmed in 91 Tex. 540, 40 L. R. A. 203, 44 S. W. 814.*

The failure of a water company constantly to furnish sufficient pure, wholesome, deep-well water to a city and its inhabitants, as required by its charter and ordinance contract, is an offense against the act creating it, which is ground for the annulment of its charter, unless justification or excuse for such failure on the particular facts under which it occurred can be found in the charter. *Capital City Water Co. v. State, 105 Ala. 406, 29 L. R. A. 743, 18 So. 62. 61 L. R. A.*

The failure of a water company to furnish pure water in compliance with its duty under an ordinance may not be taken advantage of by the state as an abuse of corporate powers, but, the grant of the franchise being within the charter powers of the city, it has the right to annul the franchise thus granted. *St. Cloud v. Water, Light, & Power Co. (Minn.) 92 N. W. 1112.*

A city is not required to obtain specifications from the state board of health, and make demand for water of the standard adopted by it, before commencing an equitable action to cancel the contract and annul the franchise of a water company to furnish water, granted on the condition that the water be pure. *Ibid.*

Specifying as a ground for forfeiting the franchise of a water company its suspension of the supply for a certain period is not a waiver of the right, independently of the terms of the contract, to forfeit the franchise for gross misuse. *Palestine Water & Power Co. v. Palestine, 91 Tex. 540, 40 L. R. A. 204, 44 S. W. 814, Affirming (Tex. Civ. App.) 41 S. W. 659.*

An offer to perform its contract to furnish wholesome water, made by a water company after suit has been brought to forfeit its franchise, does not entitle it to relief from the forfeiture and an extension of time for the performance. *Ibid.*

The court will not, in the exercise of its discretion, refuse to annul the charter of a water company which at different times for two years during droughts has supplied river water instead of pure, wholesome, deep-well water as required by its charter and ordinance contract, and, for an insufficient reason, has refused to sink additional wells necessary to the performance of its duty thereunder; where the only reasons urged for not annulling it are that, if the charter is vacated, all water supply will at once cease and the city be exposed to devastation and ruin, and that it is now exerting itself to sink such additional wells, and promises to continue such efforts until the necessary work is completed. *Capital City Water Co. v. State, 105 Ala. 406, 29 L. R. A. 743, 18 So. 62.*

Where, at the expiration of the time for the completion of waterworks, agreed upon by a contract which also contained a clause allowing the contractors thirty days after notice to put the works in satisfactory working order, the corporation served a protest upon the contractors complaining in general terms of the insufficiency of the works, without specifying particular defects, but subsequently made use of the works complained of for about nine years without further notice,—action may not, at the expiration of that time, be brought for rescission of the contract without further notice, as, on account of the long delay, the contractors cannot be replaced in their original position, and, by the acceptance and use of the waterworks for such a period of time, the complaint must be deemed to have been waived. *Richmond v. Lafontaine, 30 Can. S. C. 155.*

A city may maintain a bill for the rescission of a contract for a water supply on the ground of defendant's failure to afford a constant supply for the protection of property against fire, although no damage from such cause has yet been sustained. *Light, Heat, & Water Co. v. Jackson, 73 Miss. 598, 19 So. 771.*

Under a contract to furnish water to a municipality, which requires the water company to furnish extra pressure from its pumps in case of fire, the company is bound to take notice of such fires as it will be negligence not to know of in view of its duty, its opportunities for information, and the nature of its business. *Ibid.*

A corporation cannot complain that its receiver, appointed in another court, is not made

a party to a suit to revoke its contract to supply water to a city and its right to occupy streets. *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540, 40 L. R. A. 204, 44 S. W. 814, *Affirming* (Tex. Civ. App.) 41 S. W. 659.

3. Other remedies of municipality.

The inadequacy of the supply furnished to a municipal corporation, which renders the contract with the municipality voidable, does not authorize the municipality to erect a plant of its own in violation of the contract, without first having the contract annulled. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

When a municipal water company has constructed its plant under and in accordance with a contract with a municipal corporation, the municipal corporation will be restrained by injunction from authorizing the construction of a second plant because the first proves insufficient, the owner thereof being ready to make sufficient alterations and additions, and the municipal corporation having the power to protect its interests when granting permission to tear up the streets. *Chicoutimi v. Légaré*, 27 Can. S. C. 329, *Reversing* Rap. Jud. Quebec, 5 B. R. 542.

A water company cannot recover the contract price for water furnished to a municipal corporation when it has not complied with the terms of its contract. *Blenville Water Supply Co. v. Mobile*, 125 Ala. 178, 27 So. 781.

A city is not bound to accept and pay for water furnished for public purposes under a contract with a water company to supply the city and its citizens with well-settled and wholesome water, unless the water is of the quality provided for by the contract. *Winfield Water Co. v. Winfield*, 51 Kan. 104, 33 Pac. 714.

It is inequitable that a corporation chartered to serve a "public use," and actually undertaking to serve the public with substantially "pure water," should be allowed to collect the price of a supply of good water from those to whom it delivers an article that cannot be used, or be made fit for use, by any process within its knowledge or reach; and it will be enjoined from collecting rents in such case, except for that used in flushing closets and sewers, and for fire purposes. *Brymer v. Butler Water Co.* 172 Pa. 489, 33 Atl. 707.

The failure of a water company to supply good and wholesome water for domestic use will not be a defense to its suit against a city to recover rents for water furnished fire hydrants exclusively under a clause of the ordinance contract providing that all water rentals shall be suspended during a failure to supply good and wholesome water. *State Trust Co. v. Duluth*, 70 Minn. 257, 73 N. W. 249.

It is no defense on the part of a municipal corporation to the payment of hydrant rental to a water company, that the latter had failed to comply with its contract to keep the water pure by a filtering process, in accordance with a clause in the contract providing therefor, and that, upon its failure so to do after reasonable notice, it shall forfeit the hydrant rental until such filtering process is provided; where the evidence fails to show that the city gave the required notice, and allowed thereafter reasonable time to perfect the filtering process. *Kankakee v. Kankakee Water Co.* 38 Ill. App. 620.

A city, in an action against it to recover the contract price for hydrant rentals, may not offset damages sustained by private consumers for the failure to furnish them with pure water. *Industrial Trust Co. v. St. Cloud* (Minn.) 93 N. W. 114.

The right of taxation vested in the authorities of a city by the legislature does not create

such an interest in the taxable property therein as to give the municipality or its assigns a right of action against a water company for damages from the diminution of taxable property by the destruction thereof by fire by reason of the insufficiency of the water supplied under a contract with the municipality. *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485.

In an action against a municipality for water supplied, damages sustained by citizens and property owners from the destruction of their property by fire because of the insufficiency of the water supply cannot be set off or recouped. *Montgomery v. Montgomery Waterworks*, 79 Ala. 233.

Nor damages for failure to furnish water for public use in schools, churches, fire departments, and city offices, as provided by ordinance upon the city's making connections for that purpose, when the answer does not allege that the city has at any time made the proper connections. *Industrial Trust Co. v. St. Cloud* (Minn.) 93 N. W. 114.

A provision in a contract to supply a city with water, that the water company, on failure to repair a defective hydrant within six days after notice to do so, shall forfeit \$10 per week thereafter for each week the hydrant remains out of repair, is not in the nature of liquidated damages for an entire breach of the contract, but a penalty for the occasional and temporary neglect on the part of the company to keep all or any of the hydrants in proper repair. *Light, Heat, & Water Co. v. Jackson*, 73 Miss. 598, 19 So. 771.

Where there is no evidence to show that a city has sustained a loss on account of the failure to furnish consumers with water, in an action against contractors for breach of contract to construct a water system, the city may not recover damages for the failure of the contractors to furnish the stated amount of water as agreed, if the amount of money paid the contractors by the city, added to the amount necessarily expended in order to complete the water system, did not exceed the contract price plus the value of extra material furnished by the defendant. *Sherman v. Connor* (Tex.) 72 S. W. 238.

One furnishing water to a city and its inhabitants under contract assumes a public duty, a wilful violation of which by charging rates in excess of those stipulated therein may be declared a misdemeanor by a subsequent ordinance, and punishable as such by fine and imprisonment, without impairing the obligation of a contract, taking away a vested contract right, or depriving one of his property without due process of law; but an ordinance imposing a fine or imprisonment for the commission of an act authorized by the contract would be invalid. *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723.

4. Suit by consumer.

The question of the right of a consumer to sue for a breach by the water company of its contract with the city has given the courts some trouble. On the one hand, the consumer is not a party to the contract, and, under the general rule governing the matter of parties, would not be entitled to sue. On the other hand, the consumer is so vitally interested in the contract, and its breach may bring so much disaster to him, that some courts have upheld an action in his favor. The discussion under this subdivision does not include cases involving express contract relations between company and consumer. Such cases are treated in subd. VII. Nor does it include cases in which the company was guilty of a direct wrong, like *Green*

v. Ashland Water Co. 101 Wis. 258, 43 L. R. A. 117, 77 N. W. 722, *supra*, VI. b. 1, (b).

In general, it may be stated that a public duty which will sustain a right of action in favor of individuals injured by its nonperformance is not created by a contract with a municipality to furnish a water supply. *Houss v. Houston Waterworks Co.* 88 Tex. 233, 28 L. R. A. 532, 31 S. W. 179.

So, where a city has contracted with a water company to furnish water to its citizens, an action against the company to restrain it from enforcing higher rates than those stipulated in the contract is properly brought by the city, instead of by the citizens. *Cleburne Water, Ice, & Lighting Co. v. Cleburne*, 13 Tex. Civ. App. 141, 35 S. W. 783.

But it has been held that mandamus will issue on the relation of a consumer of water to compel a water company to furnish pure water under its contract with the city, and to supply it at reasonable rates and on reasonable terms. The relator will not be required first to pay the exorbitant charges and then seek redress at law to recover excessive amounts exacted. *People ex rel. Brush v. New York Suburban Water Co.* 38 App. Div. 413, 56 N. Y. Supp. 364.

Action for loss by fire.

Actions by consumers have most frequently arisen in cases where their property has been destroyed by fire, and they have alleged that negligence of the water company contributed to the result. The earlier cases of this class are gathered in a note to *Howsmon v. Trenton Water Co. (Mo.)* 23 L. R. A. 146. Reference is made to that note for the cases covered by it. It may be stated, however, that the cases at that time established that the municipality was under no obligation to furnish water, a breach of which would render it liable to the consumer who was injured; and a majority of the cases held that the consumer had no right of action against a water company. The cases since that time show a similar result.

Liability of municipality.

A municipal corporation which has undertaken to provide a water supply is not liable to a citizen for failure to keep the supply adequate for fire purposes. *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 30 L. R. A. 660, 42 N. E. 405, *Reversing* 80 Hun, 162, 29 N. Y. Supp. 1130, which in turn *Reversed* 6 Misc. 233, 20 N. Y. Supp. 1094.

A municipal corporation authorized and empowered to erect and maintain a reservoir to supply water for the extinguishment of fires is not liable for loss resulting from the reservoir being out of repair, as its power is discretionary. *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272.

A municipal corporation is not liable for damages to a property owner from the destruction of his property by fire due to the negligence of its officers in failing to keep the fire plugs in good order and the water mains filled with water at the proper pressure, even though it levies and collects an annual water tax for the maintenance of the water system, as such acts are governmental rather than ministerial. *Wright v. Augusta*, 78 Ga. 241.

A city is not liable for loss by fire which results from the negligence of the city authorities in allowing water pipes to fill with earth so that they are rendered useless for the purpose of supplying water for the extinguishment of fires, although the city owns its own waterworks, and charges consumers of water an annual water rent, where it appears that the city is not compelled by law to maintain the water-

works, but it is discretionary with the city as to whether it will provide for a water supply; since it is against public policy to hold the city liable in such a case, as the hazard of pecuniary loss might prevent the corporation from assuming duties which, although not strictly corporate or essential to corporate existence, largely subserve the public interest. *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665.

The power residing in a municipality to provide for a supply of water is in its nature legislative and governmental; and, if not exercised, and in consequence loss results to property owners by fires occurring, the municipality is not liable in damages. *Planters' Oil Mill v. Monroe Waterworks & Light Co.* 52 La. Ann. 1243, 27 So. 684.

A municipal corporation exercising permissive authority to maintain a water plant, when it furnishes a supply for fire protection does not assume responsibility for fire loss from the negligence of its officers in permitting its plant to be out of repair, as its fire department performs a governmental function, and, for purposes of protection from fire, the water plant and service must be a part of the fire department. *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788.

A municipal corporation owning a waterworks system used for fire purposes is not liable for the burning of property of a taxpayer in consequence of its failure to furnish sufficient water for extinguishing a fire. *Butterworth v. Henretta* (Tex. Civ. App.) 61 S. W. 975.

Where a city undertakes to provide for a supply of water by contract with a private company, which falls adequately to meet its obligations, the municipality is not liable in damages. Nor is it liable for the misfeasance or nonfeasance of its officials in connection with such contract or its enforcement. *Planters' Oil Mill v. Monroe Waterworks & Light Co.* 52 La. Ann. 1243, 27 So. 684.

A city, having been authorized to make, and having made, a contract with a water company for the supply of water to the city for five years with the privilege of continuing the contract for fifteen years, and at the end of the five years having elected not to continue it, in consequence of which the water company shut off the water, is not liable for the burning of a building while the water was shut off. *Sandusky v. Central City*, 22 Ky. L. Rep. 669, 58 S. W. 516.

But the city may bind itself by contract under such circumstances as will render it liable for a loss resulting from its breach.

Thus, a town may legally contract to furnish a person with water for use in a boiler to make steam to heat his greenhouse. *Watson v. Needham*, 101 Mass. 404, 24 L. R. A. 287, 37 N. E. 204.

And, if it has contracted to do so, it is bound to use reasonable care and diligence to have ready for delivery a sufficient supply of water for use under the contract so long as it remains in force, and may be liable for failure of supply because of a leak, which remains undiscovered until the standpipe has been emptied and there is no longer any pressure in the surface pipes. *Ibid.*

And it will be liable in tort for the injury caused by negligently uncovering the supply pipes in the construction of a sewer so that it freezes and cuts off the water supply so that the plants are lost. *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871.

For tortious acts independent of the contract, an action of tort will lie, although one of the consequences is a breach of the contract. *Ibid.*

When a municipal corporation undertakes to supply water for use in a hydraulic elevator, it is liable for a breach of contract if it supplies

water impregnated with sand, whereby the elevator is injured. *Scottish, O. & M. Land Co. v. Toronto*, 24 Ont. App. Rep. 208.

And it has been held that a municipal corporation which voluntarily assumes its corporate character, and, for its own gain, voluntarily exercises charter authority to furnish its inhabitants with a supply of water, will be liable to a patron for hire for its negligence in failing to maintain a proper pressure in its reservoir for the extinguishment of fire, by reason of which his property is destroyed. *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341. The court says there is no substantial difference between the operation of a system of waterworks, and streets and sewers and other like works; and, if cities are liable for negligence in the operation of such works and the management of such property, the same rule of liability should exist for negligence in operating its waterworks.

Liability of water company.

Some cases have upheld an action by the consumer on the ground that the action was made for his benefit.

Thus, it has been held that a private citizen may maintain an action against a water company which has contracted with the city to furnish adequate fire protection, for the loss of property from a breach of said contract by the company. *Graves County Water & Light Co. v. Ligon*, 23 Ky. L. Rep. 2149, 66 S. W. 725.

If a water company is guilty of negligence in carrying out its contract to supply water to a municipality for fire purposes, but for which a loss to a resident of the municipality would not have occurred, it will be liable to make good the loss. *Duncan v. Owensboro Water Co.* 12 Ky. L. Rep. 824, 15 S. W. 523.

A petition alleging that the plaintiff's property was destroyed by fire because of an insufficient water supply, and that the defendant's waterworks company obligated itself by contract with the city to supply the water necessary to extinguish fires, which contract was not merely for the benefit of the municipality, but for its inhabitants as well, constitutes a sufficient legal cause of action to send the case to trial on its merits. *Planters' Oil Mill v. Monroe Waterworks & Light Co.* 52 La. Ann. 1243, 27 So. 684.

So far as the right to maintain the action is based upon the fact that the contract is made for the benefit of the consumer, the decisions are not sound.

As said by Brown, J., in *Wainwright v. Queens County Water Co.* 78 Hun, 146, 28 N. Y. Supp. 987, the fact that the performance of a contract by the water company would inure to the benefit of the consumer is not sufficient to bring the case within the rule that, when a promise is made by one person for the benefit of another, it may be enforced at the suit of the latter. The cases which have permitted one for whose benefit a contract was made to sue thereon have proceeded upon the ground that he was specifically named in the contract, or that the promisor received money or property which he agreed to pay over to the beneficiary or the promisee was under a legal obligation to the beneficiary which the promisor assumed as his own, and thus connected himself with the transaction.

To entitle a third person to maintain suit on a contract the performance of which is to inure to his benefit, the contract must be made for his benefit as its object, and he must be the party intended to be benefited. *House v. Houston Waterworks Co.* 88 Tex. 233, 28 L. R. A. 532, 31 S. W. 179.

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It is very evident that the consumer is not within either of the first two classes, and the cases conclusively show that the municipality is under no obligation to the consumer; so that the water company, of course, does not assume it. Two other cases have placed the right of action upon a ground that is not so easily disposed of.

In *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L. R. A. 513, 32 S. E. 720, Clark, J., says a citizen may sue on breach of contract between a water company and a municipal corporation for private loss from failure of the water company to supply an adequate supply of water for protection against fire, since he is a beneficiary, and furnishes consideration money.

And the same reason was given in another case holding that a contract between a municipal corporation and a water company by which the latter agreed to furnish a sufficient supply of water at all times (unavoidable accidents excepted) for public and private use, and to furnish water direct from the pumps for the use of the fire department whenever an alarm was given, is an agreement for the benefit of the property owners of the city as well as for the municipality; and, as the consideration for the contract was paid by the property owner in the way of taxes, he has a right of action against such water company for an injury sustained by him by reason of the neglect of the company to furnish a sufficient supply of water for the extinguishment of a fire, by which his property was destroyed. *Duncan v. Owensboro Water Co.* 12 Ky. L. Rep. 35, 12 S. W. 557.

If the consumer is regarded as the principal who furnished the consideration, and the municipality as his agent to execute the contract, it is very difficult to see why he should not be entitled to sue, as the undisclosed principal, the real party in interest. Some courts have attempted to answer this contention, but with indifferent success.

In *Howson v. Trenton Water Co.* 119 Mo. 304, 23 L. R. A. 146, 24 S. W. 784, the court said that the facts that a contract between a town and a water company for a water supply provides that part of the consideration shall be a special tax, to be raised from citizens, paid to the water company; and that the water company shall be liable for all damages caused by its neglect to furnish an adequate supply of water to extinguish fires,—do not bring the taxpayer into privity with the contract, so that he can sue thereon in case his property is destroyed through the negligence of the water company.

So, in *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 12, 15 L. R. A. 375, 28 Pac. 989, the court said that the mere fact that a city levies and collects a tax to be paid to a water company does not create any privity of interest between the water company and a citizen or resident of the city. In making such a contract, the city discharges one of its duties for which it was created, and, in raising the required money, it only provides the consideration due from it by virtue of the contract.

So, in *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, 51 N. W. 84, it is said that the acceptance by a water company of the provisions of an ordinance "to supply said city and the inhabitants thereof with water for public and private uses, for public and private consumption, and for putting out fires;" and providing for the charging of rates for the water furnished to inhabitants for private purposes,—creates no contractual relation between the company and the inhabitants as to the furnishing of water for putting out fires.

So, in *Akron Waterworks Co. v. Brownless*, 10 Ohio C. C. 620, it is said that no contractual relation exists between a property owner, who pays for the water furnished to his premises, and a water company, which will support an action by such owner against the water company for damages from the destruction of his property by fire by reason of failure to furnish sufficient water pressure under its contract with the city to furnish water for fire purposes.

So, in *Boston Safe Deposit & T. Co. v. Salem Water Co.* 94 Fed. 238, it is said that a contract between a water company and a city to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a tax levy, does not create such privity of contract between a citizen and the water company as will authorize him to maintain an action against the company for the destruction of his property by fire, caused by the failure of the water company to fulfill its contract.

None of those cases, however, reach the gist of the contention. The nonliability of the water company depends, not on the inability of the consumer to maintain the action, but upon the failure of the contract to cover such liability.

As said in *Wainwright v. Queens County Water Co.* 78 Hun, 146, 28 N. Y. Supp. 987, the company does not agree to extinguish fires. Its agreement is to furnish water. In most cases it would be impossible to say that failure to furnish water was the cause of the loss. Fires occur constantly in which not only buildings and their contents, but whole sections of cities, are consumed, although all the water that can be used is at hand and turned upon the flames. With all the uncertainty which exists as to what is the particular cause responsible for a fire loss, a water company cannot be held liable for the loss, unless it is held to assume the responsibility of an insurer. The rule with respect to damages precludes such a holding. Damages must be such as were within the contemplation of the parties; and it certainly cannot be claimed that for the meager remuneration received a water company undertakes to make good the loss which would result from the destruction of a modern city by fire. And the principle applies equally to the destruction of any part of it. For there is no place to draw a line short of absolute nonliability if liability for loss of the entire city is denied. The great weight of authority agrees with this conclusion, although the decisions are not placed on this ground.

A water company does not assume any official duty the breach of which will render it liable to an individual injured thereby. *Wainwright v. Queens County Water Co.* 78 Hun, 146, 28 N. Y. Supp. 987.

An ordinance requiring a water company to furnish a supply for the extinguishment of fires is not one which the municipality is obliged to enact or enforce, and no public duty is imposed by its enactment the violation of which will render the city, or those appointed to carry out its provisions, liable to anyone who may suffer. *Fitch v. Seymour Water Co.* 139 Ind. 214, 37 N. E. 982.

If a city is not liable to its citizens or residents, the water company is not liable to such citizens or residents upon a contract between itself and the city; the contract in such a case being between the city and the water company only. *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 12, 15 L. R. A. 375, 28 Pac. 989.

One who contracts with a corporation to supply hydrants at certain points, with water for public use in the event of fires, is not liable for damages occasioned to the property of an individual rate payer of the city by fire, owing to

there not having been a sufficient supply of water; there being no sufficient privity between the rate payer and the contractor. *Cunningham v. Furniss*, 4 U. C. C. P. 514.

A breach of a contract by a water company to furnish water to a municipal corporation for the extinguishment of fires gives a citizen whose property is destroyed by fire no right of action against the water company. *Fitch v. Seymour Water Co.* 139 Ind. 214, 37 N. E. 982.

A water company is not liable to a private party for failure to supply certain fire plugs with a certain amount of water as stipulated in its contract with the city. *Beck v. Kittanning Water Co.* (Pa.) 9 Cent. Rep. 536, 11 Atl. 300.

A water company is not liable to a citizen for damage resulting from its failure to provide fire pressure as agreed upon in its contract with the municipality, as there is no privity of contract between the citizens and the water company. *Stone v. Uniontown Water Co.* 16 Pa. Co. Ct. 328.

A water company is not liable to the inhabitants of a city for damages occasioned by the destruction of property by fire because of failure to supply sufficient water for putting out fires under a contract with the city therefor. *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, 51 N. W. 84.

An action *ex delicto* against a waterworks company cannot be maintained by a private person on account of the failure of the company to comply with its contract with the municipality to furnish water, although the plaintiff's property was burned on account of such failure. *House v. Houston Waterworks Co.* 88 Tex. 233, 28 L. R. A. 532, 31 S. W. 179.

A contract by a city with a waterworks company for a water supply will not sustain an action against the company for a breach thereof, by a citizen whose property was destroyed by fire in consequence of such breach. *Ibid*, Affirming (Tex. Civ. App.) 22 S. W. 277.

No additional duty is imposed upon a company which has contracted with a municipality to furnish water to its citizens against fire, by an ordinance of the city imposing the duty upon it to furnish water to citizens for fire purposes. *House v. Houston Waterworks Co.* (Tex. Civ. App.) 22 S. W. 277.

Under a contract between a city and a water company, by which the latter agrees to supply the city with water sufficient for fire purposes, an individual citizen, whose property has been destroyed by fire through the alleged neglect of the water company in complying with the terms of such contract, has no right of action against the company. *Bush v. Artesian Hot & Cold Water Co.* (Idaho) 43 Pac. 69.

A water company, in carrying out its contract with a municipality for supplying water for putting out fires, is not brought into such relations with the inhabitants as to create a duty toward them which will render it liable for injuries occasioned by the destruction of private property by fire by reason of the insufficiency of the water supply. *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, 51 N. W. 84.

An action will not lie against a water company for not keeping its pipes supplied with water at a statutory pressure, whereby the plaintiff's house was burned, under a statute requiring the company to keep its pipes charged at a specified pressure, and fixing a penalty for failure so to do, to be recovered by a common informer, as the remedy by way of penalty is exclusive. *Atkinson v. Newcastle & G. Waterworks Co.* 46 L. J. Q. B. N. S. 775, L. R. 2 Exch. Div. 441, 36 L. T. N. S. 761, 25 Week. Rep. 794.

A citizen whose property is destroyed by fire because the firemen are unable to extinguish the conflagration for want of a sufficient pres-

sure is not entitled to maintain an action against the water company upon its contract with the city to supply hydrants at a maximum pressure for the extinguishment of fires. *Wilkinson v. Light, Heat & Power Co.* 78 Miss. 389, 28 So. 877.

A water company contracting with a city for water supply for fire purposes acts merely as the agent of the municipality, and is not liable for damages caused by the destruction of private property by fire because of failure to furnish sufficient water pressure; since the municipality would not be liable therefor, as its power in respect thereto is legislative and governmental. *Akron Waterworks Co. v. Brownless*, 10 Ohio C. C. 620.

A water company will not be liable to a property owner for loss by fire caused by its failure to furnish the amount of water called for by its contract with the city, where such contract exempts it from liability for such failure on account of unavoidable accident, and there is undisputed evidence that the failure was so caused. *Owensboro Water Co. v. Duncan*, 17 Ky. L. Rep. 755, 32 S. W. 478.

A water company will not be liable to a private owner for loss of his property by fire by its failure to furnish the quantity and pressure of water agreed to be furnished by it to the fire department of a city for the extinguishment of fires, where the proof shows that such fire department was not sufficiently manned, and did not have adequate fire apparatus properly to control and use the quantity and pressure of water actually supplied. *Ibid.*

In an action for damages by the owner of property against a water company for the loss of his property by fire, alleged to be due to defective water supply, where it appears that automatic sprinklers established on the premises by the owner interfered with the water supply to the fire company, the owner cannot recover. *Planters' Oil Mill v. Monroe Waterworks & Light Co.* 108 La. 236, 32 So. 376.

Special contracts.

A corporation which undertakes to furnish the owner of a factory with water under pressure sufficient for fire purposes will be liable for injuries by a fire, due to its failure to perform the contract, although the lack of pressure was due to a break in its pipes without its fault. *Middlesex Water Co. v. Knappmann Whiting Co.* 64 N. J. L. 240, 49 L. R. A. 572, 45 Atl. 692.

A contract by a lumber company to pay to a water company extra compensation if it will extend its mains to the lumber yard and maintain four hydrants there for fire protection is not against public policy, although the water company also receives compensation from the city for such hydrants, if the contract with the city did not require extension of the mains to the lumber yard, and they would not have been extended in the absence of the additional compensation. *Muscatine Water Co. v. Muscatine Lumber Co.* 85 Iowa, 112, 52 N. W. 108.

A waterworks company which has contracted to furnish the shops and tanks of a railroad company with a sufficient supply of water, at not less than 60 pounds' pressure, for all purposes for which it might be needed, is liable for the loss of the railroad property by fire, which might have been extinguished had the pressure been at 60 pounds, where a pressure of but 25 pounds was furnished. *New Orleans & N. E. R. Co. v. Meridian Waterworks Co.* 18 C. C. A. 519, 30 U. S. App. 749, 72 Fed. 227.

It has been held that a contract entered into by a municipality is *ultra vires* where it attempts to insure to a property owner an adequate supply of water at all times for the ex-

tinguishment of fires. *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785.

The law which authorizes cities to contract with individuals and companies for the building and operating of waterworks confers no powers upon a city to make a contract of indemnity for the individual benefit of a citizen or resident of the city, for the breach of which he can maintain an action in his own name. *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 12, 15 L. R. A. 375, 28 Pac. 989.

The power of a town to contract for a supply of water to extinguish fires does not include the power to make a contract of indemnity for the individual benefit of a taxpayer whose property is burned by reason of insufficient water to extinguish the flames, enforceable in the name of the individual. *Howsmen v. Trenton Water Co.* 119 Mo. 304, 23 L. R. A. 146, 24 S. W. 784.

An ordinance by the acceptance of which by a water company a contract is created for the furnishing of water for putting out fires has not the force of law so as to create a duty to furnish a sufficient supply for that purpose, for a breach of which the company will be liable to inhabitants whose property is destroyed by fire by reason of the insufficiency of the water supply. *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, 51 N. W. 84.

Where, by the terms of a city ordinance, it was the duty of the water company to furnish water of a certain pressure after a fire alarm, and a certain pressure during the fire, sufficient for fire protection, the pressure to be determined by the register in the engine house; and such company undertook, by the terms of the ordinance, to pay all damages that might accrue to any citizen of the city by reason of a failure to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence on its part; and the action was brought for a failure to furnish the water of such pressure, whereby the plaintiffs sustained damage,—the court held, there being no allegation that the plaintiff was a taxpayer or ever paid taxes, that there was no privity of contract between the citizens, the plaintiff, and such company, as would enable him to maintain an action for the injury sustained through the fire, and caused by the failure of the water company to perform the contract. *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 15, 15 L. R. A. 375, 28 Pac. 989.

An insurance company paying the loss on a building destroyed by fire cannot maintain an action against a water company for failure to furnish sufficient water to extinguish the fire, under its franchise declaring that it shall be liable for damages occasioned by failure to furnish an adequate supply of water to extinguish fires, as neither it nor the property owner is privy to such contract. *Phoenix Ins. Co. v. Trenton Water Co.* 42 Mo. App. 118.

d. Assignability of franchise.

A contract to construct and operate waterworks for a municipality may be assigned where it does not appear that the persons making the contract had any peculiar personal fitness to perform the work. *Columbia Water Power Co. v. Columbia*, 5 S. C. N. S. 225.

An ordinance of a municipal corporation granting a water company, its successors and assigns, a franchise to construct waterworks, and covenanting to pay water rent, is an assignable contract; and the assignee may collect water rent by a suit in its own name. *Carlyle v. Carlyle Water, Light & P. Co.* 36 Ill. App. 28.

A city which for eight years has acquiesced in the assignment by a water company of its

rights and privileges under a contract with a city, and has accepted performance of the contract from the assignee, cannot question the legality of the assignment to escape performance of its part of the terms of the contract. *Austin v. Bartholomew*, 48 C. C. A. 327, 107 Fed. 349.

A city authorized by its charter to contract for the construction and maintenance of waterworks "on such terms and under such regulations as may be agreed upon" has power to allow persons erecting waterworks to assign the contract, or sell or mortgage the plant, so that the assignee or purchaser shall succeed to all the rights and privileges of the original contractor. *American Waterworks Co. v. Farmers' Loan & T. Co.* 20 C. C. A. 133, 38 U. S. App. 563, 73 Fed. 956.

The assignment to a corporation organized under a general law for the purpose of supplying water to a certain town, of a franchise for the supplying of water to that town, granted to individuals and their assigns by a special act, is not invalid as conferring such franchise upon the corporation by special act in violation of the constitutional provision against the creation of corporations by special act, in the absence of evidence to show that the act was obtained for the purpose of evading the constitutional inhibition, or connecting the corporation with the passage of the act; and the purchase thereof is within the corporate power, under statutory provisions giving corporations the power to purchase such real and personal estate as the corporate purposes require, and to enter into obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation. *San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075.

A water company which succeeds to the rights of individuals under a contract with a city may acquire from them a contractual right to collect water rates other than those fixed in the mode prescribed by its charter. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

When one water company purchases the works and pipes of another or a part thereof, it takes them subject to the conditions of the franchise under which they were established or laid. *Easton v. Lehigh Water Co.* 97 Pa. 554.

A contract between a water company and a city for water supply for the city electric-light plant at a stipulated rate is not rendered non-assignable by reason of the fact that the water rent was not to be paid until the end of each month, as such a provision does not establish any relation of trust and confidence sufficient to take away its assignable character. *Jenkins v. Columbia Land & Improv. Co.* 13 Wash. 502, 43 Pac. 328.

An allegation in a complaint in an action against a water company to restrain it from shutting off the water supply in violation of a contract made by its predecessor, that the company assumed said contract, substituted itself for the old company, and complied with the terms of the contract by permitting the taking and use of water and the collection of rents therefor as provided therein, is sufficient to show an assumption and acceptance of the contract, the consideration therefor being the rents collected. *Horsky v. Helena Consol. Water Co.* 13 Mont. 229, 33 Pac. 689.

But in England it is held that a waterworks company having power to furnish water to the inhabitants of a particular district cannot delegate or transfer such authority to another company. *Richmond Waterworks Co. v. Richmond*, L. R. 3 Ch. Div. 82, 45 L. J. Ch. N. S. 441, 34 L. T. N. S. 480.

The property of a waterworks company, which was bought in by a new corporation upon a foreclosure sale, under a second mortgage, the 61 L. R. A.

new corporation assuming a first mortgage and the rights and obligations of the previous company including a contract to furnish the city with water for a term of years, is subject to the liens of judgments recovered in tort for negligently failing to furnish sufficient water in cases of fire; and such liens are entitled to priority over the lien of the mortgage. *Guardian Trust & Deposit Co. v. Greensboro Water Supply Co.* 115 Fed. 184.

e. Control of rates.

1. Governmental power.

It is within the power of the government to regulate the prices at which water may be sold by one who enjoys a virtual monopoly of the sale. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

The business of furnishing water to a city and its inhabitants by means of waterworks is a public business impressed with a public interest, and is subject to legislative control to the extent that a company carrying on that business may be compelled to furnish the supply at reasonable rates. *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118, 186 Ill. 326, 57 N. E. 1129, Affirmed in 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505; *Freeport Water Co. v. Freeport*, 186 Ill. 179, 57 N. E. 862, Affirmed in 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493.

A corporation organized as a water company, and authorized by a municipal corporation to construct waterworks and supply its inhabitants with water, is a quasi-public corporation subject to be controlled by the public with relation to the rates to be exacted for the water it was created to supply to the public. *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 863, Affirmed in 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490.

A water company being a quasi-public corporation, the public acquires an interest in the use of its property to the extent that it must be served faithfully and impartially, and must be charged no more than reasonable rates for service. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6.

The legislature has power to regulate rates of charges for services of a public or quasi-public nature, including the supply of water, when such a regulation will not interfere with rights that have become fixed and vested by contract. *Agua Pura Co. v. Las Vegas* (N. M.) 50 L. R. A. 224, 60 Pac. 208.

A board of supervisors will not be enjoined from passing an ordinance fixing in pursuance of a subsequent constitutional provision, the price of water, which, under the charter of the waterworks company, had theretofore been determined by commissioners appointed by it and the city, where irreparable injury is not shown, and the remedy at law is adequate. *Spring Valley Waterworks v. Bartlett*, 8 Sawy. 555, 16 Fed. 615.

A private corporation, by the acceptance of a franchise from a municipality to supply it and its inhabitants with water, and permitting it to use the city's streets and alleys assumes the public duty to furnish water at reasonable rates to all the inhabitants of the city, and to charge each inhabitant of the city for water furnished the same price which it charges every other inhabitant for a like service under the same or similar conditions. *American Waterworks Co. v. State*, 46 Neb. 194, 30 L. R. A. 447, 64 N. W. 711.

An act of the legislature conferring upon municipal corporations the power to fix maximum rates at which water companies are authorized

to supply water is not invalid and unconstitutional. *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118.

It is not unreasonable to give a municipality whose inhabitants are to be supplied by a water company the right to regulate the rates, since the question of the reasonableness of the regulation is always open to judicial investigation. *Knoxville v. Knoxville Water Co.* 107 Tenn. 647, 64 S. W. 1075, Affirmed in 189 U. S. 434, 47 L. ed. —, 23 Sup. Ct. Rep. 531.

A municipal corporation has the power, delegated to it by the state, to regulate by ordinance the rates for water supplied by a water company, from time to time, when necessary to prevent extortion. *Danville v. Danville Water Co.* 180 Ill. 235, 54 N. E. 224.

An act of the legislature to enable cities, towns, and villages to fix the rates for the supply of water furnished by water companies is a delegation to such municipal corporations of the state power to compel such companies to furnish water at reasonable rates. *Ibid.*

A municipal corporation may, under a statute authorizing it to establish reasonable rates for its supply of water, pass an ordinance requiring a private water company to make a reasonable reduction in the rates for future supply, although by a previous ordinance such municipal corporation had contracted to pay a higher rate for a period of thirty years. *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118.

A municipal corporation may, by virtue of a statute authorizing it to establish reasonable maximum water rates to be charged by water companies, change such rates from time to time whenever necessary to prevent the charging by such water company of unreasonable or extortionate rates. *Rogers Park Water Co. v. Ferguson*, 178 Ill. 571, 53 N. E. 363.

The annexation of a village to a city operates to clothe the latter with authority to require a water company supplying water to the village under an ordinance fixing the rate for an unexpired term of years to reduce its rates so as to conform with those in other parts of the city, provided such rates are reasonable. *Ibid.*

That a municipal corporation has an option to purchase a plant for water supply at a certain date will not invalidate its regulation of rates to be charged by the owner on the theory that they may be fixed so low as to destroy the value of the plant, since the owner may resort to the courts for protection. *Knoxville v. Knoxville Water Co.* 107 Tenn. 647, 64 S. W. 1075, Affirmed in 189 U. S. 434, 47 L. ed. — 23 Sup. Ct. Rep. 531.

A provision in a charter of a water company that the municipality "shall have power by ordinance to regulate the price of water" gives the municipality the continuing right to regulate the charges, limited only by a condition that such rates shall not be unreasonable or oppressive. *Knoxville v. Knoxville Water Co.* 107 Tenn. 647, 64 S. W. 1075.

But a municipal corporation has no implied power to determine water rates to be charged by a waterworks corporation without its consent. It must be clearly given,—especially when the courts have been invested with power to restrain the collection of unreasonable rates. *Schroeder v. Scranton Gas & Water Co.* 7 Lack. Legal News, 277.

So, an ordinance passed by a city council attempting to regulate the charges of a water company is without authority of law, and not allowable under a general welfare clause, when such water company, although incorporated prior to the adoption of the Constitution of 1874, accepted its provisions, and is therefore entitled to all the privileges, immunities, franchises, and powers conferred by that act, in-61 L. R. A.

cluding clause 7 of § 34, which provides that the court of common pleas has jurisdiction over the petition of any citizen complaining of the charges for water furnished by a water company, and the right to decide whether such rate shall be decreased; and therefore an ordinance attempting to regulate water rates is virtually an assumption of the decision of this question by the city council, and therefore void. *Schroeder v. Scranton Gas & Water Co.* 20 Pa. Super. Ct. 255.

And the legislature of a state has no power to authorize a city to fix prices at which water shall be sold by the passage of an ordinance, where it appears that the city itself is a consumer of water, since the legislature has in such case no power to grant to one of the interested parties the right to fix the price of water without any provision for judicial review or determination as to the reasonableness of such action by the city. *Agua Pura Co. v. Las Vegas* (N. M.) 50 L. R. A. 224, 60 Pac. 208.

A water company is not estopped to contest the constitutionality of a city ordinance fixing its water rates at an amount in violation of a provision in a contract between the city and the grantors of the company, merely because for fifteen years it has collected the rates established by similarly objectionable ordinances, where it has annually protested against the city's conduct. *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 538, 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

A city, after the expiration of the term of years for which a franchise to furnish water was granted a water company, has the power to regulate or prescribe the rates, as expressly authorized by statute. *Cedar Rapids Water Co. v. Cedar Rapids* (Iowa) 91 N. W. 1081.

An ordinance fixing the rates to be charged by a waterworks company is *prima facie* a schedule of reasonable rates. *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 269.

2. Method of fixing.

A water company entering upon the business of furnishing a public water supply under a constitution giving a tribunal the right to fix water rates is bound to submit to the conditions thereby imposed. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

The sole power of fixing water rates is vested in the board of supervisors of the city and county of San Francisco by Cal. Const. art. 14, § 1, providing that water rates shall be fixed annually by the board of supervisors or other governing body of a city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, but without any reference to approval by the mayor; and is not affected by § 68 of the consolidation act, requiring the mayor's approval of certain specified ordinances, the enumeration of which does not include ordinances fixing water rates. *Jacobs v. San Francisco*, 100 Cal. 121, 34 Pac. 630.

The requirement of a constitutional provision that water rates be fixed by the board of supervisors instead of by commissioners, part of whom were appointed by the water company, as provided by the act incorporating it, does not impair the obligation of a contract in violation of the Constitution of the United States, where such act was passed subject to a constitutional provision that it might be altered from time to time, or repealed. *Spring Valley Waterworks v. Bartlett*, 8 Sawy. 555, 16 Fed. 615.

A constitutional provision, passed without the consent of a waterworks company, that wa-

ter rates be fixed by the board of supervisors, whereas under its act of incorporation they had been fixed by a board of commissioners, part of whom had been named by it, does not deprive the corporation of its property without compensation or due process of law, in contravention of the United States Constitution. *Ibid.*

Members of a board of supervisors authorized to fix water rates will not be enjoined, at the suit of the water company, from passing an ordinance prescribing such rates, although such members made ante-election pledges on the subject. *Ibid.*

An act to establish water rates in the city and county of San Francisco, and acts amendatory thereof, are held in *Spring Valley Waterworks Co. v. Bryant*, 52 Cal. 132, to be void so far as they attempt to provide a mode of fixing rates to be charged by companies furnishing water to the inhabitants of San Francisco differing from that provided for establishing the rates to be allowed other companies under the general laws, as a violation of the constitutional provision that corporations, except for municipal purposes, shall be created and regulated only by general laws. See also *San Francisco v. Spring Valley Waterworks*, 33 Cal. 608.

The prescribing by ordinance of rates to be paid for water furnished to a city and county for a specified municipal purpose does not "fix" such rates, as permitted by a constitutional provision prescribing that such rates shall be annually fixed by boards of supervisors, where it further provides that such rates, when paid, shall be credited to a certain per cent in reduction of the rates charged other customers; and such ordinance is therefore void. *San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166.

Notice to a water company of an intention to fix water rates by the board of supervisors is not necessary under the California Constitution. *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910, 1046.

Formal notice of the precise day on which water rates will be fixed by ordinance need not be given to a corporation whose rates are thus fixed, where the Constitution gives notice that ordinances will be passed annually in February, to take effect July 1. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

Acquiescence by a water company in a reduction of rates made by a municipal ordinance in one year is not an acquiescence in a greater reduction made by ordinance in a succeeding year. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

An unrestrained right to fix general water rates, conferred on individuals who undertook to supply a town with water, passes by assignment of the rights and privileges under the contract to a water company duly organized under the general law, which assignment was ratified by municipal ordinance; and such right is not affected by the power, reserved to the legislature, to alter or repeal any provisions of the company's charter, which also provided a method for fixing rates. *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339.

The power of a water company to increase its annual water rates in the absence of any attempt on the part of the supervisors to fix such rates is not precluded by a statute giving the supervisors power to fix such rates, and providing that, until so established, or after they shall have been abrogated by the board of supervisors, "the actual rates established and collected" by those who furnish water shall be made and accepted as the legal established rates therefor. *Osborne v. San Diego Land & Town*, 61 L. R. A.

Co. 178 U. S. 22, 44 L. ed. 961, 20 Sup. Ct. Rep. 860.

But where a city has contracted with a water company to furnish water to its citizens at certain stipulated prices, and the water company raises the prices and threatens to cut off the water supply if such higher prices are not paid, the city is entitled to an injunction as the appropriate remedy, because of the utter uncertainty in any calculation of damages for the breach of such contract. *Cleburne Water, Ice & Lighting Co. v. Cleburne*, 13 Tex. Civ. App. 141, 35 S. W. 733.

3. Amount.

An ordinance fixing water rates so palpably unreasonable and unjust as to amount to a taking of the property of a water company without just compensation is not justified by Cal. Const. art. 14, § 1, providing for the establishment of such rates. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

A city claiming the right to fix the rates to be charged by a water company may not fix unreasonable rates. *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 269.

Water rates which will produce some reward to the owner of the water plant may be, nevertheless, so grossly and palpably insufficient to afford just compensation to the owner as to give the court power to relieve against an ordinance establishing such rates. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

A water rent is not unreasonable which yields enough to maintain the plant in a reasonable manner, provide a sinking fund for the payment of debts, and pay the legal rate of interest on capital judiciously expended in the construction of the plant. *Wilkes-Barre v. Spring Brook Water Supply Co.* 4 Lack. Legal News, 367.

Water rates which will produce but little more than 3½ per cent upon the actual cost of the waterworks after deducting current expenses do not constitute just compensation to the water company, where it is compelled to pay a much higher rate upon money which it appears to have fairly borrowed, when the rate paid does not appear to be above the lowest market rate, and the prudence and economy of the management are not successfully impeached. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

Water rents are reasonable and just which provide for a fair return to the persons who furnished the capital for the construction of the plant, in addition to an allowance annually of a sum sufficient to keep the plant in good repair and to pay any fixed charges and operating expenses. *Brymer v. Butler Water Co.* 179 Pa. 231, 36 L. R. A. 260, 36 Atl. 249.

A scale of water rents is not too high when it provides for no profit from the service. *Goebel v. Grosse Pointe Waterworks*, 126 Mich. 307, 85 N. W. 744.

Expenses of litigation in contesting an ordinance fixing water rates cannot be considered as part of the expenses to be allowed, in determining the sufficiency of the income produced by the rates. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

Interest on the indebtedness of a water company, and annual depreciation of its plant, are not proper items of expenditure to be provided for by the trustees of a city in fixing the rates to be charged and collected for furnishing water to its inhabitants for domestic purposes. *Redlands, L. & C. Domestic Water Co. v. Redlands*, 121 Cal. 312, 53 Pac. 791.

The current expenses which may be allowed in determining the sufficiency of the income provided by water rates consist of the money which is reasonably and properly expended in each year in collecting and distributing the water. *Ibid.*

In determining whether water rates fixed by a city ordinance are so low as to be virtually a confiscation of a water company's property, and therefore a proper object for the court's interference, the "going value" of the waterworks company's business is not an element to be considered, neither should the apparent profits for a rebuilding fund. *Cedar Rapids Water Co. v. Cedar Rapids (Iowa)* 91 N. W. 1081.

The investment on which a water company is entitled to base its compensation in determining the sufficiency of rates cannot include property not at present actually employed in collecting or distributing the water, however useful it may have been in the past, or may yet be in the future. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

Water rates fixed by a city for water furnished it and its inhabitants need not be so adjusted as to compensate the water company for loss sustained by it in the distribution of water to consumers outside the city and under the same general system. Nor should the fact that a company, in the construction of its plant and the carrying on of its work, borrowed a large sum of money, on which it pays interest, be considered in fixing the rates. *San Diego Land & Town Co. v. National City*, 74 Fed. 79, Affirmed in 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

The fair value of the property of a water company furnishing water to the inhabitants of a city is the proper basis on which to calculate whether a reasonable compensation for its services is received from the rates fixed by the municipal trustees to be charged for such services; and the amount of the capital stock paid in by the stockholders, as well as the amount of bonded or floating indebtedness, and the interest payable thereon, are immaterial factors. *Redlands, L. & C. Domestic Water Co. v. Redlands*, 121 Cal. 365, 53 Pac. 843.

A provision in an ordinance fixing the rate to be charged by a water company at the average price paid therefor in other cities having efficient waterworks operated by private companies, and providing for arbitration of any dispute as to what such rates shall be, will be disregarded by the court in a suit by which the city seeks to enjoin the waterworks company from demanding or receiving from the city a greater sum for furnishing water to the city and its inhabitants than the rate established by an ordinance; and the rate will be fixed by judicial inquiry upon the basis of what will be a reasonable rate. *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 269.

The reasonable value of property, rather than its original cost, is to be taken as the basis of valuation in determining whether water rates fixed under legislative authority constituted a fair compensation for the use of the property, so that the owners are not deprived of their property without due process of law. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804, Affirmed 74 Fed. 79.

Where the court held that, in reducing the rates to be charged by a water company, a municipality should take the present value of the water plant as a basis, having due regard to the cost of its maintenance, to its depreciation by reason of wear and tear, and also to the rights of the public. If, upon such a basis, a fair interest is allowed, no just cause of complaint can exist.

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4. Effect of contract.

There may be contract rights which are protected by the Federal Constitution; but, where a state constitution makes the charter of every corporation subject to alteration, a water company acquires, by the grant of its charter, no vested right to the tolls granted thereby, nor to the mode of substituting new ones. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

If the power of a city to regulate water rates is legislative or governmental, the city may, by contract, abridge such power under an implied, as well as an express, legislative grant. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

To authorize an irrevocable contract by a municipality as to the rate to be charged consumers for water furnished by a water company, legislative power to make it must be unquestionable. *Knoxville v. Knoxville Water Co.* 107 Tenn. 647, 64 S. W. 1075.

A city authorized by statute to provide for a water supply has power to agree with a water company concerning water rates. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

After the expiration of a contract made between a city and a water company for the term of thirty years, which contract required the company to furnish water free for all municipal, fire, and school purposes, and to supply water for domestic use at specified rates, and make necessary extensions of its system; and further provided that the city, upon payment of the value of the improvement, should be entitled to the plant at the expiration of the term,—the city cannot reduce such rates without unconstitutionally impairing the obligation of the contract, where it still requires the company to furnish water and extend its system, and has failed to pay the company the value of its improvements. *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. 711.

Where, by a contract between county commissioners and a water company, the latter is given the right to construct appliances for the purpose of supplying, and of supplying, water to the inhabitants of the county, such right necessarily includes the right of the company to fix the price at which it will sell the water; and a subsequent act of the legislature which regulates the price to be charged for water impairs the contract. *Agua Pura Co. v. Las Vegas (N. M.)* 50 L. R. A. 224, 60 Pac. 208.

The effect of N. M. act February 23, 1893, which provides that no proceeding shall be instituted to call in question any franchise or privilege granted by a municipal corporation before the passage of the act, unless a suit should be instituted within six years after the granting of the franchise, provided that a suit to vacate or annul any such franchise should be brought within six months after the passage of the act, was to validate a contract between county commissioners and a water company for the supply of water to the inhabitants of a county where the contract had been in force for sixteen years, and no proceeding was instituted to annul it within six months after the passage of such act; and a city has no power to pass an ordinance regulating the price of water, where the effect of that ordinance is to impair the rights of the water company under the contract. *Ibid.*

The provision of Cal. Const. 1876, art. 14, § 1, for the fixing of water rates by the governing board of a city or town, is unconstitutional and void as impairing the obligation of a contract, when applied to a contract made before the adoption of the Constitution and granting to a company the unrestrained right to fix such rates.

Santa Ana Water Co. v. San Buenaventura, 56 Fed. 339.

A reduction of the income of a water company need not be shown in order to establish the fact that a reduction of its rates by ordinance impairs the obligation of a contract prohibiting such reduction. *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

Power given to a municipal corporation to contract for a water supply "at such rates as may be fixed by ordinance and for a period not exceeding thirty years" does not give power to bind itself by the rate fixed for the whole time; but the rate may be changed by ordinance from time to time. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505, Affirming 186 Ill. 326, 57 N. E. 1129; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490, Affirming *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118, and *Freeport Water Co. v. Freeport*, 186 Ill. 179, 57 N. E. 862.

An ordinance of a municipal corporation granting a water company the right to establish a waterworks system, and to supply it and its inhabitants with water for a term of thirty years at a fixed maximum rate, does not vest such water company as with a property right with the power to demand that the rates named in the ordinance should remain fixed and unchanged for the period of thirty years. *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 863.

A provision in a contract between a water company and a municipality, that the company shall supply water to private consumers at a specified rate, does not amount to an implied undertaking by the municipality not to disturb such rate, the obligation of which is impaired by an ordinance reducing it where the company was incorporated under an act which, while conferring upon it power to charge such rates as might be agreed upon with its consumers, expressly recognized the power of the municipality to regulate water rates. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. —, 23 Sup. Ct. Rep. 531, Affirming 107 Tenn. 647, 64 S. W. 1075, where the court held that a contract by a municipality as to the rates to be charged by a water company which is chartered for a term of years does not prevent its altering such rates from time to time, where the charter provides that it shall in no way interfere with the police or general powers of the municipality, which shall have power by ordinance to "regulate" the price of water.

Statutory authority to a municipal corporation "to contract for a supply of water for public use for a period not exceeding thirty years" does not necessarily imply that the price of the supply should be fixed for the entire period, but that the supply should be provided for the entire time, the price to be determined from time to time, or, on failure to agree, to be settled by the rules of the common law. *Carlyle v. Carlyle Water, Light & P. Co.* 52 Ill. App. 577.

A contract by a municipal corporation with a water company for the supply of water for a term of years under a statute authorizing such a contract for a period not exceeding thirty years, which fixes a maximum rate for supplying the inhabitants of the city with water, is not binding on the city for the period named so far as the rates are concerned, but is merely binding until changed by the act of the city, by virtue of another statute providing that municipal corporations may prescribe by ordinance maximum reasonable rates for its water supply. *Ibid.*

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The obligation of contracts between a water company and private consumers by which the latter were to pay for the water in accordance with the rates "now or hereafter in force" is not impaired by a municipal ordinance reducing such rates, enacted in the exercise of the power of the municipality to regulate water rates. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. —, 23 Sup. Ct. Rep. 531.

The provision of a statute providing for the incorporation of water companies, that no contract between the city and company shall take from the former the right to regulate water rates, does not prevent such an agreement between a city and private persons, although the latter intend to form a corporation to carry out their contract. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

A clause in a contract between a water company and a city, that the mayor and common council shall have, and do reserve, the right to regulate water rates, which shall not be reduced to a sum less than those then charged, does not refer to a right of regulation given the city by the contract itself, but to a power already possessed by, or which might thereafter be conferred by the legislature upon, the city; and, if the city was authorized to make such an agreement, neither it nor the legislature could thereafter lawfully reduce the rates below the minimum so agreed upon. *Ibid.*

Rates which have been fixed by a municipality as chargeable by a water works company will prevail in an incorporated town absorbed by the city which, before the absorption, had entered into arrangements with a waterworks company for furnishing water to its inhabitants, and which procured the waters furnished by connection with the mains of the city supply company; and the rates established by the towns will not prevail. *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 269.

In a suit by a water company to restrain the enforcement of an ordinance regulating the price of water on the ground that such enforcement will impair rights of the company, secured by contract, to supply water to the municipal corporation passing the ordinance, it is no defense that the contract has not been performed in all its particulars by the plaintiff, as the question as to the performance of the contract can only be determined in a suit instituted for the purpose of enforcing or forfeiting the contract. *Agua Pura Co. v. Las Vegas (N. M.)* 50 L. R. A. 224, 60 Pac. 208.

An ordinance granting a water company the right to collect, during the continuance of its privilege, the rates specified, "or other rates established" by it and approved by the municipal council, is not invalid under a statute conferring the power upon cities to regulate water rates, but forbidding the making of any contract whereby the power to regulate water rates are abridged when it is not shown that the rates are unreasonable. *Creston Waterworks Co. v. Creston*, 101 Iowa, 687, 70 N. W. 739.

The provision of Cal. act of May 3, 1852, that contracts made between a city and a water company shall not take from the former the right to regulate rates for water, is not applicable to a corporation not organized under the act. *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339.

Where a contract between a city and a water company stipulated that the water company "proposes to charge consumers of water the same rates as are now charged at 'a place named' by the Bell system of waterworks, or such other reasonable rates as from time to time shall be fixed by the city council," "it being expressly understood that the limits of said rates shall not be less than is allowed by cities of

like size and population in this state,"—the contract fixes the Bell rates as a basis, and the company must furnish water at that rate until the city council shall fix other reasonable rates, not to be less than those allowed by cities of like size and population; and in no event is the company authorized to charge a higher rate than the Bell rates, where it appears from the facts and the circumstances attending the execution of the contract that this is the intention of the parties, and also that the company has for four years furnished water at the Bell rates. *Cleburne Water, Ice & Lighting Co. v. Cleburne*, 13 Tex. Civ. App. 141, 35 S. W. 733.

The reasonableness of rates prescribed by an ordinance of a municipal corporation to be charged by a water company for furnishing the city and its inhabitants with water cannot be questioned by the water company where such regulation is in compliance with the contract between the parties prescribing the mode by which such rates are to be determined, in the absence of a showing that the method selected is unreasonable and indefinite or unconscionable, rendering the contract unenforceable. *Leadville Water Co. v. Leadville*, 22 Colo. 297, 45 Pac. 362.

5. Judicial supervision.

The legislature may delegate to the court the power to determine whether rates fixed by a water-supply company for the use of water are reasonable, and to enjoin the water company from exacting an unreasonable rate in the future from persons in the relation to the company of consumers. *Janvrin, Petitioner*, 174 Mass. 514, 47 L. R. A. 319, 55 N. E. 381.

A court invested with the visitatorial powers of the commonwealth to determine, on complaint, as to quantity and quality of water supplied by a waterworks company and the reasonableness of charges therefor, when it has found on complaint that an ample supply of reasonably pure water is furnished, cannot proceed to determine the schedule of charges therefor. *Brymer v. Butler Water Co.* 179 Pa. 231, 36 L. R. A. 260, 36 Atl. 249.

Nor can it formulate an entirely new schedule of charges upon a general complaint that rates are too high, without specifying the particular rates alleged to be excessive. The framing of a general schedule is ordinarily the right of the company. The correction of this schedule, when framed, whenever it may work injustice and hardship, is the prerogative of the court. *Ibid.*

Where the power to supervise the rates established by water companies is conferred upon the courts, municipalities, as well as private citizens, must there seek redress. *Tyrone Gas & Water Co. v. Burley*, 19 Pa. Super. Ct. 348.

In a suit by stockholders in a water company, based upon a contract with the city to restrain it from fixing water rates so low that no dividend would accrue to the stockholders after payment of necessary expenses, the fact that the contract has expired since the issuance of a temporary injunction in the suit does not deprive complainants of the right to invoke the judgment of the court for the protection of their rights during the period the ordinance was in force; and the court is not required to dissolve the injunction or dismiss the suit simply because the limit of the express contract evidenced by the ordinance has been reached. *Kimball v. Cedar Rapids*, 100 Fed. 802.

The fixing of rates by legislative power, or otherwise than by appropriate judicial proceedings in which full notice and opportunity to appear and defend are given, is reviewable by the 61 L. R. A.

courts,—at least to the extent of ascertaining whether such rates will furnish some reward for the property used and services furnished. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

The board of supervisors is not so far a part of the legislative department of the state as to be entirely independent of any judicial control in the exercise of its duty under the Constitution in fixing water rates. *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910, 1046.

An arbitrary fixing of water rates by the board of supervisors without any exercise of their judgment or discretion is not a compliance with their duty under Const. art. 14, § 1, giving them power to fix such rates; and it may be set aside by the courts as a fraud on the rights of the company. *Ibid.*

A review by the court of the action of the common council in fixing water rates is not limited to a determination of the question on the same evidence that was produced before the council, where the hearing before the council was conducted without notice to the water company or the rate payers, and without any right on their part to effectually intervene. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

The reasonableness of water rates fixed by the board of supervisors after full and fair investigation cannot be reviewed by courts unless there was actual fraud in fixing the rates, or they were so palpably and grossly unreasonable as to amount to the same thing. *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910, 1046.

The court may inquire whether rates of compensation fixed by municipalities for the use of appropriated water in California would operate to deprive the water company of its property without just compensation, and may annul them if manifestly unreasonable. *San Diego Land & Town Co. v. National City*, 74 Fed. 79.

A board of supervisors having exercised its discretion and judgment in fixing water rates under Cal. Const. art. 14, § 1, imposing upon such board or other governing body the duty of annually fixing such rates, they cannot be compelled by mandamus to change their judgment or take further action thereon, after an attempted veto by the mayor of the ordinance fixing such rates, which is not included in the enumeration of ordinances his approval of which is essential to validity under § 68 of the consolidation act. *Jacobs v. San Francisco*, 100 Cal. 121, 34 Pac. 630.

Although a city, after the expiration of the term of years in a franchise to furnish water granted by it to a water company, may regulate the rates therefor, nevertheless, such right is not unlimited, as the courts will prevent enforcement of a rate so low as to operate as a confiscation of the water company's property without due process of law. *Cedar Rapids Water Co. v. Cedar Rapids (Iowa)* 91 N. W. 1081.

Water rates established by the board of supervisors, if unreasonable, will be annulled by the court at the suit of any party aggrieved, and the question again remitted to the board; but in no case will the court undertake to establish rates. *Lanning v. Osborne*, 78 Fed. 319.

An ordinance wrongfully reducing water rates will be enjoined, although the city is not actively enforcing it, where the laws impose severe penalties for the collection of higher rates than those prescribed by the ordinance, and the water company would be driven to innumerable actions at law to collect its dues. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

Equitable relief against an ordinance illegally reducing water rates will not be denied because

the ordinance will expire before an appeal from the decree can be determined by the court of last resort. *Ibid.*

The right to equitable relief against an invalid ordinance reducing the rates of a water company in violation of a contract on the ground that it is a cloud on title is not precluded by the fact that the ordinance is void, where its invalidity appears only when it is considered in connection with the contract and evidence showing what the rates were when the contract was made. *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736, Affirming 88 Fed. 720.

An injunction will be granted at the suit of a water company to restrain a city from enforcing an ordinance reducing the rates in violation of the contract between them, thereby rendering the company liable to criminal prosecutions and to legal proceedings on behalf of rate payers, if greater sums than those named in the ordinance are charged by it. *Los Angeles City Water Co. v. Los Angeles*, 108 Fed. 711.

A mortgagee of a water company has such an interest in the mortgaged property as entitles him to bring suit to enjoin the enforcement of an ordinance fixing water rates alleged to be unreasonably low. *Consolidated Water Co. v. San Diego*, 84 Fed. 369.

A foreign corporation which has acquired water and water rights under a constitutional provision declaring the appropriation of water for sale or distribution a public use, subject to state control, and authorizing municipalities supplied to fix annually the rates of compensation, cannot assert that the constitution and laws under which it has acquired its rights are in contravention of the Constitution of the United States; but it may question the reasonableness of the rates established by the municipality. *San Diego Land & Town Co. v. National City*, 74 Fed. 79.

A water company is a necessary party to a suit by its mortgagee to restrain a municipality from fixing the rates of charge for the water so low as to amount to a taking of the company's property without due process of law. *Consolidated Water Co. v. San Diego*, 35 C. C. A. 631, 93 Fed. 849.

The mayor of the city is not a necessary party to a suit to set aside the water rates established by the board of supervisors. *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910, 1046.

f. Regulations.

A water company may prescribe all such rules and regulations for its convenience and security in supplying water to a city or its inhabitants as are reasonable and just, and may refuse to furnish water to any inhabitant who refuses to comply with such reasonable rules and regulations. But the rules must be reasonable, just, lawful, and not discriminatory. *American Waterworks Co. v. State*, 46 Neb. 194, 30 L. R. A. 447, 64 N. W. 711.

A water company may make reasonable rules for the government of its consumers in the use of its water supply, and will not be put to an action for damages for infractions or violations thereof, but may enforce such rules by shutting off the consumer's supply as a penalty for violation thereof, when such rules are embodied in its contract with its consumers, the contract is made subject to the rules, and the consumer is furnished with a copy thereof; the courts reserving the right to say in any particular case whether or not the rules are reasonable. *Shiras v. Ewing*, 48 Kan. 170, 29 Pac. 320.

Where an inhabitant of a city institutes an action against the lessee of the city waterworks

company, alleging a breach of contract to supply him with water, and the defendant sets up that it was ready to supply the plaintiff with water upon his complying with the defendant's rules, he has no right of action, where it appears that such rules were reasonable, or, if unreasonable, he, having notice thereof, did not complain to the defendant. *Thomas v. Peterson* (Tex. Civ. App.) 24 S. W. 1125.

A perpetual injunction will be granted at the suit of a city to restrain the enforcement by a water company of rules, regulations, and rates which are unreasonable, and not warranted or justified by the contract between such company and the city. *Newark v. Newark, Ohio Waterworks Co.* 4 Ohio N. P. 341.

The duty of a water company to furnish all the inhabitants of a city with water at certain designated rates, without discrimination, does not prevent it from adopting reasonable rules for the conduct of its business and the operation of its plant; and a rule requiring all applicants for water to sign a regular application, and agree, in conformity to a rule of the company, to keep the hydrant closed except when using the water, is a reasonable rule; and such company will not be liable for damages for refusing to turn water into the hydrant of an applicant who refuses to comply with such rule. *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 41 S. W. 1060.

For a water company to require, as a condition precedent to furnishing water, that a consumer who pays rent for water for domestic uses only, and not for sprinkling purposes, shall put his hydrant appliances in condition for the former use only, is not unreasonable. *Harbison v. Knoxville Water Co.* (Tenn. Ch. App.) 53 S. W. 993.

Under a waterworks act providing that, for the purpose of preventing waste of the water, all consumers should provide proper ball or stop cocks or other necessary apparatus for regulating such supply, a consumer cannot be compelled to supply apparatus other than the ball cock or something akin to it, and the company cannot justify cutting off the water from the premises of a person neglecting to comply with the notice requiring him to insert in the service pipes a screw-down valve whereby the water can be shut off from the premises whenever there is indication of its being permitted to run to waste. *Ward v. Folkestone Waterworks Co.* L. R. 24 Q. B. Div. 334, 59 L. J. M. C. N. S. 65, 62 L. T. N. S. 321, 38 Week. Rep. 426, 54 J. P. 628.

Equity will not restrain a water corporation in accordance with reasonable regulations, from shutting off its supply from property, the owner of which has no standing in equity by claiming that no bill had been presented, whereas bills had been rendered and payment requested of her agent. *Smith v. Scranton Gas & Water Co.* 5 Lack. Legal News, 235.

In *Newark v. Newark, Ohio Waterworks Co.* 4 Ohio N. P. 341, a rule of a water company requiring the payment of the usual household rate in addition to the usual sprinkling rate before water would be furnished through a yard hydrant was held to be unreasonable.

A municipal waterworks corporation which has been granted in its charter the right to lay water mains in the streets, and to make such rules as are just and reasonable for the management thereof, may reserve to itself the right to make all taps of its mains, and can enjoin plumbers from tapping them if it has not refused to connect private pipes with its mains. *Pocatello Water Co. v. Standley* (Idaho) 61 Pac. 518.

A different view of that question was, however, taken by the Kentucky court, which held that a water company having the right to the

use of the streets of a city for the purpose of laying down its pipes in consideration that it will furnish water to the city and its inhabitants, has no right to prohibit connection with its mains necessary to conduct the water to private dwellings and for private use, unless the same is made by persons licensed by the company and who have executed their bonds to it indemnifying it for such work. Such a rule is not a reasonable one for the regulation of the use of its property, but is an attempt to exercise the power of controlling the rights of others; and, even if its charter and the ordinances of the city give it such power, the same would be void as in violation of the organic law of the state. *Franke v. Paducah Water Supply Co.* 88 Ky. 467, 4 L. R. A. 265, 11 S. W. 432, 718.

But a water company having authority to lay its mains in the city streets, and to make such rules as are just and reasonable for the management thereof, cannot insist on laying the supply pipes upon the private property of a consumer, or refuse to connect the mains with the pipes, on the ground that they were laid by someone not in the company's employ. *Pocatello Water Co. v. Standley* (Idaho) 61 Pac. 518.

A rule of a water company against the unusual and useless waste of the water supply by patrons is reasonable. *Shiras v. Ewing*, 48 Kan. 170, 29 Pac. 320.

A rule of a water company organized under a statute for the purpose of supplying a city and its inhabitants with water, and having a franchise for that purpose, not to supply water to rented premises except on the personal responsibility of the owner, is unreasonable, and cannot be indorsed as to a tenant of premises having no other means of water supply, the owner of which refuses to become responsible for water rents, when he requests the company to turn on the water, and tenders payment in advance; and in such case it is immaterial whether the owner had originally made a contract with the company to hold himself personally liable, or whether the tenant knew of the existence of any such agreement. *State ex rel. Milsted v. Butte City Water Co.* 18 Mont. 109, 32 L. R. A. 697, 44 Pac. 968.

A water company, though exercising quasi-public functions in supplying the public, may require payment in advance for water furnished under a contract; and may also enforce the requirement by cutting off the supply for non-compliance therewith by a consumer. *Hieronymous Bros. v. Blenville Water Supply Co.* 131 Ala. 447, 31 So. 31.

An injunction will be dissolved, and a water company allowed to cut off a consumer's supply of water, where it appears that, although it was supposed he was using metered water, the existence of another water pipe unconnected with the meter was found on his premises, and, upon the disconnection of the latter pipe by the company, the quantity of water consumed was greatly in excess of the amount registered before the disconnection of such pipe, upon which basis a bill was rendered such consumer, which he refused to pay. *Krumenaker v. Dougherty*, 74 App. Div. 452, 77 N. Y. Supp. 467.

The requirement of payment of a quarter's rent in advance for a water supply as a condition precedent to furnishing water is not an unreasonable regulation. *Harblson v. Knoxville Water Co.* (Tenn. Ch. App.) 53 S. W. 993.

A regulation of a water company giving it the right to collect charges in advance is not so unreasonable as to warrant an injunction to restrain the enforcement thereof, where it is not in violation of the contract between the water company and the city for the furnishing of the 61 L. R. A.

water. *Newark v. Newark, Ohio Waterworks Co.* 4 Ohio N. P. 341.

But a regulation of a water-supply company requiring patrons to pay their rates yearly in advance, with no rebate in case they shall cease to be patrons at any time within the year, without special agreement, is unreasonable, and may be so held by the court when the legislature has not determined said charges. *Rockland Water Co. v. Adams*, 84 Me. 472, 24 Atl. 840.

A rule of a private corporation engaged in supplying a city and its inhabitants with water in pursuance of a franchise granted by the city, which provides that, if water rents are not paid within thirty days after they fall due, the water may be turned off, and that the user of water must pay a charge of \$1 in addition to other rates before the water will be turned on, to pay the expense of turning off and on, is unreasonable, discriminatory, and void, because the cost and expense of turning off and on water enters into and forms part of the rent paid in advance under the rules of the company, and the inability of the corporation to collect this latter charge because of the water taker's insolvency affords no excuse for not supplying water, and the supply may be compelled by mandamus. *American Waterworks Co. v. State*, 48 Neb. 194, 30 L. R. A. 447, 64 N. W. 711.

A rule of a water company requiring payment of water rents past due as a condition precedent to a continuation of the supply is a reasonable one, and binding on consumers having actual notice thereof. *Tacoma Hotel Co. v. Tacoma Light & Water Co.* 3 Wash. 316, 14 L. R. A. 669, 28 Pac. 516.

But a corporation incorporated for the purpose of supplying the inhabitants of a town with water, which is authorized to distribute water through said town and establish and collect rates therefor, has no right to refuse to supply the lessee of a house with water because the owner of the house has not paid the rates for the previous year. And a rule providing that, in case of nonpayment of rates, the water may be turned off and not turned on again until all rates are paid is unreasonable. *Turner v. Revere Water Co.* 171 Mass. 329, 40 L. R. A. 637, 50 N. E. 634.

A water company cannot refuse to furnish water at the regular rates and upon the usual terms, to a resident of the city where its works are located, because such person fails or refuses to pay his outstanding duell accepted by such company for water and piping previously furnished him, where such company is operating under a charter giving it the right to condemn private property for its needs, and requiring it to build waterworks and machinery of sufficient capacity to supply such city and the inhabitants thereof with a plentiful supply of water, and also contracted with the city to furnish such water at customary rates. *Crumley v. Watauga Water Co.* 99 Tenn. 420, 41 S. W. 1058.

An injunction will lie upon a proper showing, to prevent a water company from cutting off its water supply from the consumer, who has offered to pay in advance the amount legally chargeable. *Ernst v. New Orleans Waterworks Co.* 39 La. Ann. 550, 2 So. 415.

An injunction may issue to restrain a water company from cutting off a consumer's supply, although the threatened injury be not irreparable; it is sufficient that an adequate remedy is not afforded by an action for damages. *Sedalla Brewing Co. v. Sedalla Waterworks Co.* 34 Mo. App. 49.

An injunction will be granted to prevent the cutting off of a water supply for an electric-light plant which a water company is bound, under its franchise, to furnish,—especially where there is no other supply of water available.

Jenkins v. Columbia Land & Improv. Co. 13 Wash. 502, 43 Pac. 328.

A waterworks company will be enjoined from interfering with or refusing to supply water to a sprinkling contractor who has entered into a valid contract for water to be used in sprinkling the streets. Callery v. New Orleans Waterworks Co. 35 La. Ann. 798.

As to the right to cut off supply, see also *infra*, VII. b, 5, (b).

A borough having refused to pay the water rate fixed by a water company, and having refused to take any steps to have that rate adjusted by the court of common pleas in the manner provided by law, the water company is not required to furnish water without compensation, and may turn it off. Tyrone Gas & Water Co. v. Burley, 10 Pa. Super. Ct. 348.

The owner of a building in possession of a tenant is not entitled to an injunction against the shutting off of water supply because of wrongful acts by the tenant. Brass v. Rathbone, 153 N. Y. 435, 47 N. E. 905.

A water company is not justified in disobeying an injunction restraining it from cutting off the water supply of the consumer until further orders of the court for the reason that the allegations of the petition do not sustain or justify the broad injunction asked and granted. State *ex rel.* New Orleans Waterworks Co. v. Levy, 36 La. Ann. 942.

The question of the unreasonableness of rules of a water company should not be submitted to the jury in a suit for breach of contract to furnish the water, in the absence of evidence that they were unreasonable. Thomas v. Peterson (Tex. Civ. App.) 24 S. W. 1125.

The question of reasonableness of regulations is further treated *infra*, VIII.; where the cases dealing with the municipality as a water company appear.

g. Rights after expiration of franchise.

Where a municipality granted a water company a franchise to furnish water for a term of years, the question whether the franchise survived the expiration of the term is one which may be raised in any action brought by the water company to enforce such claim. Cedar Rapids Water Co. v. Cedar Rapids (Iowa) 91 N. W. 1081.

A provision in a statute authorizing a waterworks franchise, that, "at the expiration of the twenty years, if the grant be not renewed, the city shall purchase," is not an incidental, directory, or subordinate provision, but mandatory, vital, and controlling. National Waterworks Co. v. Kansas City, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

The title and right of possession to a waterworks plant do not pass absolutely to a city on the expiration of the franchise, without payment or tender of payment therefor, under a statutory provision that the city shall purchase if the grant be not renewed. *Ibid.*

A person granted the exclusive right of supplying a city with water from a specified source for a term of years, and assured in the quiet possession of the works until the city shall redeem them, retains the right to such use and to the specified source of supply after the expiration of the agreed period, where redemption of the works has not been made. Stejn v. Blenville Water-Supply Co. 34 Fed. 145.

If, after the expiration of a contract between a municipality and a water company for the supply of water during a term of twenty years, which, although when made was in its terms exclusive, such exclusive privilege was lost on account of excessive dividends, the city is not compelled to continue to obtain its water supply

from such company, or else purchase its plant, but may make such arrangements for a future water supply as it deems proper, by erecting its own works or entering into contract with another company. Phillipsburg Water Co. v. Phillipsburg, 203 Pa. 562, 53 Atl. 347.

After the expiration of the term of years for which a franchise to furnish water was granted a water company, the company will be entitled to remain in possession of the occupation of the streets for its pipes and connections such a reasonable length of time as may be necessary to negotiate an extension or renewal of the franchise, or to close out its business without unnecessary sacrifice. Cedar Rapids Water Co. v. Cedar Rapids (Iowa) 91 N. W. 1081.

After the expiration of the term of years for which a franchise to furnish water was granted by a city to a water company, the city, by continued acceptance of the water service, and by assuming to regulate the rates thereof, gives implied consent to the possession of the streets and operation of the works until such time as it, by reasonable notice, terminates the water company's tenure of the privilege. *Ibid.*

VII. Rights and duties of consumer.

a. In general.

A consumer is bound to comply with rules regulating the municipal water supply of which he has notice, unless they are unreasonable and he has made complaint thereof to the water company. Thomas v. Peterson (Tex. Civ. App.) 24 S. W. 1125.

A citizen of a municipal corporation to which water has been brought by another citizen or corporation which has acquired the right to the water by right of eminent domain can demand water only by payment of the established rate, and by compliance with reasonable rules and regulations. Lux v. Haggin, 69 Cal. 255, 10 Pac. 874.

A house owner is entitled to the use of the water supply of the municipality in the absence of any regulation authorizing cutting off his supply as a penalty for violating the ordinances of the board of health relating to the open plumbing he may have used, and in the absence of any claim that the work as constructed is a nuisance. Johnston v. Belmar, 58 N. J. Eq. 354, 44 Atl. 166.

A city, having purchased a right of way across a person's land for its water pipes for a sum of money and the privilege in the landowner of taking water from such pipes at all times, may be enjoined from removing the pipes, and thus cutting off the landowner from the water supply. Brown v. Frankfort, 10 Ky. L. Rep. 462, 9 S. W. 394, 702.

The statute of limitations will commence to run with any use of water by a patron contrary to contract rights, when the connection making such use possible was put in by the water company, was its property and, as a matter of law, was under its control, there then being no difficulty in the way of fullest knowledge. Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co. 167 Pa. 136, 31 Atl. 484.

The lessee of waterworks is liable to an action for damages for failure to supply water to the lessees of a two-story building who sublet the upper story to a club with which they have no connection, on tender of the water rent for their part of the building only, as refusal to supply on the ground of failure to pay water rent for the whole building is not justified by a by-law providing that when two or more families or persons are supplied from the same pipe the whole will be assessed in one joint account, as such by-law is unjust and oppressive and

therefore unlawful, where provision can be made at a reasonable cost for separating or cutting off the supply of the upper story from that below. *Stein v. McArdle*, 24 Ala. 344.

The duty of furnishing water separately to each tenant of a building, and collecting rates from each as a separate consumer, cannot be imposed by the owner of the premises on the board of water commissioners, by furnishing at his own expense each room, shop, or office with lock and key, and then taking the keys to the consumers, where the municipal charter provides for furnishing water to the owners or occupants of houses and other buildings, while the rules and regulations provide for dealing with owners, and not with tenants. *Kelsey v. Marquette Fire & Water Comrs.* 113 Mich. 215, 37 L. R. A. 675, 71 N. W. 589.

A suite of rooms in a tenant house which is fitted and used as a separate tenement for the accommodation of a family, with separate water pipes of its own, is a dwelling house or a tenement, within the meaning of an ordinance fixing water rates, so that the occupant can compel delivery of water to him upon payment of the prescribed rates, without regard to whether or not the rates are paid by the other tenants in the building. *Young v. Boston*, 104 Mass. 95.

"A contract by a water company to furnish water to a brewing company 'for actual brewing purposes alone,' at a specified charge for each barrel of beer brewed, will be construed in the light of the conduct of the parties; and where, for nearly three years, the water company knowingly furnished, not only the water that actually entered into the beer brewed, but water which was used for the purpose of filling the boiler and cleaning the brewery vats and other things connected with it, and charged for it on the basis of the number of barrels of beer brewed, the contract will be construed as requiring the water company to furnish water for the purposes enumerated. *Sedalla Brewing Co. v. Sedalla Waterworks Co.* 34 Mo. App. 49.

A contract by which the water company agrees to furnish water for a definite period, and to continue the services after the expiration of such period at the option of the consumer, is one entire contract of which the option constitutes part of the consideration, which cannot be revoked as to such option during the continuance of the agreed term, and is not void for indefiniteness of duration as to such optional period, inasmuch as, by the proper exercise of the option, the length of such continued service will become definite and fixed; but will be upheld and enforced by a court of equity if the consumer promptly signifies his election in due time. *Christian & C. Grocery Co. v. Blenville Water Supply Co.* 106 Ala. 124, 17 So. 352.

An election on the part of a consumer under a contract for water supply for a definite period and for a longer period at the option of such consumer, that he will continue the services from month to month for three years from a certain date, and reserving the right to elect to continue the services for a further period after the period covered by such election has expired, without specification or limitation as to the length of time, is so indefinite and uncertain that a court of equity will not enforce the option. *Ibid.*

The introduction of water by a municipal corporation into a private house is in the nature of a license which is paid for, so that if a main becomes frozen and bursts the corporation is not liable for any loss beyond the water rent. *Smith v. Philadelphia*, 81 Pa. 38, 22 Am. Rep. 731.

An agreement to take a certain quantity of water from a water company for a period of years will survive the death of the contracting

party, although he desired it for use in his business in a leased mill, the lease of which might be terminated within three months after his death. *Drummond v. Crane*, 159 Mass. 577, 23 L. R. A. 707, 35 N. E. 90.

The water commissioners of a city have discretionary power as to the granting of permits to the owners of houses located on streets which have not been formally opened and in which no water mains are laid, to connect their houses with water mains in other streets; and, where the rule is to require the abutting property to pay for the laying of mains, the permit may be granted on condition that the lot owners pay their share of the cost of the mains when they are laid to the street on which the property is located. *Boswell v. Philadelphia*, 15 W. N. C. 169.

Permission given by the superintendent of, and owner of all the stock in, a water company, to tap a main for water supply, does not pass an interest in the property, but is a mere parole license revocable at will. *Reno Water Co. v. Leete*, 17 Nev. 203, 30 Pac. 702.

Where a realty company laid out into building lots a tract of land, and, with permission of a municipality, laid a supply pipe in an adjoining street, and connected it to its water main, and carried the water by means of service pipes into the streets of the tract, the title to the supply pipe and the right to have the water flow through it, and thence into the service pipes, as against the realty company, passed to the purchasers of the lots as appurtenances thereto. *Mulrooney v. O'Bear*, 80 Mo. App. 471.

Where a lessee of municipal waterworks continues to supply a patron as he had formerly been supplied, there will be an implied contract on the part of the lessee to continue the supply until reasonable notice is given that he intends to cease doing so, unless there is a failure to comply with the rules pertaining to the furnishing of such supply. *Thomas v. Peterson* (Tex. Civ. App.) 24 S. W. 1125.

The facts that a water company commenced to furnish water to a consumer under contract, and continued to supply him for ten years, receiving compensation therefor, are sufficient to establish an implied contractual relation between the parties, which will prevent the dismissal of a complaint to restrain the company from cutting off the water on the ground that there was no contractual relation between the parties which would warrant the suit. *McEntee v. Kingston Water Co.* 165 N. Y. 27, 58 N. E. 785.

A contractor as to work in a street may be liable for loss to adjoining property from fire if he obstructs the firemen in the use of a hydrant, so that water cannot be obtained for extinguishing the fire. *Kiernan v. Metropolitan Constr. Co.* 170 Mass. 378, 49 N. E. 648.

A consumer of city water cannot recover from the municipal corporation owning the waterworks for expenses incurred by him in making connection with a water main which the city authorities afterwards abandoned. *Linck v. Litchfield*, 31 Ill. App. 118.

Mandamus is a proper remedy to compel a water company to furnish water to one entitled to it, as the duty to furnish water is a public one. *State ex rel. Lanyon v. Joplin Waterworks*, 52 Mo. App. 812; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244.

But mandamus will not issue to require the chief engineer of a water department to lay certain water mains, when it cannot be enforced because of no appropriation to enable him to contract for and proceed with the work, although the legal right to the writ is plain. *Com. ex rel. Miller v. McFadden*, 14 Phila. 161.

A city is not liable to one who theretofore had enjoyed an exclusive privilege of using water from the hydrants for street sprinkling, because of a refusal to continue to supply him, where the privilege had been awarded to a higher bidder and the city is only obliged to supply water to individual inhabitants for domestic and other purposes upon private premises. *McKnight v. New Orleans*, 24 La. Ann. 412.

One having acquired an easement to take water from a main without payment of rates cannot compel the maintenance of the pipe for his benefit; and, if the owner, in good faith and not with the intention of defeating that right, desires to abandon that main he may do so. *Kearney v. West Chester*, 199 Pa. 392, 49 Atl. 227.

A lawful contract made by a city to supply a person whose land and water it has taken by right of eminent domain with a quantity of water from its reservoir "sufficient for washing and steam purposes" at a mill, may be specifically enforced in equity. Such a contract would have the same effect as a valid exception of the same amount of water in the original taking, and would cut down the damages accordingly. *Roberts v. Cambridge*, 164 Mass. 176, 41 N. E. 230.

A bill cannot be maintained in equity to compel the furnishing of water by a water company on the ground of its charter duty to furnish it independent of any contractual obligation, without first applying to the company for water on such terms as might be agreed upon, and without offering to pay what would be reasonably just. *Christian & C. Grocery Co. v. Blenville Water Supply Co.* 106 Ala. 124, 17 So. 352.

A resident of a municipal corporation which has contracted for a municipal water supply cannot maintain a bill after dissolution of the corporation which undertook to furnish the supply, against the corporation alone for appointment of a receiver to carry out the contract, on the ground that he will be injured by failure of the supply. *Weatherly v. Capital City Water Co.* 115 Ala. 156, 22 So. 140.

Under a statute imposing a penalty for turning on the water of a water company without authority, members of a borough council who turn on water, although directed so to do by an ordinance passed by the council, are liable for the penalty so imposed, and cannot shield themselves by such ordinance. *Tyrone Gas & Water Co. v. Burley*, 19 Pa. Super. Ct. 348.

An employee of a public commission does not commit a criminal offense within a statute forbidding the cutting of water mains where, acting under authority of his employers, he cuts the mains by which the latter have been receiving a supply of water under a contract therefor with a private individual, because they had decided to take no more water under the contract. *Wass v. Stephens*, 128 N. Y. 123, 28 N. E. 21.

Where by statute connection with water mains is to be made by or at the expense of the consumer, and the company is authorized to sever connections for failure to pay rates, the consumer, and not the company, must restore the connection upon demand for continued supply upon tender of the required rates. *Sheffield Waterworks Co. v. Wilkinson*, L. R. 4 C. P. Div. 411, 48 L. J. M. C. N. S. 145.

Where the waterworks system of a city does not include the lateral service pipe, which is put in under the direction of the city but at the expense of the one who connects the water main with his premises, such lateral service pipe is owned, and must be kept in repair, by the one whose premises it connects with the water main; and the city is justified in severing the connection where the owner refuses to pay the expenses of repairing a break in the pipe in the

street a short distance from the main pipe, although it appears that he has paid his water rates for a period running beyond the time when the connection is severed. *Jackson v. Ellendale*, 4 N. D. 478, 61 N. W. 1030.

b. Fixing and collection of rates.

1. Duty to pay.

Water rents are not taxes. The latter are imposed by an act of sovereignty, and payment of them is compulsory. The obligation to pay for water is based on an express or implied contract or license. *Rieker v. Lancaster*, 7 Pa. Super. Ct. 149, Affirming 14 Lanc. L. Rev. 393.

Water rates paid by consumers are not taxes, but simply the price paid for water as a commodity. No one is required to take water unless he chooses, and the lien, although enforced in the same way as a lien for taxes, is really a lien for an indebtedness. *Jones v. Detroit Water Comrs.* 34 Mich. 273.

A person charged by law with the collection of municipal taxes has no authority *ipso facto* to collect municipal water rents, as water rents are not taxes, but voluntary burdens undertaken by licensees of the municipality. *Dixon v. Entriiken*, 19 Pa. Co. Ct. 414.

Water rates charged under a statute directing the water commissioners to establish a scale of rates to be paid in advance on a stated term of credit, and authorizing the board to cut off the supply of water if such rates are not paid, are not taxes in such sense that notice must be given before they are levied. *Silkman v. Yonkers Water Comrs.* 71 Hun, 37, 24 N. Y. Supp. 806.

It is not a valid objection to the assessment of water rates against property abutting on the streets where the mains are laid, that a water tax is not an assessment because in the nature of an annual impost, since the maintenance of the pipes and the supply of water therein is a special benefit. *Batterman v. New York*, 65 App. Div. 576, 73 N. Y. Supp. 74.

But in one case it was held that municipal water rents constitute taxation, and cannot be justified as reasonable license regulations, when they become a source of municipal revenue and profit, or, by being apportioned according to the sizes of the houses and business of the occupants, show that they are levied on the value of the property, as well as the business and occupation of the citizen, and not according to the quantity of water consumed, whereas a license for the same privilege ought not to vary in the amount of its fee. *Davis v. Doylestown*, 3 Pa. Co. Ct. 573.

Upon the question whether or not water rents constitute taxes, see note to *Wagner v. Rock Island* (Ill.) 21 L. R. A. 519. See also *infra*, 5, (a).

The owner of premises is not liable for water rates beyond the quarterly day next after his house became unoccupied, although he neglected to give notice to the water company to discontinue the supply, and the water was not, therefore, turned off. *British Empire Mut. Life Assur. Co. v. Southwark & V. Water Co.* 59 L. T. N. S. 321, 36 Week. Rep. 894, 52 J. P. 758.

A landowner may be presumed to know that the tenants of two of his adjoining houses use the same hydrant, when it is so located as to be convenient for both, and no other supply of water is reasonably available for either. *Harrisburg's Appeal*, 107 Pa. 102.

Laches by a property owner in contesting the validity of water rents assessed against him will not make his property liable for water rents imposed under a statute declared uncon-

stitutional. *Provident Inst. for Savings v. Allen*, 37 N. J. Eq. 36.

The signing by an inhabitant of a city of an application to a water company, furnishing water to the inhabitants, to be supplied with water "subject to the rules and regulations of the company now in force or hereafter to be enacted or adopted," does not constitute a contract on his part to pay the rates fixed by the then rules and regulations of the company, but merely binds him to pay those rates so long as the company has the lawful right to demand and receive them; and he may compel such company, by mandamus, to supply him with water at reduced rates fixed by a valid ordinance of the city council. *Rogers Park Water Co. v. Ferguson*, 178 Ill. 571, 53 N. E. 363.

Where the guiding principle of a statute making the owner of a house liable for water rates is to make the owner pay for the use of the water a sum proportionate to the annual value of the house he will not be required to pay a full quarter's water rent where the house is unoccupied at the beginning of the quarter and becomes occupied in the course of it, although the statute provides that the water rates shall be paid by equal payments on the usual quarter days. *East London Waterworks Co. v. Foulkes* [1894] 1 Q. B. 819, 10 Reports, 243, 58 J. P. 384.

The lessor of a building which is piped for city water is under no obligation, because of that fact, to pay for the water used by his tenant. *McCarthy v. Humphrey*, 105 Iowa, 535, 75 N. W. 314.

Under a charter providing that the owner or occupier of any house, lot, or tenement where water shall be taken, shall each be liable for payment, a landlord is not liable for water furnished to his tenant and used on other premises not belonging to such owner, occupied by the latter, merely because the water meter was placed on his land to measure the water while in transit to the place of consumption. *Jersey City v. Morris Canal & Bkg. Co.* 41 N. J. L. 66.

A water tax is an "ordinary yearly tax" within a covenant in a lease requiring a tenant to pay such taxes, although the lease was executed prior to the establishment of the water system, where it was made subsequent to the passage of an act authorizing a water supply under which some charge upon the property for the use of the water could fairly be presumed. *Garner v. Hannah*, 6 Duer, 262.

A landlord cannot be presumed to have agreed to pay for water to be used on the leased premises because it was essential for the purpose for which the premises were to be used; and he cannot be required to pay for it, unless he agreed to do so,—at least where the rates were not a lien on the property. *Leighton v. Ricker*, 173 Mass. 564, 54 N. E. 254.

A consumer of water is liable to a water company for the acts of his servant in secretly attaching a pipe to the water company's high service so as to draw the water off at a higher level than that agreed for, where he adopted the acts of his servants on discovering them. *West Middlesex Waterworks Co. v. Suwerkrop*, 4 Car. & P. 87, *Moody & M.* 408.

A charter giving the board of water commissioners of a city power to require payment in advance for the use or rent of water furnished by it does not contemplate an exclusively cash system, but gives the water commissioners authority to furnish water on credit, in view of a provision thereof that in case prompt payments shall not be made they may shut off water from the premises and shall not be compelled to supply such premises with water again until the 61 L. R. A.

"arrears with interest thereon" are paid. *Atlanta v. Burton*, 90 Ga. 486, 16 S. E. 214.

A water company organized for the sale and distribution of water appropriated under the Constitution and laws of California is not entitled to charge, in addition to the rates fixed by law, a separate sum for the so-called "water right;" but each member of the community, on payment of the legal rate, has the right to use a reasonable quantity of water in a reasonable manner. *San Diego Land & Town Co. v. National City*, 74 Fed. 79.

A municipal corporation seeking to recover for water taken by a consumer from a pipe unconnected with a meter for a certain period of time has the burden of showing such taking for all time not admitted by the consumer. *St. Louis v. Arnot*, 94 Mo. 275, 7 S. W. 15.

In apportioning taxes between an heir at law and the widow to whom dower has been assigned in a part of the premises, the annual water tax should be contributed by each in the ratio in which the part of the premises occupied by each bears to the annual value of the whole; but the tax for water for use on the premises generally, and which is used exclusively in the apartments of one of them, should be borne by that one. *Graham v. Dunigan*, 2 Bosw. 516.

Under the terms of a transfer to a municipality of the plant of a water company whereby its members were entitled to a supply for household purposes, either by a stop cock at an annual rental fixed by the number of persons in the family, or, by a gauge controlled by the public water commissioners, at the member's option, an old consumer who elects to draw water by stop-cock at the rent imposed has no right, except on payment of an additional charge, to use the water drawn for a new domestic purpose—in this case a water-closet—unknown when the rent was fixed, even though the quantity of water used is no greater than before. *Rutland v. Edgerton*, 47 Vt. 155.

Water rents are illegal which are assessed under a municipal charter on vacant lots arbitrarily and without regard to valuation of property assessed or benefits conferred. *Provident Inst. for Savings v. Allen*, 37 N. J. Eq. 36.

Assessments for water rates in Jersey City, laid on vacant lots or lots with buildings which do not take or use water, are invalid, because the amount of the tax imposed is determined by fixed rates adopted by the authorities in their discretion, without regard to either special benefits conferred or uniform rules as to values, not because a special taxing district less than a political subdivision is created by the charter in this respect. *Jersey City v. State*, *Vreeland*, *Prosecutor*, 43 N. J. L. 638, *Affirming* 43 N. J. L. 135; *State*, *Culver*, *Prosecutor*, *v. Jersey City*, 45 N. J. L. 256.

But a municipal corporation may be authorized to assess water rents upon every dwelling on a street wherein its water mains are laid, as it is a local tax for a local benefit. *Allentown v. Henry*, 73 Pa. 404.

So, under a statute authorizing village water commissioners to assess water rates upon all real property abutting on the streets where the water pipes are laid, an assessment against the owner of a house fronting on such a street is valid, although no water is used on the premises. *Dasey v. Skinner*, 33 N. Y. S. R. 15, 11 N. Y. Supp. 821.

Under a power to impose an assessment or water rent upon all dwelling houses situate upon its line of water pipe, a municipal corporation cannot impose the tax upon such dwelling houses only as are not supplied with hydrants. *Allentown v. Henry*, 73 Pa. 404.

2. Amount.

Water rates paid to a city by consumers are not a tax, but simply the price paid for water as a commodity; and they need not be based upon property values. *Preston v. Detroit Water Comrs.* 117 Mich. 589, 76 N. W. 92.

A waterworks company may reasonably fix its charges according to the size of the connections made, and it is immaterial with what size pipe the water is conveyed onto the consumer's premises, he having notice of the charges, and that he can make a connection to correspond with the size of his pipe. *Goebel v. Grosse Pointe Waterworks*, 126 Mich. 307, 85 N. W. 744.

The court cannot, where no evidence is introduced to sustain the contention, judicially say that an ordinance providing for a charge for water of \$6 a year for a building of five rooms or less, and \$1 a year for each additional room, is on its face unreasonable or oppressive. *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723.

A proviso in a statute fixing a specified water rate for water used for domestic purposes, which provides that the term "domestic purposes" shall not include a supply for baths, wash-houses, or public purposes, does not apply to fixed baths in dwellings, but refers only to a public establishment of baths. *Weaver v. Cardiff*, 48 L. T. N. S. 906, 47 J. P. 599.

Domestic uses or purposes of water for a family occupying a dwelling house include all uses which contribute to the health, comfort, and convenience of the family in the enjoyment of their dwelling as a home. *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723.

An ordinance fixing rates for water supply at a certain amount per annum for buildings of five rooms or less, and an additional rate for each room over that number, and providing for the punishment of anyone charging rates in excess thereof has no application to charges for water furnished a consumer by measurement at his election, although such charges are in excess of stipulated rates. *Ibid.*

The power conferred upon water commissioners to assess water rates upon such basis as they deem equitable authorizes them, subject to the limitation that the rate shall be reasonable, to fix them at such sums as will, in addition to paying the cost of furnishing the water, provide a fund applicable to the payment of interest on the water bonds, the extension accounts, and the cost of the plant. *Preston v. Detroit Water Comrs.* 117 Mich. 589, 76 N. W. 92.

That the rate levied for a water tax is not confined to the cost of construction and maintenance of the particular pipe and the supply therein in front of the premises assessed does not invalidate the assessment. *Batterman v. New York*, 65 App. Div. 576, 73 N. Y. Supp. 44.

In a contract to furnish water at prices fixed by what is termed a schedule of annual water rates, but which includes meter rates graduated according to the amount consumed, the word "annual" has no reference to the meter rate so as to base it upon the amount consumed annually; but the period of consumption to which the meter rate applies is left to be determined by extrinsic evidence. *Carney v. Chilli-cothe Water & Light Co.* 76 Mo. App. 532.

A court cannot declare an otherwise reasonable water rent to be unreasonable in the case of one consumer because he uses a larger quantity than others, as it is a question solely for the municipal authorities. *Penn Iron Co. v. Lancaster*, 17 Lanc. L. Rev. 161, Affirmed in 15 Pa. Super. Ct. 556.

The New Orleans water company is not entitled, under its charter, to receive more from its customers than the rates paid to the city at the 61 L. R. A.

time of the incorporation of the company. *Levy v. New Orleans Waterworks Co.* 38 La. Ann. 25.

Under an ordinance establishing water rates, which provides certain meter rates on the average quantity of water used during the year, and fixes a uniform rate for water used for manufacturing purposes, and that, in case the quantity used exceeds a certain amount annually, the rate shall be 1 cent per hundred gallons, the water need not all be used in one plant to entitle the manufacturer to the 1-cent rate; and it is immaterial that the meter rates are accorded to the person "applying for a meter," since the use of the singular term does not, of necessity, limit the favored rate to water passing through one meter. *St. Louis Brewing Assn. v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911.

But a provision in an ordinance providing for meter rates to water consumers that persons using a certain amount annually shall be entitled to receive the water at the rate of 1 cent per hundred gallons, when used by a manufacturing plant located in one or more blocks adjoining each other, will not apply in favor of independent powers on adjoining blocks, although owned by one person. *Ibid.*

A water company which has supplied a consumer with water for \$10 a year, and thereafter raises the rates to \$12, and notifies the consumer, who refuses to pay the increased amount, but offers to pay the same as formerly, cannot recover at the increased rate, where it continues to supply the consumer without exercising its right to cut off the water. *Haverhill Aqueduct Co. v. Page*, 52 N. H. 472.

A consumer who has had one faucet put in his house under a special contract at a certain rate per year is not entitled to take advantage of the schedule governing rates for houses upon attempting to put in another for the use of another family in the same house while his former contract is still in force. *Re McGrath*, 56 Hun. 76, 9 N. Y. Supp. 168.

A schedule of rates or charges fixing a maximum tariff for water used in a residence of a certain number of rooms, with an additional charge for each additional room; and specifying the rates for "bath," for "water-closets," and for "water basins;" and stipulating that special rates should be charged for supplies not mentioned,—will not permit a consumer, upon payment of the rate for private residences, to use water for bathtub, closet basins, and heater in that residence without paying additional rates. *Allen v. Duluth Gas & Water Co.* 46 Minn. 290, 48 N. W. 1128.

The terms "room" and "domestic purposes" are not so uncertain and indefinite as to render void an ordinance fixing the rates for water supply for such purposes according to the number of rooms in a house, without defining such terms. *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723.

The term "room," in an ordinance fixing the rate for water supply according to the number of rooms in a house, includes those apartments which are adapted with more or less convenience to personal occupation, but does not include small apartments prepared and adapted for use as mere pantries, water-closets, or bath rooms. *Ibid.*

A building, the lower portion of which is used for a store and the upper portion for sleeping apartments, is a "dwelling" as to such upper apartments, within the meaning of a contract for water supply, fixing a certain gross rate per annum according to the measurement for other purposes. *Smith v. Birmingham Waterworks Co.* 104 Ala. 315, 16 So. 123.

A water company authorized to charge specified rates for buildings of different characters,

and according to the number of rooms in dwelling houses, is not required to supply water to a military reservation, comprising dwellings for officers, hospitals, warehouses, and barracks as a single consumer. *United States v. American Waterworks Co.* 37 Fed. 747.

The distinction between manufacturing and domestic purposes for which water is used is clear, and manufacturing uses do not become domestic because the product of the manufacturer is used for domestic purposes. *Gallagher v. Philadelphia*, 4 Pa. Super. Ct. 60.

3. Meters.

So far as the authorities have gone, *State ex rel. Hallauer v. Gosnell* is not opposed to them, although it seems to be a pioneer case in a portion of its holding. As indicated in the opinion, *Sheffield Waterworks Co. v. Bingham*, L. R. 25 Ch. Div. 451, 48 L. T. N. S. 604, 52 L. J. Ch. N. S. 624, held that where the statute permits consumers to take water for certain purposes at a certain price per thousand gallons, they, and not the company, must furnish meters.

But in that case the statute seems to have been for the benefit of the consumer, and it was not unreasonable that, if he sought to avail himself of it, he should comply with its conditions.

Hill v. Thompson, 18 Jones & S. 185, held that a statute authorizing the commissioner of public works to place a water meter in buildings in which water is furnished for business consumption, and making its cost a lien upon the premises, is not unconstitutional.

Smith v. Birmingham Waterworks Co. 104 Ala. 315, 16 So. 123, conversely held that an injunction will lie to restrain a water company from cutting off a water supply for refusal to pay an arbitrary rate for water, which, under its contract, should be charged for by measurement; as in all cases where it has the right to charge by measurement it is bound to furnish meters for that purpose, and has no authority to refuse to furnish them and fix, instead, an arbitrary rate.

And *Albert v. Davis*, 49 Neb. 579, 68 N. W. 945, held that a grant of power to a city to fix and collect charges for the use of water meters excludes, by implication, the power in the city to compel the consumer to furnish his own meter; and he may not be compelled to do so, although another portion of the same statute confers authority upon the city to enforce all needful rules and regulations for the use of water, and to tax, assess, and collect a tax rent or rates for the use of water supplied.

A water company is not entitled to require the consumer to put up a meter at his own expense, or hire one from the company, as a condition precedent to receiving a water supply, under statutes providing for the appointment of inspectors if the company requires a meter to be used, and empowering it, when authorized by special act to supply water by measure, to let meters for hire for such remuneration as may be agreed upon. *Sheffield Waterworks Co. v. Carter*, L. R. 8 Q. B. Div. 645, 51 L. J. M. C. N. S. 97, 30 Week. Rep. 889, 46 J. P. 548.

The words "any consumer of water," in a statute enacting that a water company "shall, at the request of any consumer of water," or at its own instance, afford a supply of water by means of a meter, mean, not any person merely desirous of being a consumer, but a person who is actually consuming water, or who, at least, is entitled to demand a supply, and is taking the necessary steps to obtain it. *Cooke v. New River Co.* 59 L. J. Ch. N. S. 333, L. R. 14 App. Cas. 698.

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There seems to have been no previous attempt to require the consumer to furnish meters in the way shown in *State ex rel. Hallauer v. Gosnell*. As indicated in the opinion in that case, *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910, 1046, held that a requirement that a water company shall furnish meters to those who desire to have the water used by them measured is not unreasonable.

And *State, Red Star Line S. S. Co. Prosecutors, v. Jersey City*, 45 N. J. L. 246, held that, under the general scheme for supplying Jersey City with water, the city, adopting a meter as a basis for fixing the charge for water in given cases, cannot require the consumer to pay for it under penalty of cutting off his supply.

The custom is certainly not general to place the cost of meters upon consumers, unless an advantage is offered him which will in some measure offset the burden.

A consumer is not entitled to compel the supplying of water, or prevent by injunction the cutting off of water supply, for refusal to pay meter rates charged by the company, instead of house rates, under an ordinance permitting it to apply a meter and charge specified rates in case of large consumption or waste of water, where he admits that the ordinance was regularly adopted, that his use of the water was large, unusual, and wasteful, and that the meter rates charged were the ordinary rates charged other consumers, and were less than the amount fixed by the ordinance. *Sheward v. Citizens' Water Co.* 90 Cal. 635, 27 Pac. 439.

The discretionary power vested by statute in the commissioner of public works to place water meters in buildings occupied as stores, work shops, or manufactories is not unconstitutional, although individual rights may be disturbed thereby, while no provision is made for compensation by such disturbances. *Hill v. Thompson*, 16 Jones & S. 481.

The use of a meter is optional with a water consumer under the franchise of a water company which declares that the water charges shall not exceed a specified rate per thousand gallons, "to be approximated for the several purposes" according to a schedule of rates for specified purposes, and provides that charges for all other purposes shall be fixed by meter measurement at the same rate per thousand; and the last clause, while it requires that a meter shall be used for the measurement of water consumed for other purposes than those enumerated in the schedule, does not prevent its being also used for the purposes mentioned in such schedule. *State ex rel. Lanyon v. Joplin Waterworks*, 52 Mo. App. 312.

Where a city ordinance prescribing water rates, after fixing the rates for domestic use, specified the rates for manufacturing and special uses, and then stated: "All parties have the privilege of furnishing water meters and paying only for water actually used," etc.,—such clause was held to refer only to parties taking water for manufacturing or special uses, and not to users for domestic purposes. *State ex rel. Vits v. Manitowoc Waterworks Co.* 114 Wis. 487, 90 N. W. 442.

Where the contract of a waterworks company with a city provided that certain rates should be charged for the supply of water to dwellings, and water supplied for all other purposes should be metered, the owner of a dwelling, who also takes boarders, is entitled to water at the fixed rates, as the character of his house as a dwelling is not changed, so as to require him to meter the water used, by the fact that he has boarders. *Birmingham Waterworks Co. v. Truss* (Ala.) 33 So. 657.

In the absence of a contract to furnish water

to a consumer for a definite time, the water company may shut off the supply at any time for refusal to comply with a newly adopted rule requiring the placing of meters and payment for water at meter rates. *Sweeny v. Blenville Water Supply Co.* 121 Ala. 454, 25 So. 575.

Under a statute authorizing the commissioner of public works to place a water meter in any building in which water is furnished for business consumption, he is empowered to do so, although the water taken is used by employees, and not for business purposes. *Hill v. Thompson*, 18 Jones & S. 165.

A consumer cannot enjoin the collection of meter rates for a water supply on the ground that such rates are not enforced against other consumers in the class to which he belongs, as required by the city ordinance. *Rock Island v. Wagner*, 45 Ill. App. 444, Affirmed in 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545.

The mere fact that meters have not been placed in all buildings of like kind will not prevent a charge at meter rates for the water used in a particular building. *Parker v. Boston*, 1 Allen, 361.

Under a franchise of a water company authorizing it to make regulations for shutting off water for waste or any wrongful use of the water, it is not confined to an action for damages for such waste, but may ascertain by meter measurement the water used by a consumer, and, if he is wasting it, charge him meter rates for all used over a reasonable amount, and, on his failure to pay the same, shut off the water. *McDaniel v. Springfield Waterworks Co.* 48 Mo. App. 273.

An injunction will be granted to restrain the threatened shutting off of water supply by a water company for refusal of a consumer to pay meter rates for water furnished through meters voluntarily placed on the premises by the company as permitted by ordinance, instead of the family rate fixed by such ordinance, which also provides for the putting in of meters at the consumer's request, in which case he must pay meter rates; as his right to have water furnished at family rates where a meter has not been demanded by him is absolute, and rates fixed by the ordinance for water furnished through meters, applies only where the meter is put in at his request. *Shaw v. San Diego Water Co. (Cal.)* 50 Pac. 698.

Equity will not restrain a municipal corporation from removing a meter and requiring a consumer to pay for water at unmetered rates according to the number of fixtures in the building. *Ladd v. Boston*, 170 Mass. 332, 40 N. E. 171, 49 N. E. 627. The court says an equitable determination of the price to be paid for supplying water does not look alone to the quantity used by each water taker; and it is immaterial that the arrangement of fixtures is such that for the water used the new rate will be twenty times as much as paid by others using a like quantity. The nature of the use and the benefit obtained from it, the number of persons who want it for such use, and the effect of a certain method of determining prices upon the revenues of the city and upon the interests of the property holders, are all to be considered.

4. Discrimination.

The undertaking by a water company to enhance the value of certain estates by furnishing water which is denied to other estates will be an abuse of the franchise. *Lumbard v. Stearns*, 4 Cush. 60.

A city having authority from the legislature to furnish water and establish a sewer system

must do so to all impartially and on reasonable terms; and, where a city charges one using water alone as much as it charges another for the use of both water and sewerage, and charges others who take water from another corporation for sewer service alone as much as it charges its own customers for both water and sewerage, a court of equity will interfere to remedy the wrong. *Mobile v. Blenville Water Supply Co.* 130 Ala. 379, 30 So. 445.

But neither by statute, nor by the common law, are municipal corporations owning and operating waterworks required to observe absolute uniformity of water rates, or forbidden to discriminate between their inhabitants by furnishing the water to one at rates lower than those exacted of others. *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545.

A municipal corporation may charge less relative rates to large consumers of water than to small ones. *Silkman v. Yonkers Water Comrs.* 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612, Affirming 71 Hun, 37, 24 N. Y. Supp. 806.

A requirement that municipal rates of prices shall be uniform, and that contracts with citizens shall be under "general and equal regulations fitting the occasion" at rents fixed by the committee, lodges a reasonable discretion in the committee; and, when without unjust discrimination, a uniform charge upon all of a given class, such as brewers, of 5 cents per thousand gallons may be made, while other patrons are supplied at an annual rental price. *Rieker v. Lancaster*, 7 Pa. Super. Ct. 149, Affirming 14 Lanc. L. Rev. 393.

A water company may charge some of its customers by the hydrant and others by the gallon if the charge is substantially uniform, under a charter providing that all its water rates shall be uniform for the same class of service, and designating special charges for hydrants, but also providing that the charge shall not exceed a certain price per hundred gallons. *Exchange & Bldg. Co. v. Roanoke Gas & Water Co.* 90 Va. 83, 17 S. E. 789.

An ordinance of a municipal corporation changing the water rates charged for the use of city water so as to diminish them to small consumers, and imposing meter rates upon larger consumers, which increases their rates, does not contravene either the rules of the common law or the provisions of the statute, where the rates are neither unreasonably small for the one class, nor unreasonably large for the other class; and the neglect of the city officers to collect from others the full amount of their water rates, as provided by the ordinance, does not discharge one consumer from his obligation to pay the full rates. *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545.

The imposition by a municipal corporation upon consumers of water supplied from the city waterworks of water rent or taxes is not the exercise of its taxing power, and is therefore not controlled by the constitutional limitation which requires taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. No one is compelled to receive or use water so as to be under obligation to pay for it except at his own election, and, when he does receive and use it with knowledge of the rates charged therefor, his obligation to make payment rests upon contract, rather than upon an exercise of the taxing power. *Ibid.*

An ordinance, enacted by a city council, which by the Constitution is declared to be the legislative body for the regulation of rates to be charged for water furnished inhabitants of cities, providing for house rates, to be determined by the size of the house and certain specific uses, and permitting water companies to

apply meters in case of large consumption or waste of water, and charge specified meter rates, giving consumers the right to place meters themselves, is not invalid as establishing two different rates for the same class of consumers, and enabling water companies to discriminate between different consumers of the same class, where it does not show upon its face that rates to be collected where the consumption is determined by meters are different from those collected from persons who are rated by the use to which they apply the water, and the latter rates are not conclusive upon the consumer or water company, but either may demand a measurement, even though such provision for rates without exact measurement, which will only, as a general rule, be equivalent to the rates charged by measurement, may result in an inequality of individual rates. *Sheward v. Citizens' Water Co.* 90 Cal. 635, 27 Pac. 439.

The fact that one price is fixed for the consumer who has a meter, and a different price for one who has none, does not make an ordinance fixing water rates uncertain and indefinite. *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910, 1046.

The use of water meters in some, but not all, of the supply pipes to buildings in a given city does not violate a statutory provision requiring the scale of water rates to be general and uniform, where the meters are used simply to determine whether or not more than 150 gallons per day are being used in violation of a regulation as to the amount of water which may be used. *Frothingham v. Bensen*, 20 Misc. 132, 44 N. Y. Supp. 879.

A by-law exempting government institutions from the privilege of a discount for paying water rents within a certain time is unreasonable and invalid as to such exemptions. *Atty. Gen. v. Toronto*, 23 Can. S. C. 514, Reversing 18 Ont. App. Rep. 622, Affirming 20 Ont. Rep. 19.

While the fixing of water rates is a legislative function, the courts may prevent the exaction of unreasonable charges and discriminations. *Mobile v. Bienville Water Supply Co.* 130 Ala. 379, 30 So. 445.

Certainly in the absence of legislative regulations, they may protect the public against the exaction of oppressive and unreasonable charges, and discrimination, as a municipal water charter is affected with a public use. *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319.

Mandamus may issue against a water company for unjust discrimination in its water rents. *Long v. Springfield Water Co.* 8 Del. Co. Rep. 151.

For water furnished by a public, or quasi-public, corporation, and charged with a public use, the rates established by law must control, and private contracts in respect thereto between the water company and consumers are without validity. *Lanning v. Osborne*, 76 Fed. 319.

A water rate established by an ordinance of a city of 1 cent for 100 gallons to manufacturing establishments which are located on one or more adjoining blocks of a city, consuming over a given amount of water for purely manufacturing purposes, while the same ordinance provides that the general rate for manufacturing purposes shall be 1¼ cents per 100 gallons, is not a violation of the constitutional provision that taxes shall be uniform upon the same class of subjects; a water rate not being a tax levied by the city in its sovereign capacity, but being a toll based on contract made by the taker with the city as proprietor of the waterworks. *St. Louis Brewing Assn. v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911.

A limitation to charter authority to fix water rates which shall produce sufficient revenue to pay the expense of the waterworks department, forbidding exceptional discrimination, will not prevent the giving of a different rate to manufacturers who use a given quantity of water in one plant from that charged to manufacturers using different plants, although the combined use of the water in all of them equals that for which the lower rate is given. *Ibid.*

5. Enforcement.

(a) In general.

A municipal water rate is a tax when the water department forms an administrative department without distinct funds, and its rates are to be collected the same as taxes. *Emaus v. Emaus School Dist.* 12 Pa. Co. Ct. 349.

When the payment of water rents cannot be collected by lien as required by law, as other taxes are collected, because of exemption of the property from sale in such proceedings, the special proceeding being inapplicable, a common-law action will lie. *Berks County v. Reading*, 4 Walk. (Pa.) 13.

Water rents are not a lien upon real estate when their collection is authorized by "levy and sale, in like manner as other taxes, of any property on the premises or elsewhere, belonging to the owner or occupant." *Re Cornelius's Estate*, 13 Pa. Super. Ct. 531.

The legislature may give a lien for water rents upon land, which shall take precedence to that of a prior mortgage executed after the passage of the statute containing such provision. *Provident Inst. for Savings v. Jersey City*, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612.

The legislature may give a municipal corporation a lien upon property for the collection of the water rents; and, unless the manner of fixing them is objectionable as subjecting property to arbitrary assessments to which of necessity the owner must submit whether just or unjust, the regulation is not unconstitutional. *Vreeland v. O'Neil*, 36 N. J. Eq. 399, Affirmed in 37 N. J. Eq. 574.

In *Hennessey v. Volkening*, 30 Abb. N. C. 100, 22 N. Y. Supp. 528, it was held that where water is actually used the water rent, if not paid, may be carried into the tax of the following year, and its payment enforced by lien and sale like ordinary taxes; but that, where the water is not so used, no contract obligation by the owner to pay is to be implied, and the charge becomes nothing more nor less than an involuntary tax imposed without legal notice to the landowner or "due process of law," and therefore unconstitutional. In that case a statute authorizing a charge on all buildings situated on streets in which water pipes run and from which the buildings may be supplied with water was construed to apply only to buildings actually supplied, in order to uphold the statute.

Where water rates are imposed upon property under a statute void because affording no notice to the owner, the legislature may confirm the taxes and levy them on the land upon which they are assessed. *Re Flower*, 55 Hun, 158, 7 N. Y. Supp. 866.

The effect of the statute of 50 & 51 Vict. chap. 21, § 4, making the arrears of water rate a charge on the premises, and making them recoverable from the owner, is to make a purchaser of the freehold liable to a personal action to recover arrears of water rate accruing before the date of the purchase. *East London Waterworks Co. v. Kellerman* [1892] 2 Q. B. 72, 67 L. T. N. S. 319, 56 J. P. 773.

The authority conferred upon a water company to collect water assessments in a summary

manner by a levy and sale under a warrant of the commissioners is repealed or changed by the adoption of a new constitution providing for the manner in which special assessments may be collected, and the general laws passed in pursuance of that provision in the constitution must be followed in such cases; or if the power conferred upon such commissioners to "assess the houses and other buildings" means to give them authority merely to fix upon the amount that should be paid, then, as between the board and the owner, the amount assessed can only be collected in the same manner in which special assessments may be collected. *Springfield Water Comrs. v. Conkling*, 113 Ill. 340.

A municipal corporation cannot enforce water rates against the realty for water furnished to a tenant for years thereof, under the act of 1839 making such rates a lien on the land, which may be enforced by sale. *Carpenter v. Hoboken*, 33 N. J. Eq. 27.

A municipal corporation which makes an erroneous estimate of the water rates to be paid by certain property, and places the amount in the proper book, is not estopped by the fact that a person purchased the property after consulting the book and receiving credit for the amount as recorded, from enforcing the correct higher rate against the property. *Reld v. New York*, 56 Hun, 156, 9 N. Y. Supp. 697.

A municipal corporation under whose direction a claim against a hospital for laying water pipes in front of it is satisfied of record cannot, after the hospital has conveyed the property to a third person, insist on his paying the assessment as a condition to receiving a permit to connect his property with the street pipes. *Philadelphia v. Matchett*, 116 Pa. 103, 8 Atl. 854.

A purchaser of land takes it subject to a prior statutory lien for nonpayment of rates for water supplied to the premises by the municipality. *Vreeland v. O'Neil*, 36 N. J. Eq. 399, Affirmed in 37 N. J. Eq. 374.

When the claim of a municipal corporation for water rent is not a lien on the realty, it is not discharged or constructively paid by a sheriff's sale thereof. *Glard Life Ins. & T. Co. v. Philadelphia*, 12 Phila. 293.

The purchaser at sheriff's sale of realty cannot assume that arrears of water rent have been paid from the fact that water is still supplied it, as would be true if the ordinances were strictly enforced, as the facts could be determined by inquiry at the waterworks office. *Ibid.*

A priority of lien for water assessments is lost by a municipal corporation by a sheriff's sale of the land for more than the amount thereof, although the assessments were not paid. *Philadelphia v. Cooke*, 30 Pa. 56.

A municipal corporation has no priority of lien for water supplied after any rents are due and unpaid under a statutory provision that in such case the water shall be shut off until arrears with interest thereon shall be fully paid. *Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills Co.* 58 N. J. Eq. 59, 43 Atl. 418.

A municipal corporation cannot avail itself of a priority of lien for water rates incurred after the premises have been shut off for arrears in payment, but in such a way that it was readily turned on again by the tenant without the city's consent. *Ibid.*

A sale of realty for unpaid water rates is void if made after the expiration of the time limited by law for the continuance of the lien. *Field v. West Orange Twp.* 39 N. J. Eq. 60.

(b) *By stopping supply.*

A water company has the right to shut off 61 L. R. A.

the water from its consumer whenever the consumer refuses to pay for the water supply. *Sheward v. Citizens' Water Co.* 90 Cal. 635, 27 Pac. 439.

But, under a statute imposing a penalty on a water company for failure to furnish a supply to anyone who has paid or tendered the rates, the company is not entitled to withhold a supply to an occupant of premises because of arrearages due from a former occupant. *Sheffield Waterworks Co. v. Wilkinson*, L. R. 4 C. P. Div. 411, 48 L. J. M. C. N. S. 145.

A water company which turned off the water without notice to a tenant, in compliance with the landlord's demand after his payment of the water rate which he had agreed to pay, and after he had served notice upon the tenant to quit, which the tenant had refused to do, did not act in contravention of the statute prohibiting the cutting off of the water supply by a water company for nonpayment of the rate, and providing for notice to a tenant upon nonpayment of the water rate by a landlord, before taking steps to collect the same. *Chelsea Waterworks Co. v. Paulet*, 52 J. P. 724.

The remedy by lien to be filed is only cumulative, and an existing ordinance is not invalid which requires the payment of all arrears of rent for water supplied to a particular lot before it will again be turned on, after the passage of a law providing for the remedy by lien, but also authorizing the city to provide by ordinance for the penalties for nonpayment of rates. *Altoona v. Shellenberger*, 6 Pa. Dist. R. 344.

A water company cannot justify refusal to supply water to a consumer who has not paid for the use of water in a bath, where the bath is not connected with the supply pipes, merely because it has an outlet pipe so as to be capable of use. *Sheffield Waterworks Co. v. Carter*, L. R. 8 Q. B. Div. 645, 51 L. J. M. C. N. S. 97, 30 Week. Rep. 889, 46 J. P. 548.

The courts will refuse to restrain a municipal corporation from shutting off water from a customer because of nonpayment of rates because of an alleged overcharge of \$8.77, in view of the small amount involved, and the large interests of the city in operating the system, and the difficulties that might follow if it is shown that the controversy is ill advised or unfounded, in a suit to recover the overcharge. *McGregor v. Case*, 80 Minn. 214, 83 N. W. 140.

Until after there has been a determination at law of the question involved, a court of equity will not compel a water company to supply an inhabitant, or restrain it from discontinuing such supply, although he tender a reasonable price, under a statute authorizing the company to supply water to inhabitants at such terms as they shall mutually agree upon, and declaring that the company shall not charge unreasonable rates. *Weale v. West Middlesex Waterworks*, 1 Jac. & W. 358.

An injunction to prevent a water company from cutting off a consumer's supply will not be denied on the ground that the effect of the writ will be to compel the company to continue to furnish water under its contract. *Sedalia Brewing Co. v. Sedalia Waterworks Co.* 34 Mo. App. 49.

An injunction will lie to restrain a water company from shutting off the entire water supply of a brewery in violation of a contract which it had assumed, the effect of which would result in great damages to the brewery. *Horsky v. Helena Consol. Water Co.* 13 Mont. 229, 33 Pac. 689.

A preliminary injunction restraining a water company from cutting off the supply of a consumer will be continued during the action, where the only issue is as to the amount due

under the contract; but the plaintiff will be required to give a bond conditioned for the payment of any amount found to be due under the contract. *Van Nest Land & Improv. Co. v. New York & W. Water Co.* 7 App. Div. 295, 40 N. Y. Supp. 212.

Upon the failure of a company incorporated to supply a city with water to furnish a sufficient supply according to the terms of the contract with a consumer, for which reason the latter refuses to pay a bill for such water, he may enjoin the company *pendente lite* from cutting off his supply for such nonpayment as authorized by its rules. *McEntee v. Kingston Water Co.* 165 N. Y. 27, 58 N. E. 785.

A preliminary injunction will not be issued to restrain a municipal corporation from turning off water from a mill when the rights of the parties under an alleged contract are in doubt. *Shroder's Appeal*, 1 W. N. C. 528.

A court of equity will not restrain a municipal corporation from shutting off water because of nonpayment of alleged unlawful water rents on grounds of irreparable damage, since the consumer can pay the amount demanded, and sue in law to recover back the amount improperly demanded. *Penn Iron Co. v. Lancaster*, 17 Lanc. L. Rev. 161, Affirmed in 15 Pa. Super. Ct. 556.

6. Other matters.

The payment of the prescribed charges for water services entitles a consumer only to so much water as is reasonably necessary for all domestic uses, and such consumer is liable to pay its reasonable value for water permitted to go to waste. *Capital City Water Co. v. Carey*, 99 Ala. 539, 13 So. 276.

A presentation of bills for excessive use of water, on which the regulations of the water department are printed, and their retention by the consumer, raise an implied contract by him to pay for the excessive use at the rate specified on the printed bills. *Brass v. Rathbone*, 153 N. Y. 435, 47 N. E. 905, Affirming 8 App. Div. 78, 40 N. Y. Supp. 466.

The Croton aqueduct board has the right to fix extra rates to be paid for the use of unusual quantities of water in the city of New York, and to cut off the supply for nonpayment of the rate charged. *Treadwell v. VanSchaick*, 30 Barb. 444.

Where a statute makes the owner of a house liable to pay the water rate, instead of the occupier, such owner is a person supplied with water within the meaning of a statute subjecting such a person to a penalty for suffering the water so supplied to be wasted. *Brock v. Harrison* [1899] 1 Q. B. 958, 68 L. J. Q. B. N. S. 730.

A tender of water rates for the whole of a building according to the rates fixed by contract for water supplied by measurement is sufficient, where part of the building is used as a dwelling, for which the contract fixes a different rate. *Smith v. Birmingham Waterworks Co.* 104 Ala. 315, 16 So. 123.

Equity cannot restrain the collection of an unlawful water rent, as the complainant has an adequate remedy at law. *Kershaw v. Philadelphia Water Department*, 15 W. N. C. 415.

Excessive water charges paid a municipality may be recovered, where they were paid without first making a tender of the exact amount due, if it was apparent from the language used in demanding the payment that such a tender would have been refused. *Westlake v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4.

Excessive water charges paid to a municipality may be recovered where they were paid 61 L. R. A.

under a threat to shut off the supply of water if they were not paid. *Ibid.*

The payment of a water rate to a city is compulsory, and entitles the party so paying to recover back any excess paid, when the city, under provisions of an ordinance, threatens to turn off the water from a manufactory wholly dependent upon the water of the city in its operations unless the charges exacted by the city are paid. *St. Louis Brewing Asso. v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911.

One having many employees at work in his building acts under duress in paying an exorbitant water rate to prevent the supply being shut off from the building where no other supply is obtainable. *Panton v. Duluth Gas & Water Co.* 50 Minn. 175, 52 N. W. 527.

The requirement of the payment of arrears in water charges by one in possession of a building under a charter provision giving the city authority to shut off the water for failure to pay therefor and to refuse to again supply such buildings, place, or premises with water until the arrears are paid, although such arrears had accumulated while the premises were occupied by a former tenant, is lawful; and the money so paid cannot be recovered from the city, although paid under protest and solely for the purpose of securing water to escape punishment for failure to keep a water closet properly flushed, as required by an ordinance, which, however, left the occupant free to obtain a supply for that purpose from any source he pleased. *Atlanta v. Burton*, 90 Ga. 486, 16 S. E. 214.

Money is not paid under duress when, under a municipal regulation, a purchaser of land is required to pay the water assessment charged against it prior to his purchase, before he will be accepted as a water taker. *Philadelphia v. Cooke*, 30 Pa. 56.

Where water rates, past due, were paid by the lessor in the lessee's name, a suit cannot be maintained by said lessee to recover money so paid. *Randolph v. Bar Harbor Water Co.* 87 Me. 126, 32 Atl. 790.

VIII. Rights and duties of municipality.

a. In general.

When a municipal corporation enters into the business of supplying water to its inhabitants, it in a large measure lays aside its governmental character and assumes that of a business corporation. It may have some advantage in the fact that its public functions and business affairs are administered by the same officials, so that its acts are *prima facie* clothed with authority. But for the most part the decisions involving the rights of water companies, collected in subd. VI. *supra*, are applicable to them.

As indicated in subd. I. a, 1, the weight of authority is that legislative authority is necessary to permit them to undertake such a venture.

The business of furnishing the inhabitants of a city with water by means of permanent waterworks is public in its nature, upon which a public interest is impressed; but, when a municipal corporation erects and operates waterworks, it does so in the exercise of its private, and not its governmental, functions, and stands upon the same footing as a private individual upon whom a franchise for that purpose has been conferred; and the fact that such municipal corporation erected waterworks, not for purposes of speculation or profit, or of deriving a revenue for a sale of water, but only for the purpose of supplying water for the use of itself and its inhabitants at cost, does not change its character from a private to a public nature, so as to render it unlawful for it to change its

policy by increasing the water rates above the actual cost of maintaining and operating the works. At most, it would go to show the motive upon which the city acted, and has no bearing upon its right to change its policy whenever it sees fit to do so. *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545.

Under a charter providing that, when the city becomes the "owner" of any water supply, a water department and a water fund shall be established, the expense of operation and salaries of commissioners being payable by payment of monthly rental, the word "owner" is to be construed, not in the sense that the city must be the holder of the title, but that it shall have the control of the water supply, and priority of payment of the expenses of a plant operated under a void lease is not illegal as against a claim for the reasonable value of the use of the plant, since both such payments rest upon the same ground. *Higgins v. San Diego*, 131 Cal. 294, 63 Pac. 470.

A municipal corporation owns and may use water from the municipal waterworks to sprinkle streets and lay sewers without consent first obtained of a board of water commissioners which was created by the legislature to construct, maintain, and operate them, but without interest or ownership therein. *Sewickley Waterworks v. Sewickley*, 159 Pa. 194, 28 Atl. 169.

Water need not be furnished without pay, by an incorporated board of water commissioners having no source of revenue for the running expenses of the waterworks except from water rates, to a house of correction which is under the control for the most part of a board of inspectors, and not of the city council, although the city is obliged to pay the expenses so far as they exceed the earnings of the institution; since any such burden should be laid upon the whole body of taxpayers of the city, and not upon those only who are private consumers of water. *Detroit v. Detroit Water Comrs.* 108 Mich. 494, 31 L. R. A. 463, 66 N. W. 377.

Water commissioners cannot charge water rents against the park commissioners of the same municipality for supplying water to the fountains established by the latter by direction of law, no express statutory authority for such charge being shown, the city and its departments taking its supply free, not for its or their special benefit, but for that of its citizens. *Detroit Water Comrs. v. Parks & Boulevards Comrs.* 126 Mich. 459, 85 N. W. 1132.

A statute requiring the water board to provide fire hydrants when required by the council or board of fire commissioners does not indicate that such hydrants must be used only for fire purposes, nor that the use of water for any public purposes is thereby curtailed. *Detroit Water Comrs. v. Detroit Citizens' Street R. Co.* (Mich.) 9 Det. L. N. 326, 91 N. W. 171.

A city authorized to construct waterworks for fire and other purposes, and to establish a water precinct within which taxes may be levied to defray the necessary expense, will be enjoined from paying to the board of water commissioners, in payment for the use of hydrants within the precinct, money collected by taxation upon property without such limits. *Brown v. Concord*, 56 N. H. 375.

A city has the power to levy a special tax to meet back water rents due a water company, occasioned by its failure to levy such taxes for preceding years in excess of 3 mills on the dollar, provided the levy is not in excess of that rate for each year for which no levy was made, under a proviso in the statute conferring the power to make such levies, forbidding the levy of a special tax for water rent "in excess of 3 61 L. R. A.

mills on the dollar for any one year." *Bowen v. West*, 10 Colo. App. 322, 50 Pac. 1085.

The fact that a city has established water rates, and is empowered to collect such rates from consumers as taxes are collected, does not affect its right to recover water clandestinely taken from its mains and converted, in an action of conversion. *Milwaukee v. Herman Zoehrlaut Leather Co.* 114 Wis. 276, 90 N. W. 187.

b. Regulations.

Where a city requires unreasonable regulations as a condition to furnishing water to its inhabitants, and also requires that, if the regulations are not complied with, the consumer must make a contract with the city, the price of the water to be fixed by the city council not less than double that which is charged other consumers, an injunction will lie to restrain the city authorities from discontinuing the supply of water to an inhabitant solely on account of his refusal to enter into such contract, as the remedy at law is not adequate. *Dittmar v. New Braunfels*, 20 Tex. Civ. App. 293, 48 S. W. 1114.

A municipal corporation which, under its charter has power to establish and maintain a municipal waterworks system, may order all work done necessary for connecting the city's mains with the pipes of water customers, or for protecting the city's property from injury or destruction; but cannot lawfully engage in a general plumbing business, buying supplies and materials, selling them to citizens, and doing the work of placing them on their premises. *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

A regulation of a board of public works of a city, having full charge of the waterworks thereof, and the power to regulate and control the manner of using the streets of the city for the laying down of waterpipes, requiring citizens desiring to use the water of the city to lay down at their own expense the necessary service pipe from their lots to the main pipes in the street, is a just and reasonable one, founded upon the same principle upon which special assessments are levied for special benefits. *Prindiville v. Jackson*, 79 Ill. 337.

A city operating waterworks may require consumers to enter into contracts to comply with reasonable regulations for the use of water, but cannot require agreements absolving it from duties imposed by law, or releasing it from liability for negligence; and a regulation requiring the consumer to release the city from its obligation to furnish water of proper quality and sufficient quantity, or to supply water in case of fire, is unreasonable, and will not justify cutting off such consumer's supply upon his refusal to make such contract. *Dittmar v. New Braunfels*, 20 Tex. Civ. App. 293, 48 S. W. 1114.

The board of water commissioners of a municipality, invested with the control and management of its waterworks, has power to require the exclusive use by consumers of a particular kind of hydrant or cock which the board considers best adapted to promote convenience of supply with the least possible waste. *State ex rel. White v. Goodfellow*, 1 Mo. App. 495.

Where a city waterworks company makes an unreasonable regulation which requires the consumer of water to release the city from its obligation to furnish water of proper quality and sufficient quantity, or supply water in case of fire, the consumer cannot be required, as an alternative to such regulation, to enter into a special contract at rates to be fixed by the city council not less than double those charged to other consumers in the same condition and similarly situated, it appearing that the supply un-

der the control of the city is of good quality and adequate in quantity. *Dittmar v. New Braunfels*, 20 Tex. Civ. App. 293, 48 S. W. 1114.

A municipal corporation may be given power to enforce its rules as to use of water by citizens by cutting off the supply. *Brass v. Rathbone*, 153 N. Y. 435, 47 N. E. 905.

A regulation by a city or board of water commissioners reserving the right of shutting off any water taker who does not pay his rates as due is unreasonable so far as it contemplates the shutting off of a taker who, since a bill became due and was disputed, has paid current rates and been accepted as a patron. *Wood v. Auburn*, 87 Me. 287, 29 L. R. A. 376, 32 Atl. 906.

A municipal corporation which has undertaken to supply its inhabitants with water at established rates, and received payment from a householder for a year's supply in advance, cannot shut off such supply because of arrears due from his predecessor in title, and will be liable for so doing in an action at law. *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, 10 L. R. A. 122, 26 N. E. 97.

Under an ordinance providing that if water rent shall remain unpaid on a certain date the connection to such premises shall be detached, suit instituted for the rent, and water shall not again be supplied to the premises, except upon payment of all arrears of water rent, the owner of the premises is not relieved by neglect of the municipal officers to carry it out strictly. They are accountable to the city. *Girard Life Ins. & T. Co. v. Philadelphia*, 12 Phila. 293.

A municipal corporation which supplies its citizens with water may provide by ordinance that water will not be furnished to consumers until all indebtedness for previous supplies shall be paid. *Jones v. Nashville (Tenn.)* 72 S. W. 985.

The purchaser of land at sheriff's sale may be required by the municipal corporation to pay arrears of rent for water supplied to the premises, together with the prescribed penalty, before it will turn the water on again, when the municipal ordinance, requiring the water to be shut off after a lesser period if rents were in arrears, was merely directory, the purchaser having the privilege to determine the facts before purchase. *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 393.

The rule in *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 393, applies to the by-laws of a private water corporation, as there is no distinction between the two cases; since a municipal corporation which supplies water does so in its capacity of a private corporation, and not in the exercise of powers of local sovereignty. *Brumm v. Pottsville Water Co. (Pa.)* 22 W. N. C. 137, 12 Atl. 855.

An owner of two houses supplied with water through one service pipe, and for whose failure to pay the special water-meter tax the water has been shut off by the city in conformity with its authority, is not entitled to make connection with the water main for the separate supply of one of the houses upon offering to pay the special water tax against it, where it is impossible to subdivide the bill on account of there being but one meter and one supply pipe for both houses. *Frothingham v. Bensen*, 20 Misc. 132, 44 N. Y. Supp. 879.

A municipal corporation may require payment of arrears of water rent incurred by a former tenant with any penalty that may be due, and the expenses of turning off, before it will again turn on the water. *Altoona v. Shellenberger*, 6 Pa. Dist. R. 544.

A charter giving the board of water commissioners power, on nonpayment of water charges, to shut off water from, and to refuse to furnish

it again to, the "building, place, or premises" until the arrears are paid, contemplating the furnishing of the water to the property, and not to the individuals, creating a charge thereon for such arrears, and requiring the payment of such charge by an occupant of the premises before water will be supplied, although the arrears accrued during the occupancy of a former tenant, — is not unfair or unjust as requiring such occupant to pay the debt of a former tenant. *Atlanta v. Burton*, 90 Ga. 486, 16 S. E. 214.

A municipal corporation cannot refuse to supply premises with water because the tenant thereof has not paid for water used while he was a tenant of another's premises. *Dayton v. Quigley*, 29 N. J. Eq. 77.

A municipality cannot refuse to furnish water for the use of locomotive engines of a railroad operated by receivers because of nonpayment for water supplied to the railroad company prior to the appointment of the receivers, as it is unreasonable for it to refuse to furnish water except on conditions which it seeks to impose, as in such a case the municipality is in controversy with the court, which will secure to it its full rights, as far as practicable, in another manner. *Coe v. New Jersey Midland R. Co.* 30 N. J. Eq. 440.

A statute requiring water to be furnished on every floor of a tenement house is a valid exercise of the police power with respect to health. *New York Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 418, 39 N. E. 829.

c. Rates.

There is nothing illegal or reprehensible in a municipal corporation so operating the water-works as to make a profit thereon. *Rieker v. Lancaster*, 7 Pa. Super. Ct. 149, Affirming 14 Lanc. L. Rev. 393.

The question of the power of a municipal corporation so to charge for water as to make a profit can only be raised by one who is charged with such excessive rates, or who is refused water unless he pays such excessive rates. The mere fact that it charges them in no way determines its power to create local assessment districts for the purpose of laying water mains. *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612.

A general power in a municipal corporation to fix water rents must be exercised in a reasonable manner. *Atty. Gen. v. Toronto*, 23 Can. S. C. 514, Reversing 18 Ont. App. Rep. 622, Affirming 20 Ont. Rep. 19.

Rents for water are not taxable, so that the persons against whom they are charged are entitled to notice and opportunity to be heard before they are established. *Silkman v. Yonkers Water Comrs.* 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612, Affirming 71 Hun, 37, 24 N. Y. Supp. 806.

Owners of factory property are entitled to notice of an assessment thereon for water rates before a valid assessment can be made. *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564.

A statute authorizing cities "to tax, assess, and collect from the inhabitants thereof such tax, rent, or rate for the use and benefit of water used and supplied to them," relates to moneys due the city from those using the water by virtue of the contractual relation that exists between them, and not to any mode of taxation, strictly speaking. *Lemont v. Jenks*, 197 Ill. 363, 64 N. E. 362.

An ordinance of a municipal corporation providing "that the commissioner of public works be, and he is hereby, authorized and empowered to remit and rebate the water tax or rates assessed against property used and occupied wholly for charitable and educational purposes" is not imperative that the commissioner shall remit or

rebathe the rates in any case; but he is only authorized and empowered to do so in the exercise of his judgment and discretion; and such municipality cannot be compelled, by virtue of such ordinance, to furnish water free to a county hospital situated within its limits. *Cook County v. Chicago*, 103 Ill. 646.

Water commissioners may, in the exercise of their power to fix such water rates as they deem equitable, furnish water free to the various city departments and to charitable or to educational institutions in which the city is more or less interested, at a special rate. *Preston v. Detroit Water Comrs.* 117 Mich. 589, 76 N. W. 92.

A municipal corporation cannot collect rates for water used in the erection of a schoolhouse when the school corporation is by law exempt from payment of water charges. *Emaus v. Emaus School Dist.* 12 Pa. Co. Ct. 349.

A provision by a statute prohibiting waterworks trustees from making any charges for water furnished to hospitals and other public institutions is not a violation of a constitutional provision for uniformity of taxation, where the expenses of the works are provided for by way of assessment on the tenements and premises supplied with water, rather than by tax; and an injunction will not be granted to restrain a voluntary furnishing thereof by such trustees to a state hospital, such provision applying as well to state institutions as to similar institutions owned by the city. *Gallipolis v. Waterworks Trustees*, 2 Ohio N. P. 161. The judge further says that he considers the enactment in harmony with other legislative acts exempting institutions of purely public charity, and public property used exclusively for public purposes, from taxation. The point was also presented that it was a violation of the Constitutional provision prohibiting the taking of private property for such use without just compensation; but the court considered that, inasmuch as it was not an action to compel the trustees of the waterworks to furnish water to the institution, but an action by the city to restrain the voluntary furnishing thereof by the trustees, it was not necessary to pass upon it.

The assessment of water rates to tenants in some instances, under an express agreement with the owner of the premises that he would pay if the tenants were delinquent, when this was done by the superintendent without any express authority from the board of commissioners, does not bind the board to deal with tenants instead of owners of buildings. *Kelsey v. Marquette Fire & Water Comrs.* 113 Mich. 215, 37 L. R. A. 675, 71 N. W. 589.

d. Lease or sale of plant.

Waterworks belonging to a city are property held in trust for a public use, and cannot be sold or disposed of by the city unless especially authorized by the legislature. *Lake County Water & Light Co. v. Walsh (Ind.)* 65 N. E. 530.

A municipal corporation is not authorized to lease or otherwise to transfer its waterworks system, or its water right used in supplying its inhabitants with water, to a private individual or corporation, under a provision in its charter authorizing it to lease, convey, and dispose of property, real and personal, for the benefit of the city even though such transferee may be required by the contract to continue the water supply upon reasonable compensation; as that charter provision does not apply to property dedicated to public use, a sale of which can only be made by virtue of express statutory power. *Ogden City v. Bear Lake & River Waterworks & Irrig. Co.* 16 Utah, 440, 41 L. R. A. 305, 52 Pac. 697.

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It seems, that if waterworks of a city are to be considered as part of the realty because attached as fixtures to the freehold, then, as such realty is necessarily held and owned by the city for public use, it cannot by contract lawfully surrender its control over such property to any individual or corporation; and a court will not, therefore, render a judgment against a city for the recovery of waterworks and the control thereof. *Texas Water & Gas Co. v. Cleburne*, 1 Tex. Civ. App. 580, 21 S. W. 393.

Where a city leases its water plant and source of supply which it enjoys under an act of Parliament, an assignee of the lessee is liable to the city on the lessee's covenant to pay rent until such time as he assigns the lease to another. *London v. Richmond, Prec. in Ch.* 156, 2 Vern. 421, Affirmed in 1 Bro. P. C. 516.

A city having made an invalid lease of its waterworks, and induced the lessee to make valuable improvements, cannot equitably maintain an action of ejectment against the lessee without making remuneration for the improvements. *Litchfield v. Litchfield Water Supply Co.* 95 Ill. App. 647.

Where the city of London, after making a contract with a person to construct a pipe line of dimensions sufficient to convey to the city a stated amount of water from its springs, and before the completion of the pipes leased the springs and water plant at a stipulated annual rental, which subsequently the lessee and his assigns failed to pay, the facts that the pipe line, as completed, was sufficient in capacity, and part of the water was claimed by a third person, will not prevent equity from decreeing the payment of the full amount of the rent, as the fact that the bargain was a losing one will not prevent equity from enforcing it in the absence of fraud. *London v. Richmond, Prec. in Ch.* 156, 2 Vern. 421, Affirmed in 1 Bro. P. C. 516.

A lease of waterworks, made by a city for the term of thirty years in consideration of a yearly rental of \$1,500 and the cancelation of large claims against the city, is not unreasonable, where the company is further to furnish water for municipal purposes free of charge, and to extend its pipes as fast as required for domestic uses. *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720.

Reservation by a city in a lease of its waterworks of the right to regulate rates provided they be not reduced below the then existing rates must, if valid, be deemed to be a limitation upon the right of the city, as a municipality, to regulate water rates, and not a mere granting back by the lessees of the right of the city in its proprietary capacity only. *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

A contract whereby a city leased its waterworks for the term of fifteen years to one who agreed to maintain the plant in good working order and put the pumps in operation in case of fire, receiving his compensation solely from private persons whom he might supply with water, may be rescinded by a court of equity, where the lessee, through negligence or drunkenness, failed to care for the machinery, or furnish water in case of fire. *Mahon v. Columbus*, 58 Miss. 310, 38 Am. Rep. 327.

In case of a conditional sale by a municipal corporation of mains belonging to it to one who undertakes to furnish a municipal water supply, it may retake possession of the mains upon failure to comply with the contract. *Farmers' Loan & T. Co. v. Galestburg*, 133 U. S. 156, 33 L. ed. 573, 10 Sup. Ct. Rep. 316.

The waterworks of a city, constructed and maintained by the municipality at the expense of its citizens and for the public use, being held

by such municipality charged with a public trust, such trust, and the duty of the municipality under it, cannot be discharged and devolved upon another by a sale by the city's common council, without legislative authority, of such water works. *Huron Waterworks Co. v. Liuron*, 7 S. D. 9, 30 L. R. A. 848, 62 N. W. 975.

Upon such attempted sale by the city council, the purchasers paid into the city treasury the sum of \$45,000 as the purchase price of said waterworks, but it was not found that said purchase money was appropriated by the common council to any lawful purpose of the corporation, or was in any manner used by the corporation. It was held that the payment of the consideration into the city treasury was unauthorized, and that its receipt by the city treasurer did not estop the city from recovering possession of its waterworks system without repayment of the sum so paid into the city treasury. *Ibid.*

H. P. F.

Omer H. MENDENHALL, by Next Friend,
Plff. in Err.,
v.

ATCHISON, TOPEKA, & SANTA FE RAIL-
WAY COMPANY.

(.....Kan.....)

- *1. One who pays a brakeman on a passenger train a sum of money to be carried to a certain point, and is told to ride upon the platform of the baggage car, and get off the train at all stops, and keep out of sight, and who follows such instructions, is not a passenger.
- *2. Allegations that a minor, fifteen years of age, did not know that he was doing wrong in making such an arrangement as that referred to in the preceding paragraph, and did not know that he was exposing himself to any great danger in following such directions, are not sufficient to take the case out of the rule stated, or to relieve the minor from responsibility for his own negligence.

(March 7, 1903.)

ERROR to the District Court for Barton County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Nimocks, Swartz, & Hess, for plaintiff in error:

The question whether the boy was of sufficient intelligence, natural capacity, foresight, and judgment to be guilty of contributory negligence is for the jury.

Biggs v. Consolidated Barb-Wire Co. 60 Kan. 217, 44 L. R. A. 655, 56 Pac. 4; *Atchison, T. & S. F. R. Co. v. Potter*, 60 Kan.

*Headnotes by MASON, J.

NOTE.—As to status of person riding unlawfully on train by permission of employee, see also, in this series, *Wagner v. Missouri P. R. Co.* (Mo.) 3 L. R. A. 156; *Whitehead v. St. Louis, I. M. & S. R. Co.* (Mo.) 6 L. R. A. 409; *McVeety v. St. Paul, M. & M. R. Co.* (Minn.) 11 L. R. A. 174; *Wilson v. Chicago, B. & Q. R.* 61 L. R. A.

808, 58 Pac. 471; *Price v. Atchison Water Co.* 58 Kan. 551, 50 Pac. 450; *Kansas P. R. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Atchison, T. & S. F. R. Co. v. McFarland*, 2 Kan. App. 662, 43 Pac. 788.

The act of the servant and employee of the company was gross neglect of duty in permitting the infant to be in an exceedingly dangerous position, having cause to know that the position and the carrying out of his instructions would be dangerous to his life and limb, and, in fact, amounted to wantonness and wilfulness.

Defendant in error was in duty bound to protect him, but failed to do so.

Handley v. Missouri P. R. Co. 61 Kan. 237, 59 Pac. 271.

Defendant in error is not relieved from liability because its servant did not do his duty, and acted in a wrongful manner, and was negligent.

Kansas City, Ft. S. & G. R. Co. v. Kelly, 30 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172; *Ramsden v. Boston & A. R. Co.* 104 Mass. 117, 6 Am. Rep. 200; *Higgins v. Watervliet Turnp. & R. Co.* 46 N. Y. 23, 7 Am. Rep. 293; *Northwestern R. Co. v. Hack*, 66 Ill. 238; *Kline v. Central P. R. Co.* 37 Cal. 400, 99 Am. Dec. 282; *Louisville, E. & St. L. Consol. R. Co. v. Lohges*, 6 Ind. App. 288, 33 N. E. 449; *Cleveland, C. C. & St. L. R. Co. v. Adair*, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822; *Louisville, N. A. & C. R. Co. v. Creek*, 14 L. R. A. 737, and notes, 130 Ind. 139, 29 N. E. 481; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451; *Smith v. Louisville & N. R. Co.* 95 Ky. 11, 22 L. R. A. 72, 23 S. W. 652.

The master is responsible for the acts, either of commission or omission, of his servant.

Pittsburgh, C. & St. L. R. Co. v. Shields, 47 Ohio St. 387, 8 L. R. A. 464, 24 N. E. 658; *Ritchie v. Waller*, 27 L. R. A. 161, and extensive notes, 63 Conn. 155, 28 Atl. 29; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269; *Cooley, Torts*, 674; *Bottoms v. Seaboard & R. R. Co.* 25 L. R. A. 784, and note, 114 N. C. 699, 19 S. E. 730; *Chicago City R. Co. v. Robinson*, 4 L. R. A. 126, and notes, 127 Ill. 9, 18 N. E. 772; *Penso v. McCormick*, 125 Ind. 116, 9 L. R. A. 313, 25 N. E. 156; *Robinson v. Oregon Short Line & U. N. R. Co.* 7 Utah, 493, 13 L. R. A. 765, 27 Pac. 689; *Ft. Worth & D. C. R. Co. v. Robertson* (Tex.) 14 L. R. A. 781, 16 S. W. 1093.

The direct cause of the accident was the neglect of the company's employee in permitting the infant to occupy so dangerous a place, but the instructions given and negligent manner in which the company's serv-

Co. (Neb.) 25 L. R. A. 79; *Louisville & N. R. Co. v. Halley* (Tenn.) 27 L. R. A. 549; *Condran v. Chicago, M. & St. P. R. Co.* (C. C. App. 8th C.) 28 L. R. A. 749; *Louisville & N. R. Co. v. Weaver* (Ky.) 50 L. R. A. 381; and *Purple v. Union P. R. Co.* (C. C. App. 8th C.) 57 L. R. A. 700.

ants left the semaphore board where the accident took place also contributed to it; and these two facts, combined, make a case of negligence on the part of the company,—such negligence as entitles the plaintiff to recover, and excludes contributory negligence on the part of the infant.

Indianapolis, P. & C. R. Co. v. Pitzer, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70.

An infant, though a trespasser, may recover for personal injuries if the company knew its dangerous position, or had cause to know it.

Brill v. Eddy, 115 Mo. 596, 22 S. W. 488; *Smith v. Louisville & N. R. Co.* 95 Ky. 11, 22 L. R. A. 72, 23 S. W. 652; *Haehl v. Wabash R. Co.* 119 Mo. 325, 24 S. W. 737; *Thompson v. Yazoo & M. Valley R. Co.* 72 Miss. 715, 17 So. 229; *Louisville & N. R. Co. v. Popp*, 96 Ky. 99, 27 S. W. 992; *Missouri, K. & T. R. Co. v. Rodgers* (Tex. Civ. App.) 35 S. W. 412; *Texas & P. R. Co. v. Brown*, 11 Tex. Civ. App. 503, 33 S. W. 146; *Illinois C. R. Co. v. King*, 77 Ill. App. 581; *Galveston, H. & S. A. R. Co. v. Zantlinger* (Tex. Civ. App.) 49 S. W. 677; *Underwood v. Western & A. R. Co.* 105 Ga. 48, 31 S. E. 123; *Littlejohn v. Fitchburg R. Co.* 148 Mass. 478, 2 L. R. A. 502, 20 N. E. 103; *Thompson v. Missouri, K. & T. R. Co.* 11 Tex. Civ. App. 307, 32 S. W. 191.

Messrs. A. A. Hurd and O. J. Wood, for defendant in error:

The facts show that plaintiff possessed that degree of intelligence which made him accountable for his acts.

Bess v. Atchison, T. & S. F. R. Co. 62 Kan. 302, 62 Pac. 996; *Wilson v. Atchison, T. & S. F. R. Co.* (Kan.) 71 Pac. 282.

Plaintiff was a conscious trespasser upon the train. No recovery can be had in such case unless there was an averment, sustained by proof, that the trainmen knew of the perilous position in which he was, and then, with that knowledge, wilfully and wantonly injured him.

McNamara v. Great Northern R. Co. 61 Minn. 296, 63 N. W. 726; *Janny v. Great Northern R. Co.* 63 Minn. 380, 65 N. W. 450; *Texas & P. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118; *Keating v. Michigan C. R. Co.* 97 Mich. 154, 56 N. W. 346; *Benedict v. Minneapolis & St. L. R. Co.* 86 Minn. 224, 57 L. R. A. 639, 90 N. W. 360; *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641.

The plaintiff and the brakeman whom he had bribed were co-conspirators against the railroad company, and notice to the brakeman would not be notice to the company.

Brevig v. Chicago, St. P. M. & O. R. Co. 64 Minn. 168, 66 N. W. 401.

The court committed no error in sustaining the demurrer to the amended petition.

Bess v. Atchison, T. & S. F. R. Co. 62 Kan. 299, 62 Pac. 996; *Handley v. Missouri P. R. Co.* 61 Kan. 237, 59 Pac. 271; *Wilson v. Atchison, T. & S. F. R. Co.* (Kan.) 71 Pac. 282; *Chicago, K. & N. R. Co. v. Parkinson*, 56 Kan. 652, 44 Pac. 615; *Missouri P. R. Co. v. Cooper*, 57 Kan. 185, 45 Pac. 587; 61 L. R. A.

Tennis v. Interstate Consol. Rapid Transit R. Co. 45 Kan. 503, 25 Pac. 876; *Atchison, T. & S. F. R. Co. v. Todd*, 54 Kan. 551, 38 Pac. 804; *Butler v. Pittsburgh & B. R. Co.* 139 Pa. 195, 21 Atl. 500; *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641; *St. Louis S. W. R. Co. v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 625; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L. R. A. 326, 23 Atl. 590; *Louisville & N. R. Co. v. Ricketts*, 93 Ky. 116, 19 S. W. 182; *Woolsey v. Chicago, B. & Q. R. Co.* 39 Neb. 798, 25 L. R. A. 70, 58 N. W. 444; *McVeety v. St. Paul, M. & M. R. Co.* 45 Minn. 268, 11 L. R. A. 174, 47 N. W. 809; *Illinois C. R. Co. v. Meacham*, 91 Tenn. 428, 19 S. W. 232; *Files v. Boston & A. R. Co.* 149 Mass. 204, 21 N. E. 311; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19.

Mason, J., delivered the opinion of the court:

The only question presented in this case is whether the district court erred in sustaining a demurrer to the petition. The petition alleged that plaintiff, a boy fifteen years of age, agreed with the brakeman of one of defendant's passenger trains to pay him 25 cents to carry him from Great Bend to Hutchinson; that plaintiff paid the brakeman this amount, and the brakeman told him to get upon the platform of the baggage car, and to get off at the stopping places on the way for the purpose of keeping out of sight; that plaintiff rode upon the car platform as far as Ellinwood, and in getting off the train while it was still in motion, on the opposite side from the depot, stumbled over a semaphore board, fell under the train, and received injuries requiring the amputation of both feet. The plaintiff places his right to recover upon the acts of the brakeman in instructing him to ride on the car platform, and to get off at the stopping places for the purpose of keeping out of sight, and upon the negligence of the company in permitting the semaphore board to remain exposed above the surface of the ground.

The demurrer was properly sustained. The plaintiff was not a passenger. It has often been held that one does not become a passenger by the payment of money to the brakeman of a freight train, the collection of fare not being within the real or apparent scope of his authority. *McNamara v. Great Northern R. Co.* 61 Minn. 296, 63 N. W. 726; *Janny v. Great Northern R. Co.* 63 Minn. 380, 65 N. W. 450; *Texas & P. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118; *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641; *Brevig v. Chicago, St. P. M. & O. R. Co.* 64 Minn. 168, 66 N. W. 401. Whether the rule is the same in the case of the brakeman of a passenger train or not, the plaintiff in this case was not a passenger, because in the absence of specific allegations to the contrary, it must be presumed that the fact that he was told to ride on the car platform, and keep out of sight, informed him, even if he would not otherwise have known it, that he was not received or

considered as a passenger by the company or its authorized agents. His minority does not affect the matter, except so far as it is a mark of capacity. *Bess v. Atchison, T. & S. F. R. Co.* 62 Kan. 299, 62 Pac. 996. A boy of fifteen, having ordinary intelligence for his age, would presumably understand, under the circumstances stated, that the directions given him were unusual, and were intended to prevent his discovery by the person in charge of the train. It is true that the petition alleges that the plaintiff did not know that he was doing wrong in making the arrangements referred to with the brakeman, and that he did not know that he was exposing himself to any great danger in following the instructions given him. But it is not alleged that he had not ordinary intelligence for his age, or that he lacked capacity to understand the nature of the transaction, or that he believed that the brakeman took the money in behalf of the company, or that he did not know that the reason he was told to ride on the platform and keep out of sight was in order that the conductor should not see him. As he was not a passenger, but a trespasser, the company owed him no duty with regard to the construction of its semaphore or otherwise, except to avoid wilful and wanton negligence. The plaintiff was injured, not because he was riding on the platform, but because he got off the train while it was in motion, and on the other side of the car from the depot. It is not alleged that the brakeman told him to get off before the train stopped. The exact language of the petition in this regard is that the brakeman told the plaintiff "that as the train pulled up at the different stopping places between Great Bend and Hutchinson he should get off, and keep out of sight." The allegations are insufficient to show defendant to have been guilty of any wilful or wanton neglect, or to relieve plaintiff from the responsibility for his own obvious recklessness.

The judgment is affirmed.

All the Justices concur.

KANSAS CITY, FORT SCOTT, & MEMPHIS RAILROAD COMPANY, *Plff. in Err.*,

v.

John T. LITTLE.

(.....Kan.....)

*1. A passenger going upon a railroad train has a right to rely upon the representations of a local ticket agent, and upon those of the railroad company's agent in charge thereof, that such

*Headnotes by CUNNINGHAM, J.

NOTE.—As to right of passenger to rely upon statement of ticket agent of railroad, see *Atkinson v. Southern R. Co.* (Ga.) 55 L. R. A. 223, and cases in *footnote* as to liability for ejection of passenger because of defective ticket given him by agent's mistake.
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train will stop at a certain point to which he has purchased a ticket and desires to ride. And the company is liable to such passenger in damages if he is compelled to leave the train before arriving at his destination, because by the general rules of the company, unknown to the passenger, such train is not scheduled to stop at such station.

2. Exemplary or punitive damages may be awarded where a wrong has in it the element of negligence which is gross or wanton, or wilfully oppressive.

3. An indignity need not be done to one in the presence of a number of people, in order to entitle the person wronged to recover damages for the humiliation and disgrace suffered.

(March 7, 1903.)

ERROR to the District Court for Johnson County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged expulsion of plaintiff from defendant's train. *Affirmed.*

Statement by **Cunningham, J.:**

Defendant in error, desiring to go from Olathe to Hillsdale, a station about 20 miles south on the railroad of plaintiff in error, inquired of the ticket agent in charge of its station at Olathe at what time he could obtain a train, and was told that there would be a freight train leaving that point at 6:35 P. M. This was train No. 27. Shortly after 6 o'clock, he went to the ticket office at Olathe, purchased his ticket, and, as a train pulled into the station, the agent said to Mr. Little, "The train is now coming." He proceeded to board the caboose, and, as he did so, told the man in charge that he wanted to go to Hillsdale, and this man, who afterwards turned out to be the rear brakeman, said, "That is all right; this train takes the place of 27 to-night, and carries passengers." Thereupon Mr. Little took his seat in the caboose, and, after the train had started, the brakeman took up his ticket, as also that of another passenger, who was his companion. The train stopped at Ocheltree, the first station, and also at Springhill, the second station. Upon his arrival at Springhill, the conductor came into the car for the first time, and inquired of Mr. Little in a boisterous manner, "What are you doing on this car? You can't ride on this car. This car doesn't carry passengers." After being ordered off the car, he obeyed. This was about 9 o'clock at night, at a point about 1/4 of a mile from the station, on a steep embankment. After he had left the car and gone some distance, the brakeman came running after him and tendered back his ticket, which he refused to accept. Upon the trial, the jury returned a general verdict in behalf of the plaintiff for \$225.58, and at the same time returned their special findings, which are as follows:

Special Questions Asked by Plaintiff.

(1) Did plaintiff, about 11 A. M., October 6, 1901, call up the ticket agent, Ferguson, at the company depot, and make inquiry about going to Hillsdale that evening, and

was he informed that, if he would call at the office about 6 o'clock P. M., he could go on a freight train to Hillsdale?

A. Yes.

(2) Did plaintiff go to the depot about 6 o'clock, and did the ticket agent sell him a ticket to ride on a freight train to Hillsdale?

A. Yes.

(3) Did the ticket agent, after he had sold the ticket to plaintiff, inform him that the train was then coming?

A. Yes.

(4) What was the price of the ticket?

A. Fifty-eight cents.

(5) Did a freight train about 6:35 arrive at the depot at Olathe?

A. Yes.

(6) Did plaintiff inquire of an employee of the company, who just got off the caboose, if that freight train would carry him to Hillsdale?

A. Yes.

(7) Did the person inquired of say to plaintiff that this train takes the place of number 27 and carries passengers, and that he could go to Hillsdale?

A. Yes.

(26) When plaintiff approached the caboose, was there an employee of the company standing on the rear platform, who afterwards took up the plaintiff's ticket?

A. Yes.

(27) Did plaintiff state to this person that he wanted to go to Hillsdale, and did such person then inform plaintiff that he could go, and that this train takes the place of number 27, and that number 27 did not go to-night?

A. Yes.

(8) Did the person who informed plaintiff that he could ride to Hillsdale take up his ticket after traveling about 8 miles?

A. Yes.

(9) Did the person who took up the plaintiff's ticket appear to be acting as conductor?

A. Yes.

(10) From the time that plaintiff entered the car until his ticket had been taken up, was there any other person in this car except passengers?

A. No.

(11) Did the person who took up plaintiff's ticket take up the ticket of any other passenger, and, if so, what was the passenger's name?

A. Yes; Adams.

(12) Did the plaintiff, while on the train, act in a quiet and peaceable manner?

A. Yes.

(13) Did the train stop at Ocheltree, Kan., and did Adams get off?

A. Yes.

(14) Did the train then move on to Springhill, and then stop?

A. Yes.

(15) While the train was at rest at Springhill, did an officer or employee of the company approach the plaintiff, and in a
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boisterous manner ask the plaintiff, "What are you doing on this car?"

A. Yes.

(16) Did plaintiff inform said person that he had purchased a ticket from the agent at Olathe, and that the agent informed him that he could ride on that train?

A. Yes.

(17) Did the said person then say, "This train doesn't carry passengers, and you must get off?"

A. Yes.

(18) Did not plaintiff then in a quiet manner insist on going to Hillsdale, and did not the person say, "I told you to get off this car?"

A. Yes.

(19) Did plaintiff then get off the car and walk to Springhill?

A. Yes.

(20) While plaintiff was then walking along the side of the car, did the person who took up the ticket come up to him, with his lantern, and request the plaintiff to take back his ticket and tear it up?

A. Yes.

(21) Did the plaintiff take back his ticket?

A. No.

(22) What hour of the night was it when plaintiff got off the train?

A. About 9 o'clock P. M.

(23) What was the distance from where plaintiff got off the car to Hillsdale?

A. About 8 miles.

(24) Where did plaintiff stay that night?

A. Springhill.

(25) Was the defendant, through its agents and servants, guilty of gross negligence toward the plaintiff?

A. Yes.

Special Questions Asked by Defendant.

(1) In assessing plaintiff's damages, how much, if anything, do you allow plaintiff for expenses?

A. Fifty-eight cents.

(2) How much do you allow plaintiff, if anything, for loss of time?

A. Nothing.

(3) How much do you allow plaintiff, if anything, for exemplary or punitive damages?

A. \$175.

(4) How much, if anything, do you allow plaintiff for humiliation or disgrace?

A. \$50.

The plaintiff in error claims that the train which plaintiff boarded was not No. 27, which carried passengers, but No. 35, upon which passengers were not allowed to ride, and that the conductor could not stop the train at Hillsdale without disobeying his orders. Judgment was rendered upon the general verdict, and a motion for a new trial was overruled.

Messrs. Pratt, Dana, & Black; for plaintiff in error:

Plaintiff cannot sue in tort and recover on a contract.

Ellis v. Flaherty, 65 Kan. 621, 70 Pac. 586; *Marshall v. St. Louis, K. O. & N. R. Co.* 78 Mo. 610; *Sira v. Wabash R. Co.* 115 Mo. 133, 21 S. W. 905; *Miller v. King*, 21 App. Div. 192, 47 N. Y. Supp. 534; *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60; *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 609, 17 Pac. 54.

There should have been no recovery allowed for exemplary or punitive damages.

The most that could be claimed is that there was negligence in the agent at Olathe directing plaintiff to wait for train No. 27, or in telling plaintiff to take the train he did. This was simply negligence for which exemplary or punitive damages cannot be allowed.

Logan v. Hannibal & St. J. R. Co. 77 Mo. 664.

Even gross negligence is not sufficient to justify exemplary or punitive damages.

Kansas P. R. Co. v. Kessler, 18 Kan. 523; *Southern Kansas R. Co. v. Rice*, 38 Kan. 402, 16 Pac. 817; *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 627, 17 Pac. 54; *Chicago, K. & W. R. Co. v. O'Connell*, 46 Kan. 581, 26 Pac. 947; *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 671, 21 Pac. 770; *Daniels v. Florida, C. & P. R. Co.* 62 S. C. 1, 39 S. E. 762; *New York, L. E. & W. R. Co. v. Bennett*, 1 C. C. A. 544, 6 U. S. App. 95, 50 Fed. 496; *Rose v. Wilmington & W. R. Co.* 106 N. C. 168, 11 S. E. 526.

There was no indignity offered plaintiff, and there should have been no allowance for humiliation or disgrace, or for insult or injury to his feelings.

Miller v. King, 21 App. Div. 192, 47 N. Y. Supp. 534.

Messrs. J. P. Hindman and Parker & Hamilton, for defendant in error:

Where there is any proper evidence to support the verdict of a jury, approved by the trial court, this court will not disturb such verdict.

Williams v. May, 44 Kan. 179, 24 Pac. 52; *Missouri P. R. Co. v. Cassity*, 44 Kan. 207, 24 Pac. 88; *Wood v. Dickinson*, 34 Kan. 137, 8 Pac. 205.

The jury might take into consideration the "indignity, insult, and outrage" to plaintiff.

Southern Kansas R. Co. v. Rice, 38 Kan. 398, 16 Pac. 817; *Louisville & N. R. Co. v. Hine*, 121 Ala. 234, 25 So. 857; 1 Am. & Eng. Enc. Law, p. 410.

The company was liable in damages for wrongful ejection.

Baltimore & O. R. Co. v. Bambrey, 2 Monaghan, 109, 16 Atl. 67; *St. Louis, A. & T. R. Co. v. Mackie*, 71 Tex. 491, 1 L. R. A. 667, 9 S. W. 451; *Head v. Georgia P. R. Co.* 79 Ga. 358, 7 S. E. 217; *Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 631, 31 N. W. 544.

The conduct of the person who came into the car and ordered the defendant in error to leave it entitles the defendant in error to exemplary damages.

Southern Kansas R. Co. v. Rice, 38 Kan. 398, 16 Pac. 817; *Kansas P. R. Co. v. Kessler*, 18 Kan. 523; *Leavenworth, L. & G. R. Co.* 61 L. R. A.

Co. v. Rice, 10 Kan. 426; *Wiley v. Keokuk*, 6 Kan. 94.

Mental anguish arising from the nature and character of the assault is an element of compensatory damages.

19 Am. & Eng. Enc. Law, p. 910, and notes; *McKinley v. Chicago & N. W. R. Co.* 44 Iowa, 314, 24 Am. Rep. 748; *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96; *Chicago & N. W. R. Co. v. Chisholm*, 79 Ill. 584; *Toledo, W. & W. R. Co. v. McDonough*, 53 Ind. 289.

The company cannot represent that a train will carry passengers, sell tickets for that train, direct passengers to take passage on it, collect their fares, as was done in this case, and then ask the passenger: "What are you doing on this car?"

International & G. N. R. Co. v. Smith (Tex.) 1 S. W. 565; *Richmond, F. & P. R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620; *Brown v. Kansas City, Ft. S. & G. R. Co.* 38 Kan. 634, 16 Pac. 942; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374.

Cunningham, J., delivered the opinion of the court:

It is claimed that the railroad company is not liable for any sum whatever, because the plaintiff was riding upon a train which, under the rules of the company, was not permitted to stop at Hillsdale, or even carry passengers at all, and that the conductor was required to obey the regulations of the company in running its trains; that the company has the right to make reasonable rules for the running of its trains and the carrying of passengers; that it is not bound to carry passengers on all trains, or to stop at all stations, and that the traveling public must conform to these rules. These claims are without fault, but do not fit the facts of this case. It was shown in the evidence that train No. 27, due in Olathe at 6:35 P. M., regularly carried passengers, and it appears from finding 5 that this train on which plaintiff took passage did actually arrive there at about that time. The ticket agent, who was the company's representative at Olathe at the time for this purpose, told the plaintiff, knowing where he was going, that the train was coming. Acting upon this suggestion, he went to the caboose, and, before getting on, inquired of the company's employee, who appeared to be in charge of it, and who afterwards took up plaintiff's ticket, if "that freight train would carry him to Hillsdale," and was informed that it would; that it took the place of No. 27, which was the one that ordinarily carried passengers, and he could go to Hillsdale on it. If all of these representations were untrue, and the train which plaintiff boarded was not, under the rules of the company, scheduled to stop at Hillsdale, there is nothing to show that he had knowledge of such fact. He made all reasonable inquiry, of those whom the company had put there to furnish such information, to ascertain if he might rightfully enter the train, and acted upon the information thus received.

He had a right to rely upon all of these representations and assurances. They were made by the agents of the company within the scope of their agency, in the execution of their duties, and bound the company. Acting upon them, the plaintiff had a right to go upon that train and be carried to the specified destination. To be ejected from the train before this was accomplished was a wrong for which a recovery might be had.

This case is clearly distinguishable from *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, relied upon by the plaintiff in error, where it was held probable that the plaintiff did not take "the next train," as directed by the local agent, or, if he did, opportunity was given him to ascertain the fact that the train upon which he had taken passage did not stop at the station to which he had purchased his ticket, if he had paid attention to the warning of the brakeman to that effect. More than this, it was there held, page 621, 38 Kan., and page 61, 17 Pac.: "If a passenger has suffered in his business, or been put to expense, by the delay or refusal of the railroad company to carry him as promised by its ticket agent, he would be entitled to ample damages therefor."

It is contended, however, that under the circumstances no recovery of exemplary or punitive damages should be allowed. This court has, in *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, at page 402, 38 Kan., and page 819, 16 Pac., laid down the rule relating to damages for the wrongful expulsion of a passenger from a train as follows: "If the expulsion be malicious, or through negligence which is gross and wanton, then exemplary damages may be awarded." In *Cady v. Case*, 45 Kan. 733, 26 Pac. 448, it is said, page 734, 45 Kan., and page 448, 26 Pac.: "Whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows the jury to give what is called exem-

plary or vindictive damages." This case collects and cites a large number of cases decided by this court to the same point. The court instructed the jury that before they could allow exemplary damages they must find in the transaction complained of either malice, wantonness, wilful oppression, or violence. The jury must, therefore, have found some one or more of these elements present, and we think the evidence warranted them in so doing. Besides this, the jury specifically find that the acts of the agents of the company were such as would make it "guilty of gross negligence toward the plaintiff." The case was therefore, under the findings and authorities, one for vindictive damages.

It is further insisted that damages for humiliation or disgrace should not have been allowed, because, at the time of the expulsion, no one was present besides the conductor, brakeman, and plaintiff, and, the expulsion being thus private, there was no indignity, insult, or injury to plaintiff's feelings, by being publicly expelled. We are not disposed to go into a consideration of how much of publicity must accompany a wrong in order to humiliate or disgrace. A rule could hardly be formulated. What would humiliate one would not affect another. In this case, the plaintiff was on his way to Hillsdale to fill an appointment to make a political speech. He was, of necessity, compelled to notify the public why he was unable to keep the appointment. It is a matter of common knowledge that he has occupied the office of attorney general of this state. To have it go out that he had been expelled from a railroad train was certainly well calculated to humiliate and disgrace him, and was such an injury for which damages might be awarded.

We find no error in the judgment; hence must affirm the same.

All the Justices concur.

VIRGINIA SUPREME COURT OF APPEALS.

FARMVILLE, *Appt.*,
v.

C. M. WALKER.

(.....Va.....)

1. Public money may be lawfully expended in the regulation and control of the traffic in ardent spirits.
2. The legislature may permit a town to establish a dispensary for the exclusive sale of ardent spirits, although in so doing it may render necessary the expenditure of money, and ultimately the imposition of a tax.

(March 12, 1903.)

NOTE.—For other cases in this series as to validity of state dispensary laws, see *McCullough v. Brown* (S. C.) 23 L. R. A. 410; *State ex rel. George v. Alken* (S. C.) 26 L. R. A. 345; and *Plumb v. Christie* (Ga.) 42 L. R. A. 181. 61 L. R. A.

A PPEAL by defendant from a judgment of the Circuit Court for Prince Edward County in favor of plaintiff in a suit to enjoin the enforcement of a statute providing for the establishment of a dispensary for the sale of intoxicating liquors. *Reversed.*

The facts are stated in the opinion.

Messrs. A. D. Watkins and W. H. Mann for appellant.

Messrs. W. C. Franklin and Caskie & Coleman, for appellee.

The inevitable effect of the act, if enforced, would be violative of the provision of the Constitution which requires that taxation shall be equal and uniform; and would be violative, also, of the fundamental principle that a local tax cannot be imposed except for local purposes,—for the benefit of the locality upon which it is imposed.

25 Am. & Eng. Enc. Law, p. 60; Cooley,

Taxn. p. 104; *Hammitt v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; *Norwood v. Baker*, 172 U. S. 260, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Norfolk v. Chamberlain*, 89 Va. 206, 16 S. E. 730; *Lynchburg & R. Street R. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951.

Every law which imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

Va. Const. art. 10, § 18; *Com. v. Brown*, 91 Va. 762, 28 L. R. A. 110, 21 S. E. 357; *Morgan v. Com.* 98 Va. 812, 35 S. E. 448.

It is necessary that license taxes imposed by the state "shall be the same on all those in the same business."

Com. v. Moore, 25 Gratt. 951.

In construing the Constitution, the courts seek to ascertain its spirit and intent, and do not observe the strict rules of construction which are applied to contracts or assurances between individuals.

Cooley, Const. Lim. pp. 73, 74.

No warrant is to be found in the Constitution for an act of the legislature which coerces or requires a municipality to contract a debt against its will, or to risk its revenue, exacted from the taxpayers and property holders within its limits, in the hazards of any business enterprise whatsoever.

2 Campbell's Lives of the Chief Justices, p. 326; *People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 488; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 211; *Adkins v. Randolph*, 31 Vt. 226; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

The act in question violates § 1 of the 14th Amendment to the Constitution of the United States in that it undertakes to deprive the inhabitants of Farmville of property without due process of law, and denies to them the equal protection of the law.

25 Am. & Eng. Enc. Law, pp. 55, 56.

Keith, P., delivered the opinion of the court:

The legislature, at the extra session in 1901, passed an act entitled "An Act to Establish a Dispensary for the Sale of Intoxicating Liquors in Farmville Magisterial District, Prince Edward County, Virginia; to Prohibit All Persons, Firms, Corporations to Sell Barter, or Exchange Such Liquors in Said District, and to Repeal All Laws in Conflict with This Act, so Far as They Apply to the Said Magisterial District." Acts 1901, chap. 113.

The 1st section of the act makes the sale of intoxicating liquors of any kind in Farmville district, except as therein provided, a misdemeanor punishable by fine and imprisonment.

By the 2d section the town of Farmville is authorized to elect three of its citizens, who shall constitute a dispensary board, and 61 L. R. A.

fixes their term of office, and their compensation; and the sections following authorize the purchase of spirituous, vinous, and malt liquors in such quantities as the board shall order; requires the treasurer of the town of Farmville to pay all bills for the establishment and maintenance of the dispensary and the purchase of stock; prescribe the terms upon which sales shall be made; empower the board from time to time to make rules and regulations for the operation of the dispensary; prohibit the sale of wines and liquors to any person known to be an habitual drunkard, to minors, or persons intoxicated, except upon the prescription of a regularly licensed physician; direct that the dispensary shall not be opened before sunrise, and that it shall be closed at sunset each day, and on Sundays, election days, and such other days, and under the same circumstances as make the sale of liquors unlawful under the laws of this state. It is provided that the room in which the business shall be conducted shall front upon one of the principal streets of the town, and shall have no other means of ingress or egress except the front door thereof. The price at which liquors, etc., shall be sold is to be fixed by the dispensary board, provided that the same shall not be sold for a profit exceeding 80 per centum above the actual cost thereof.

There are other provisions of the statute which need not be specifically mentioned.

The 12th section enacts that "the council of the said town shall appropriate from the treasury of the town, a sufficient amount to establish the dispensary as provided for in this act, which amount shall be paid into the town treasury from the profits arising from said dispensary as they shall accrue, and no profit shall be paid out in any other direction until said amount is so repaid, and thereafter said dispensary shall be supported and maintained out of the profits accruing out of said business: Provided, however, that the said town council may allow said board to borrow money or buy goods on the credit of the dispensary alone, if it be necessary to keep said dispensary in operation."

By the 16th section it is provided: "The net profits accruing from said dispensary under this act shall be disposed of in the following manner: One fourth to the state of Virginia; three eighths to the town of Farmville for the purpose of building and maintaining its streets and alleys, and three eighths to the Farmville magisterial district outside of said town for its public roads. Such distribution shall be made when ordered by said board and at least once a year."

In May, 1901, C. M. Walker, a citizen of the town of Farmville, exhibited his bill in the circuit court of Prince Edward county, in which, after reciting in detail the various provisions of the above act, he insists that it is void as being in many respects repugnant to the Constitution of the state and of the United States.

In accordance with the prayer of the bill

an injunction was awarded, "enjoining the council of the town of Farmville from taking any steps whatever looking towards the enforcement of the act known as the dispensary act for Farmville magisterial district," and at the September term, 1901, a final decree was entered perpetuating that injunction, and that decree is now before us for review.

The act in question is not a tax law. Its purpose is not to raise revenue, but to regulate the sale of intoxicating liquors. Its constitutionality, therefore, is to be determined by referring, not to the taxing power of the legislature, but to its police power. Its enforcement may or may not result in raising revenue. If the conduct of the dispensary should prove to be remunerative, it will bring revenue into the treasuries of the county, the town, and the state. Should it prove unprofitable it would deplete the treasury of the town of Farmville.

The act does, however, authorize the expenditure of money by the council of the town of Farmville, which was raised by taxation, and this can only be properly expended for some public use.

As was said by Justice Miller in *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455: "It is undoubtedly the duty of the legislature, which imposes, or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

That the regulation of the sale of intoxicating liquors is within the police power of the state is established, if not literally by all the cases where the subject has been considered, certainly by an overwhelming array of authority.

In *Trageser v. Gray* (Md.) 9 L. R. A. 780, it is held that "The legislature may prohibit or restrict the sale of spirituous liquors in any manner which its discretion may dictate. No one can claim as a right any power whatever to sell such liquors. If he sells at all, it must be on such terms as the legislature sees fit to impose. . . . The validity of an exercise by a state of its police power in regulating the sale of spirituous liquors does not in the least degree depend on any question as to the pres-

ence or absence of discrimination for or against particular persons or classes of persons. The legislature may lawfully grant the right to sell to a certain class or classes of persons and withhold it from all others."

In the notes to that case, decisions from many states are collated, which are to the same effect; among them *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929, which holds that "the usual and ordinary legislation of the states, regulating or prohibiting the sale of intoxicating liquors, raises no question under the Constitution of the United States. . . . The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, which by that amendment [the 14th Amendment to the United States Constitution] the state were forbidden to abridge."

In *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 9 Sup. Ct. Rep. 6, it was held that "a state has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sale and traffic in them in said state; to inflict penalties for such manufacture and sale; and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes. Whether a state, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors except for certain purposes, is not any longer an open question before this court."

In *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, it was held: "Legislation by a state prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States. . . . It belongs to that [the legislative] department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety;" subject to the power of the court to adjudge whether any particular law is an invasion of rights secured by the Constitution. Government does not interfere with, nor impair, "anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."

That case, indeed, seems to have reached the limit in maintaining the police power of the state when exercised for the safety of health or morals of the community; and a prohibition upon the use of property in the manufacture, sale, or barter of intoxicating liquors, declared by the legislature to be injurious to the health, morals, and safety of the community, was not deemed a taking or appropriation for the public use,

nor could the state be stayed from providing for "the discontinuance of any manufacture or traffic which is injurious to the public morals, by any incidental inconvenience which individuals or corporations may suffer."

Two cases growing out of the receivability of coupons for taxes, which at one period so gravely interested the people of this state, illustrate the limitation upon the legislature, when acting under the power to levy taxes in order to raise revenue, and practically the unlimited power of the legislature in the exercise of its police power for the protection of the health, safety, and morals of the community.

In *Royall v. Virginia*, 116 U. S. 572, 29 L. ed. 735, 6 Sup. Ct. Rep. 510, the constitutionality of an act which required lawyers to pay the license taxes assessed upon them in money, and not in coupons, was held to be void, because in violation of the contract of the state to receive coupons in payment of all "taxes, debts, dues, and demands due the state."

In *Hucless v. Childrey*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972, the Virginia statute which required a license for the sale of intoxicating liquors to be paid in money, and not in coupons, was held to be constitutional.

In *Royall v. Virginia* the license was imposed, not for the purpose of regulating the privilege or occupation of practising of law, but in order to raise revenue. In *Hucless v. Childrey* the object was held to be the regulation of the sale of intoxicating liquors, and the requirement that the license imposed should be paid in money, and not in coupons, was maintained upon the ground that the object in view was the regulation of the traffic in liquor, and came within the police power of the state.

In concluding the opinion in *Hucless v. Childrey*, 135 U. S. 712, 34 L. ed. 319, 10 Sup. Ct. Rep. 972, it is said: It is conceded "that the state might, in her discretion, absolutely abolish the sale of spirituous liquors, or prescribe on what terms they shall be sold. In this view, there does not seem to be any violation of the obligation of the state in requiring the tax which is imposed to be paid in any manner whatever—in gold, in silver, in bank notes, or in diamonds. The manner of payment is part of the condition of the license intended as a regulation of the traffic. It would be very different if the business sought to be followed was one of the ordinary pursuits of life, in which all persons are entitled to engage. License taxes imposed upon such pursuits and professions are imposed purely for the purpose of revenue, and not for the purpose of regulating the traffic or the pursuit."

Enough has been said to show that, in dealing with the sale of intoxicating liquors, the legislature is fulfilling a public duty; that it is striving to promote the health, safety, and morals of the community, and that it is in the exercise, not of its taxing, but of its police, power. If the power exists 61 L. R. A.

in the legislature, it is not for us to question the manner of its exercise.

It is true that it is not always necessary, in order to declare an act unconstitutional, to point out the precise limitation which it violates if it be repugnant to the spirit of the Constitution or of the institutions which the Constitution creates.

As was said by Justice Miller in *Citizens' Sav. & L. Assn. v. Topeka*, 20 Wall. 663, 22 L. ed. 461: "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments,—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C and B the wife of D; or which should enact that the homestead now owned by A should be no longer his, but should henceforth be the property of B."

The illustrations here given are extreme, and it is wholly improbable that such cases will arise. It is, indeed, possible that we might be driven to invoke the maxim that the safety of the Republic is the supreme law in order to protect society from the exercise of governmental power not directly within the limitations of the Constitution, but such a contingency is remote and improbable. As a rule of action the power and duty of the courts is sufficiently defined in the case of *Prison Assn. v. Ashby*, 93 Va. 670, 25 S. E. 893, where it is said: "The courts have nothing to do with the question whether or not the legislation contained in its provisions is wise and proper. The only question they have to deal with is one of power. The legislature of the state has plenary legislative power, except where it is restricted by the Constitution of the state, or of the United States. If the statute, validity of which is attacked, is not in conflict with the state or Federal Constitution, the courts have no power to declare it invalid, however well satisfied they may be that it is unwise or vicious legislation."

The cases which we have reviewed show the practically unlimited control which the legislature may exercise with respect to the sale of intoxicating liquor. The usual mode in which the legislature has hitherto sought to regulate it has been by the imposition of a license tax, which, while operating in some degree to control the traffic, has had the incidental effect of bringing money into the treasury. The legislature, however, being in the exercise of a public duty when dealing with the subject, may, in its choice of means, deem it wise to expend money upon its control or suppression, rather than to make it a source of revenue.

The dispensary law is a recent innovation.

It may yet be considered as in its experimental stage. It may result in profit or loss according as it is discreetly or unwisely enforced. But with that the court has nothing to do. The end being legitimate, the legislature is left to choose the means.

The act under consideration does not require the town of Farmville to expend its money or to contract a debt. It permits it to make an experiment in regulating the sale of intoxicating liquors which may result in a profit or loss, in the increase of the revenue, or in the imposition of a tax. Should the latter alternative become necessary, whatever tax is imposed must be in accordance with the Constitution and laws, but a discussion of those details may with propriety be waived until the necessity for their consideration shall arise. For the present, we deem it sufficient to say that the council of the town of Farmville is here as an appellant, asking this court to reverse the decree by which it was enjoined from enforcing the law. Whether the legislature can require a municipality against its will to incur a debt or to expend money already in its treasury is a question not presented to us upon this record. The town of Farmville seeks to be permitted to establish a dispensary, in the hope that it may thereby so regulate the sale and use of ardent spirits in that community as to promote the health, safety, and morals of its people.

Similar laws have been enacted in other states and passed upon by the courts. In *State ex rel. George v. Aiken*, 42 S. C. 222, 28 L. R. A. 345, 20 S. E. 221, it was claimed that the act violated the Constitution of South Carolina in numerous respects, most of which are of merely local interest, but the court held, among other things, that the act was not "unconstitutional because it empowers the state to engage in traffic in liquors, as such traffic by the state is a mere incident of the regulation of the sale, and not the object of it."

In *Plumb v. Christie*, 103 Ga. 686, 42 L. R. A. 181, 30 S. E. 759, it was held that "the general assembly of this state, by virtue of its police powers, has the authority to regulate and control the sale of all intoxicating liquors, and can establish dispensaries for an exclusive sale of such liquors under the management of agents or officials created for this purpose."

We conclude, therefore, that it is within the province of the legislature to pass laws for the promotion of the safety, health, and morals of the people; that the regulation and control of the traffic in ardent spirits is within the discretion of the legislature under the police power of the state; that it constitutes a public object, use, or purpose in the promotion of which public money may be lawfully expended; and that, while it is unnecessary to decide whether or not it may require, it is plain that the legislature may permit, the town of Farmville to establish a dispensary, though in doing so it may render necessary the expenditure of money, and ultimately the imposition of a tax; and finally, that the act in question is not repug-

nant to the letter or the spirit of the Constitution in force when it was passed.

We are of opinion that the act establishing a dispensary in the town of Farmville is constitutional, and that the decree of the Circuit Court must be reversed.

FALLSBURG POWER & MANUFACTURING COMPANY, *Plff. in Err.*,

v.

John D. ALEXANDER *et al.*

(.....Va.....)

A corporation is for a private, and not for a public, purpose, and is, therefore, not entitled to exercise the right of eminent domain, which is authorized to develop and use the water power of a river and generate electric, or other power, light, or heat, and utilize, transmit, and distribute it for its own use, or the use of other individuals or corporations, and the mere fact that its charter recognises it as an "Internal improvement company" is immaterial.

(January 15, 1902.)

ERROR to the Circuit Court for Albemarle County to review a judgment in favor of defendants in a proceeding to condemn property for the generation of power. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. W. Allen and Daniel Harmon, for plaintiff in error:

In determining whether a statute is constitutional it is the duty of the court to give such construction to it, if possible, as will uphold the act.

Wellington, Petitioner, 16 Pick. 87, 26 Am. Dec. 634.

Where the legislature declares a particular use to be a public use the presumption is in favor of its declaration, and the courts will not interfere therewith unless the use be clearly and manifestly of a private character.

10 Am. & Eng. Enc. Law, 2d ed. p. 1070; Mills, Em. Dom. § 10, p. 93.

Electric light companies are generally recognized as quasi-public corporations, subject to the control of the legislature, and capable of being vested with the power of eminent domain.

10 Am. & Eng. Enc. Law, 2d ed. p. 869; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679; *Johnston's Appeal* (Pa.) 5 Cent. Rep. 564, 7 Atl. 167; *Edison United Mfg. Co. v. Farmington Electric Light & P. Co.* 82 Me. 464, 19 Atl. 859; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319; *Plecker v. Rhodes*, 30 Gratt. 798; *Alexandria & F. R. Co. v. Alexandria & W. R. Co.* 75 Va. 780,

NOTE.—As to what is a public purpose for which the water power of a stream may be appropriated by eminent domain, see also, in this series, *Re Barre Water Co.* (Vt.) 9 L. R. A. 195, and *Avery v. Vermont Electric Co.* (Vt.) 59 L. R. A. 817.

40 Am. Rep. 743; *Tait v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697.

The expediency, or public necessity, of exercising the power in the particular case is a question to be determined solely by the legislature.

Plecker v. Rhodes, 30 Gratt. 798; *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Fletcher v. Peck*, 6 Cranch, 128, 3 L. ed. 175; *Charlottesville v. Maury*, 96 Va. 386, 31 S. E. 520; *Lewis, Em. Dom.* § 286.

The corporation is vested with all the rights, powers, and privileges of an internal improvement company, and charged with the execution of a work of extensive development and improvement of the natural resources of the country. Such company would seem, clearly, to come within the provisions governing the construction of internal improvements.

State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co. 18 Ohio St. 262; *Traver v. Merrick County*, 14 Neb. 327, 45 Am. Rep. 111, 15 N. W. 690; *Blair v. Cuming County*, 111 U. S. 363, 28 L. ed. 457, 4 Sup. Ct. Rep. 449.

This company is one of the class which is subject to governmental control in its dealings with the public, and it can be compelled to serve all alike, subject only to such uniform and reasonable regulations as it may properly prescribe.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 538, 36 L. ed. 253, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Winchester & L. Turnp. Road Co. v. Croston*, 33 L. R. A. 177, note, 98 Ky. 739, 34 S. W. 518; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244; *State ex rel. Wood v. Consumers' Gas Trust Co.* 157 Ind. 345, 55 L. R. A. 245, 61 N. E. 674; *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.* 25 W. Va. 324; *Stone v. Illinois C. R. Co.* 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390.

Mr. John B. Moon, for defendants in error:

Eminent domain is a power to be exercised with caution.

1 Bl. Com. 139; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162.

The legislature of a state may determine when private property may be taken for public uses; but, if they should take it for purposes not of a public nature, under the pretext that it was for a public use, it would be a gross abuse of their discretion, and would be unconstitutional and void.

2 Kent, Com. 340; *Cole v. La Grange*, 113 U. S. 7, 28 L. ed. 898, 5 Sup. Ct. Rep. 416; *Harding v. Goodlett*, 3 Yerg. 41, 24 Am. Dec. 546; *Tyler v. Beach*, 44 Vt. 648, 8 Am. Rep. 400; *Re Niagara Falls & W. R. Co.* 108 N. Y. 375, 15 N. E. 429; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Valley* 61 L. R. A.

City Salt Co. v. Brown, 7 W. Va. 191; *Vanner v. Martin*, 21 W. Va. 534; *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 568; *Portage Twp. Bd. of Health v. Van Hoesen*, 87 Mich. 533, 14 L. R. A. 114, 49 N. W. 894; *Pittsburg, W. & K. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. 453; *Kyle v. Texas & N. O. R. Co.* (Tex. App.) 4 L. R. A. 275; *Re Rhode Island Suburban R. Co.* 22 R. I. 457, 52 L. R. A. 879, 48 Atl. 591; *Garbutt Lumber Co. v. Georgia & A. R. Co.* 111 Ga. 714, 36 S. E. 942; *Apex Transp. Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882; *Chicago, B. & Q. R. Co. v. State*, 50 Neb. 399, 69 N. W. 955; *Cooley, Const. Lim.* 654; *Mills, Em. Dom.* § 15, p. 102; *Randolph, Em. Dom.* § 55, p. 52; 1 *Lewis, Em. Dom.* 2d ed. §§ 157, 158; *Charlottesville v. Maury*, 96 Va. 386, 31 S. E. 520.

No state shall deprive any person of life, liberty, or property without due process of law.

U. S. Const. 14th Amend.; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

Cardwell, J., delivered the opinion of the court:

This is a writ of error to a judgment of the circuit court of Albemarle county affirming a judgment of the county court of that county dismissing a proceeding instituted by plaintiff in error to condemn certain lands of the defendants in error, alleged to be needed for the purposes of the corporation as an internal improvement company.

Among the many and comprehensive powers and privileges intended to be conferred by the act of the general assembly entitled "An Act to Incorporate the Fallsburg Power and Manufacturing Company" (Acts 1899-1900, p. 418) are the following:

"To erect, maintain, and operate its plant or plants, acquire, own, develop, maintain, operate, and use water power on the James river, and for this purpose it may erect and maintain a dam across said river from a point in Albemarle county to the Buckingham side; and to construct canals and other hydraulic and auxiliary steam works and manufacture and generate water power, electrical or other power, light, or heat, and utilize and transmit and distribute such power, light, or heat to any place or places for its own use or for the use of other individuals or corporations; and may construct, own, maintain, and operate telephone lines between any or all of its works or plants. And for the purpose of constructing its dam, canals, and plants and machinery necessary to develop and generate power, light, or heat, and such pipe or wire lines as may be necessary to utilize or deliver the same, and for the construction of a railroad or railroads and telephone lines, said company is given the power of eminent domain with all the rights, powers, and privileges given to internal improvement companies by the laws.

of this state, except in so far as such laws might be modified," etc.

Being unable to "agree on the terms of purchase with those entitled to lands wanted for the purposes of such company" (Code, § 1074), plaintiff in error, under its supposed powers as an internal improvement company, gave to defendants in error notice that it would proceed in the county court of Albemarle for the condemnation of their lands and water rights in the James river, or such of them as were needed for the company, under §§ 1075-1079 of the Code. The notice sets forth that the appointment of commissioners will be asked, "who shall ascertain and report what will be a just compensation for so much of your land, and so much of water right in the James river situated in the said county of Albemarle, Virginia, and described as follows: That tract of land conveyed to you by Mrs. Eliz. Rives, lying on the south side of Ballinger's creek, near Warren, and having a front on James river, being the same tract of land upon which you now reside, as well as for damages to the residue of your said tract beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed."

Upon the return of this motion, the defendants in error moved to quash it on three grounds, two of which were sustained, one of them being that the proceeding is an attempt to take private property for private use. While, as we have stated, the charter of plaintiff in error confers upon it very extensive powers and privileges, this proceeding is under that portion of the charter quoted which authorizes it to acquire by condemnation the lands of defendants in error and so much of their water rights in the James river as may be needed for the purposes of the company. In other words, the purpose is to acquire by condemnation so much of the lands and water rights of defendants in error as may be needed by the company to enable it to locate and establish its plant or plants for the "manufacture and generation of water power, electrical power, or other power, light, or heat, to be utilized, transmitted, and distributed to any place or places for the company's use, or for the use of other individuals or corporations."

The case has been ably argued for both plaintiff in error and defendants in error, though the discussion has taken a very much wider range than is necessary to a decision of the case, and it is conceded by counsel for the former that the sole question at issue is whether the power granted to plaintiff in error by the legislature is forbidden by the limitations of the Constitution; that, if the legislature has transcended its powers, it cannot matter whether it has done so in violation of the Federal or state Constitution; its act in either case is void, the prohibition in either case being based upon the assumption that the charter authorizes the taking of private property for private, and not public, purposes.

Neither in our Constitution nor in the Constitutions of other states of the Union is 61 L. R. A.

there any express provision forbidding the legislature to pass laws whereby the private property of one citizen may be taken and transferred to another for his private use. As has been well said by Green, J., in *Varnier v. Martin*, 21 W. Va. 548: "It was doubtless regarded as unnecessary to insert such a provision in the Constitution or Bill of Rights, as the exercise of such an arbitrary power of transferring by legislation the property of one person to another without his consent was contrary to the fundamental principles of every republican government; and in a republican government neither the legislative, executive, nor judicial department can possess unlimited power." In that case it is further said that there is an entire concurrence of all the authorities in the proposition that private property cannot be taken for private use, either with or without compensation.

In approaching the question presented, we recognize the well-established rule that every presumption is in favor of the right of plaintiff in error to exercise the powers distinctly granted in its charter, and that the right will not be abridged unless the legislature has clearly transcended its constitutional authority. In other words, unless the grant of the right of eminent domain is not clearly in violation of the constitutional inhibition, the act will be upheld; and it is also true, courts go no further in determining the constitutionality of an act of the legislature than is necessary to a decision of the particular question at issue. Therefore the only question there is to be here considered is whether it is within the constitutional authority of the legislature to confer upon an individual or corporation the right of eminent domain to acquire a site or location for a plant to manufacture or generate water power, electrical power, or other power, light, or heat, and utilize, transmit, and distribute such power, light, or heat to any place or places for the individual or corporation's "own use, or for the use of other individuals or corporations."

Section 14, art. 5, of our state Constitution, in force when this proceeding was begun, provides that no law shall be passed by the legislature "whereby private property shall be taken for public uses without just compensation."

Whenever the public use of property requires it, the private rights of property must yield to this paramount right of sovereign power to take it for the public use. When so taken, it is the character of the use for which the property is taken, and not the means or agencies by which it is taken, which determines the question whether it is legally taken under the legitimate exercise of the right of eminent domain; but in all cases the use for which it is proposed to take private property in the exercise of this right must be a public use, or for a public purpose, and this, as is conceded, is a question for judicial determination.

No attempt has been made by the courts or law writers to lay down a general rule for determining this question, and it would

be impossible, in an opinion of reasonable length, to review all the cases in which courts have had occasion to hold what is, and what is not, a public use of property.

Says the opinion in *Soudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 23 Am. Dec. 756: "The great principle remains: There must be a public use or benefit; that is indispensable. But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to general rule. . . . What shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being."

The cases decided by this court having any bearing upon the question are collated in the opinion in *Varner v. Martin*, 21 W. Va. 548, but they arose out of acts authorizing owners of mill sites to condemn lands for the erection of dams to supply water power for gristmills, and also to condemn lands to be overflowed by the erection of such mill dams. The right to condemn lands for such purposes was clearly recognized in those cases, and, although the statute laws of Virginia have gone beyond authorizing the condemnation of lands for water gristmills alone, and been extended so as to include not only water gristmills, but other purposes useful to the public, there has been no condemnation of lands for mills or manufactories of any sort other than water gristmills, so far as the Virginia Reports show.

In *Varner v. Martin*, 21 W. Va. 548, referring to that class of cases other than those in which the general public have the immediate use of the property condemned without charge, as in cases of public highways, where the property condemned is under the control of public officers, though the gratuitous use of it is enjoyed by the public at large, etc., the opinion demonstrates that, where the property condemned is in the direct use and occupation of a private person or of a private corporation, and the general public has only an indirect and qualified use of it, or perhaps no use of it of any kind, but simply derives from its use some indirect advantage, as by the promotion of the general prosperity of the community, to which belong railroads, ferries, gristmills, etc., in order that a person or corporation may be included in this class, and have legislative authority to condemn lands, it must be shown that he or they are possessed of each and all of three qualifications: First. The general public must have a definite and fixed use of the property to be condemned; a use independent of the will of the private person or private corporation in whom the title of property when condemned will be vested; a public use, which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature. Second. This public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience. Third. It must be impossible, or very diffi-

cult at least, to secure the same public uses and purposes otherwise than by authorizing the condemnation of private property.

The opinion further says: "Upon the principles we have laid down it would follow that the legislature could not authorize lands to be condemned for the erection of dams, or for the overflowing of lands by dams erected for sawmills or manufactories generally, because they obviously want the first qualification we have laid down as necessary to confer this power on the legislature. The general public have no general and fixed use of any such mills and manufactories. They have no use of them which is independent of the will of the owners of such mills and manufactories, and they can be defeated in any sort of use of such mills and manufactories at the pleasure of the owners of them."

In *Plecker v. Rhodes*, 30 Gratt. 798, it is said: "Authority given to an individual for the construction of a toll bridge across a river is a franchise which is to benefit the individual to whom it is granted, else he would not undertake it; but it is granted to the individual in consideration of the convenience and benefit it will be to the public. All these exercises of the functions of sovereignty by the legislature and the bestowment of franchises upon individuals are designed to be for the public benefit."

"Undertakings which are sought to be promoted by the right of eminent domain are often of private benefit. The judicial practice in such cases is to approve the undertaking if it is capable of furthering a public use, and to disregard the private benefit as a mere incident. This practice is correct where the public interest clearly dominates the private benefit; as, for example, the public interest in railroad transportation dominates the private benefit from tolls. Even where the disproportion between public and private benefit is much less marked, the courts are justified in sustaining a legislative act by singling out the public use." Randolph, Em. Dom. § 54. But this learned author says in § 55: "In placing works of partly private use, it is essential that the private use be incidental, and not exclusive. Thus, where a company were authorized to build a basin and reserve a part for their use, the act was declared unconstitutional,"—citing *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42. The opinion in the case cited says: "The taking of private property for private purposes cannot be authorized even by legislative acts, and the fact that the use to which the property is intended to be put, or the structure intended to be built thereon will tend incidentally to benefit the public, . . . is not sufficient to bring the case within the operation of the right of eminent domain so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public."

In *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564, it was held, under the laws of Michigan, which imposed no public duties

and responsibilities upon mills and their owners, but which authorized the condemnation of lands for the purpose of the establishment of mills, that the act authorizing the condemnation of lands for that purpose was void. The opinion by Cooley, J., says: "It is manifest that in such a case the proprietor [of a mill] can have no valid claim to the interposition of the law to compel his neighbor to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. Indeed, the last two named would have far higher claims, for they would subserve actual needs, while the former would at most only incidentally benefit the locality by furnishing employment and adding to the local trade. There is nothing in the present legislation to indicate that the power obtained under it is to be employed directly for the public use. Any sort of manufacture may be set up under it, and the proprietor is not obliged in any manner to carry it on for the benefit of the locality or of the state at large."

In a more recent case decided by the same court, in 1891 (*Portage Twp. Bd. of Health v. Van Hoesen*, 87 Mich. 533, 14 L. R. A. 114, 49 N. W. 894), it was said: "To justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use. In *Gilmer v. Lime Point*, 18 Cal. 229, a public use is defined to be a use which concerns the whole community, as distinguished from a particular individual. The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use. In other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use or to direct its management is conferred upon the public."

Randolph, Em. Dom. § 55, lays down the broad doctrine that manufacturing companies cannot condemn land for their purposes.

Lewis, Em. Dom. § 165, in discussing the meaning of the term "public use," and, referring to the provision usually inserted in state constitutions on the subject, says: "'Public use' means the same as 'use by the public,' and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general

practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation, or renders them capable of any definite and practical application." In a note to this text it is said: "The test whether a use is public or not is whether a public trust is imposed upon the property; whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn at the pleasure of the owner,"—citing *Farmers' Market Co. v. Philadelphia & R. Terminal Co.* 10 Pa. Co. Ct. 25, and a number of other authorities.

"Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well-defined rights to that use secured,—as, the right to use the public highway, . . . the public ferry, the railroad, and the like. But when it is so appropriated that the public have no right to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use." *Jordan v. Woodward*, 40 Me. 317.

To the effect that the power of eminent domain to condemn a site for a manufacturing plant or for a railroad track to facilitate such a business undertaking, or for a plant some distance from its line to generate electricity to operate an electrical railway, or for an elevator to be used in buying, selling, or storing grain, cannot be conferred upon individuals or a corporation incorporated for no public purpose and charged with no public duties, are the cases of *Garbutt Lumber Co. v. Georgia & A. R. Co.* 111 Ga. 714, 36 S. E. 942; *Re Rhode Island Suburban R. Co.* 22 R. I. 457, 52 L. R. A. 879, 48 Atl. 591; *Chicago, B. & Q. R. Co. v. State*, 50 Neb. 399, 69 N. W. 955; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130. In those cases it was held that such a taking of private property would be for a purely private purpose.

In his work on Constitutional Limitations (p. 654) Judge Cooley says: "The public use implies a possession, occupation, and enjoyment of the land by the public at large or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."

In the view that we take of the case at bar, it is wholly unnecessary to consider the question whether or not the proposed taking of the property of defendants in error is in violation of the 14th Amendment of the Constitution of the United States, providing that private property cannot be taken for any purpose without due process of law; since, if the proposed taking is for a private, and not a public, use, it is clearly in violation of our state Constitution.

It is urged upon us that, although the

charter in question does not command the performance of the company's public duties, since it is "a public-service corporation," the right of public control arises from the grant of the franchise of eminent domain; and, when the company undertakes to devote its property and its products to the public use, it becomes subject to public regulations. This proposition is unquestionably sound, and sustained by the authorities cited.—*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 538, 36 L. ed. 253, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857,—to which many others might be added; but, this does not meet the difficulty in this case. The mere recognition of the corporation in its charter as an "internal improvement company" does not make it so, and bring it within the operation of the general laws of the state governing such companies and controlling their operations. The difficulty with the charter is, that the purpose for which the property is authorized to be taken by the right of eminent domain in this instance does not clearly appear to be for a public use or a public purpose. On the contrary, the grounds of public benefit upon which the taking is proposed are vague, and the use which the public is to have of the property, or how the public is to be benefited by the use of it by the company, is by no means fixed and definite. Not only is the public benefit to spring from the use to which the company proposes to devote the property vague, indefinite, and uncertain, but, under the plain language of the charter, the public use of the property, or any use of it by the public, may be gainsaid or denied or withdrawn by the company at its

will, since it is authorized to use, not only a part, but the entire product, of the work or works it proposes to establish, for its own use or benefit. In such a case the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking of private property for a private use, against the will of the owner, which cannot be done in any case.

The difficulties confronting plaintiff in error in this particular cannot be obviated by invoking the general laws of the state specifying and regulating the public duties and obligations of internal improvement companies. These statutes, contained in chapter 51 of the Code, impose no duty upon such a company that can be made to apply to this corporation in its manufacturing operations, to say nothing of the other uses to which it may, under its charter, put the land and water rights sought to be acquired by condemnation. We do not mean to say, however, that under no condition can the right of eminent domain be conferred by the legislature in furtherance of the establishment of plants for the generation of electric power or other power, light, or heat, where public necessity requires it, and the public use or benefit is apparent, and safely guarded. To meet industrial progress, new conditions, and the ever-increasing necessities of society, the courts have gone very far in sustaining legislation conferring the franchise of eminent domain, and it is not necessary for us in this case, if we were so inclined, to question the soundness of the policy sustained in those decisions.

We are of opinion that the judgment complained of here is right, and it is therefore affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

George H. MIFFLIN *et al.*, *Appts.*,
v.

R. H. WHITE COMPANY.

SAME, *Appts.*,
v.

B. F. DUTTON *et al.*

(50 C. C. A. 661, 112 Fed. 1004.)

1. An author who permits the publication in a magazine of chapters of a book on which he has secured a copyright without any notice other than the general notice by the publishers of the magazine of a copyright of its matter loses his exclusive rights under his copyright.
2. An author who, after publishing a

NORM.—As to when book is published so as to defeat common-law copyright, see, in this series, *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.* (N. Y.) 41 L. R. A. 846.

As to common-law rights of authors and others in intellectual productions generally, see *Press Pub. Co. v. Monroe* (C. C. App. 2d C.) 51 L. R. A. 333, and *note*.
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manuscript in a magazine under a copyright notice in the name of the publisher, publishes it in book form with a copyright notice in his own name, making no reference to the former one, abandons the work to the public.

(January 16, 1902.)

A PPEALS by plaintiffs from decrees of the Circuit Court of the United States for the District of Massachusetts in favor of defendants in suits brought to enjoin infringement of copyrights. *Affirmed.*

The facts are stated in the opinion.

Argued before Putnam, Circuit Judge, and Webb and Aldrich, District Judges.

Messrs. Elder, Wait, & Whitman, for appellants:

Copyright can be secured for part of a work.

Low v. Ward, L. R. 6 Eq. 415; *Cary v. Longman*, 1 East, 358; *Reid v. Maswell*, 2 Times L. R. 790; *Black v. Henry G. Allen* Co. 9 L. R. A. 433, 42 Fed. 618; *Harper v.*

Shoppell, 23 Blatchf. 431, 26 Fed. 519; *White v. Geroch*, 2 Barn. & Ald. 298; *Drone, Copyright*, pp. 144-149; *Laurence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136.

The difference between the notice of copyright in the book and in the magazine is immaterial. A magazine copyright is distributive, and "secures," to use the language of the Constitution of the United States, to each author publishing his work in the magazine his copyright.

Laurence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136.

In the present statute it is distinctly provided that the notice shall contain "the name of the party by whom it was taken out," and it has been said that this clause was "added for the purpose of preventing any ambiguity as to the character of the notice which should accompany the use of the word 'copyright.'"

Werckmeister v. Springer Lithographing Co. 63 Fed. 808.

The decisions have universally been opposed to any insistence on a literal compliance with the terms of the statute in regard to the form of this notice.

Scribner v. Henry G. Allen Co. 49 Fed. 854; *Rock v. Lazarus*, L. R. 15 Eq. 104; *Werckmeister v. Springer Lithographing Co.* 63 Fed. 808.

The object of the statute (Act June 18, 1874, chap. 301) was to give notice of the copyright to the public; to prevent a person from being punished who ignorantly and innocently reproduces the photograph without the knowledge of the protecting copyright.

Sarony v. Burrow-Giles Lithographic Co. 17 Fed. 591, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; *Falk v. Schumacher*, 48 Fed. 222; *Hefel v. Whitely Land Co.* 54 Fed. 179; *Bolles v. Outing Co.* 46 L. R. A. 712, 23 C. C. A. 594, 45 U. S. App. 449, 77 Fed. 966.

Whether or not the notice is calculated to mislead anyone to his harm is the real and only test.

Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177.

Notice by a publisher is in effect notice of the rights of the persons for whom he acts.

The relation is nonassignable except by consent of the author.

Hole v. Bradbury, L. R. 12 Ch. Div. 886; *Stevens v. Benning*, 1 Kay & J. 168; *Gibson v. Carruthers*, 8 Mees. & W. 343.

The statute nowhere provides that, after copyright is duly secured by entry, the author may not change the title of his work as often as he pleases without impairing the validity of his copyright.

Every magazine is an illustration of the rule that the title has nothing necessarily to do with the contents, as the magazine title never changes, while its contents are always changing.

Osgood v. Allen, Holmes, 185, Fed. Cas. No. 10,603; *Jollie v. Jaques*, 1 Blatchf. 618, 61 L. R. A.

Fed. Cas. No. 7,437; *Black v. Henry G. Allen Co.* 56 Fed. 764; *Johnson v. Newnes* [1894] 3 Ch. 663.

It was the clear duty of the publishers to secure copyright so that the rights of the author would be protected as well as their own. They were acting as his agents and for his benefit. Such copyright as they secured was held by them under the terms of the contract and in trust for Dr. Holmes.

Black v. Henry G. Allen Co. 56 Fed. 764; *Pulte v. Derby*, 5 McLean, 328, Fed. Cas. No. 11,465; *Laurence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136; *Drone, Copyright*, pp. 260, 368.

If registration is made in the name of a publisher, either with or without the author's consent, the copyright is none the less vested in the author. An action for infringement may be brought in the name of the author, and in any case the publisher would have no power to prevent an action in his name.

Laurence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; *Pulte v. Derby*, 5 McLean, 328, Fed. Cas. No. 11,465; *Sweet v. Coter*, 11 Sim. 572; *Bohn v. Boguc*, 10 Jur. 420; *Chappell v. Purday*, 4 Younge & C. Exch. 485.

The acts of Congress relating to copyright should be construed, as far as possible, in the interests of the author, in whose interest alone they can be enacted.

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; *Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; *Belford, C. & Co. v. Scribner*, 144 U. S. 488, 36 L. ed. 514, 12 Sup. Ct. Rep. 734; *Beckford v. Hood*, 7 T. R. 627; *Thompson v. Hubbard*, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710; *Osgood v. A. S. Aloe Instrument Co.* 69 Fed. 291; *Jackson v. Walkie*, 29 Fed. 15; *Higgins v. Keuffel*, 140 U. S. 428, 35 L. ed. 470, 11 Sup. Ct. Rep. 731; *Bolles v. Outing Co.* 46 L. R. A. 712, 23 C. C. A. 594, 45 U. S. App. 449, 77 Fed. 966; *Snow v. Mast*, 65 Fed. 995; *Werckmeister v. Pierce & B. Mfg. Co.* 63 Fed. 445; *Hoertel v. Tuck*, 94 Fed. 844.

Even if the magazine notice is construed to refer only to the magazine copyright, and the book notice to the book copyright, the copyrights relied on are nevertheless valid.

Mr. Andrew Gilhooly, for appellees:

The notice in each of the two magazine numbers of the entry by Ticknor & Fields of the copyright entered thereon by them is not a sufficient notice, in addition, of the independent copyright entered by Harriet Beecher Stowe on "The Minister's Wooing" because the name of Harriet Beecher Stowe is wholly omitted from the notice.

Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710; *Hoertel v. Tuck*, 94 Fed. 844; *Osgood v. A. S. Aloe Instrument Co.* 63 Fed. 470, 69 Fed. 291; *Higgins v. Keuffel*, 30 Fed. 627, Affirmed in 140 U. S. 428, 35 L. ed. 470, 11 Sup. Ct. Rep. 731; 7 Am. & Eng. Enc. Law, 2d ed. p. 557; *Jackson v. Walkie*, 29 Fed. 15.

Putnam, Circuit Judge, delivered the opinion of the court:

The first of these appeals originated in a bill to protect an alleged copyright in a portion of "The Minister's Wooing," and the second in a portion of "The Professor at the Breakfast Table." In each there was a demurrer, a decree dismissing the bill with costs, and an appeal. The alleged copyrights were taken out under the act of February 3, 1831 (4 Stat. at L. chap. 16, p. 436), and each claims the benefit of a renewal. Some questions are made about the renewals, but we need not consider them.

Twenty-nine of the 42 chapters of "The Minister's Wooing" were published in the serial numbers of the *Atlantic Monthly*, beginning with December, 1858, and ending with October, 1859. In October, 1859, Mrs. Stowe took out a copyright of "The Minister's Wooing" as a whole, and in the book published by her authority a proper notice of this copyright is entered. Subsequent to taking out this copyright, the remaining 13 chapters were published in the November and December numbers of the *Atlantic Monthly* for the same year. On the page following the title page of these numbers was printed the following: "Entered according to act of Congress, in the year 1859, by Ticknor & Fields, in the clerk's office of the district court of the district of Massachusetts." All the magazine publications were with the consent of Mr. Stowe under a formal contract between her and the publishers.

The bill does not state whether or not Ticknor & Fields took out a copyright of any kind. The circuit court found that the publication of the first 29 chapters without any copyright abandoned them to the public, in which it was undoubtedly correct. It also found in substance, that, as the remaining 13 chapters were published with no notice of the copyright except that which we have stated, this, although giving information that somebody had copyrighted something, was not a sufficient notice of a copyright by Mrs. Stowe, even in view of the liberal rulings as to the permissible form of a notice found in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 55, 56, 28 L. ed. 349, 350, 351, 4 Sup. Ct. Rep. 279, and in other cases of like class. We agree with this proposition. But the case goes farther. The notice given by the publishers of the *Atlantic Monthly* was clearly a notice of a supposed copyright secured by themselves, and it contained nothing to indicate that it was a notice of one taken by Mrs. Stowe. The presumption, therefore, is that it was a notice of a copyright of so much of the *Atlantic Monthly* as the publishers were entitled to copyright in their own behalf. They could not then copyright "The Minister's Wooing," because it had already been copyrighted, and there cannot be two successive copyrights of the same publication. To permit this would render possible an extension of the statutory period through which a copyright runs, which, of course, the law

will not allow. Therefore, on the whole, the just conclusion is that Ticknor & Fields published the November and December numbers of the *Atlantic Monthly*, not only without any notice of Mrs. Stowe's copyright which was sufficient in law, but only with one which was presumably a notice of a copyright of their own.

With reference to "The Professor at the Breakfast Table," as the learned judge of the circuit court well said, the sequence of the facts is different, but the case is governed by the same principles. Ten of the twelve parts of this work were published in the serial numbers of the *Atlantic Monthly*, beginning in January, 1859, and ending in October, 1859, without any notice of any copyright. The remaining two parts were published in the following December number, as to which the bill states that a copyright was obtained by Ticknor & Fields, and a notice thereof given on the page following the title page, in the precise form which we have already stated in regard to "The Minister's Wooing." Afterwards, Dr. Holmes published the entire work in one volume, containing the following notice: "Entered according to act of Congress in the year 1859, by Oliver Wendell Holmes, in the clerk's office of the district court of the district of Massachusetts." In this case there is an allegation that Dr. Holmes took out a copyright in his own behalf, so that the same observations apply even more positively to the notice given by him which we made with reference to that printed by Ticknor & Fields with regard to "The Minister's Wooing;" that is to say, it was a notice of a copyright taken out by him, and not of that taken out by Ticknor & Fields. While, therefore, as already said, we agree with the line of reasoning of the learned judge of the circuit court, we may add the same conclusion as with reference to the other case, that, in the volume published by Dr. Holmes, no notice was given, or intended to be given, of the copyright taken out by Ticknor & Fields.

We ought to observe that the publication by Ticknor & Fields was with the authorization of Dr. Holmes, under a contract with him, so that he is chargeable with what was done by them. We ought also to add that while it is possible that, in some aspects of the law, Ticknor & Fields might have obtained a copyright in behalf of themselves and of Dr. Holmes which would have protected the interests of both, and that thus Ticknor & Fields might have become a trustee of a copyright in behalf of both, yet there is no allegation in the bill to that effect. Therefore, inasmuch as the copyright taken out by Dr. Holmes was insufficient to protect any part of his volume, because the whole had received prior publication, and, as we have said, there cannot be successive copyrights, and inasmuch, also, as he published the only parts which could be regarded as protected by the prior copyright without giving notice thereof, it necessarily follows that the conclusion of the circuit

court that the whole work was, in the end, abandoned to the public, was correct.

In No. 387, *Mifflin v. Dutton*, the decree of the Circuit Court is affirmed, and the costs of appeal are awarded to the appellees.

In No. 388, *Mifflin v. R. H. White Com-*

pany, the decree of the Circuit Court is affirmed, and the costs of appeal are awarded to the appellees.

Affirmed by Supreme Court of United States June 1, 1903.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

DELAWARE INSURANCE COMPANY of
PHILADELPHIA, *Plff. in Err.*,

v.

J. E. GREER *et al.*

(120 Fed. 916.)

*1. Policies and contracts of insurance must be construed, like other contracts, according to the ordinary, popular sense of the terms they contain. The meaning of their stipulations, in their common, popular sense, is not to be discarded for some hidden meaning, that nothing but the exigency of a hard case and the ingenuity of an acute mind would discover.

2. The effect of the mortgage clause, "loss, if any, payable to —, mortgagee, as his interest may appear," or of words of similar import, often attached to policies of fire insurance, is to make the mortgagee the simple appointee of the mortgagor, to receive the proceeds of the amount of his interest, and to place his indemnity at the risk of every act and omission of the mortgagor that would avoid, terminate, or affect the insurance of the latter's interest under the terms of the policy.

3. A policy of insurance to a mortgagor, to which was attached a mortgage clause in the above form, contained these provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice be given of sale of any property covered by this policy by virtue of any mortgage or trust deed," and "if, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto." *Held*:

(1) The mortgage clause expressed, more clearly than any other stipulation could have done, the provision and condition that the insurance of the mortgagees was subject to the risk of every act or neglect of the mortgagor which would avoid or terminate the latter's insurance under the

original policy, because that had been the adjudicated construction of this mortgage clause for more than forty years when it was attached to the policy.

(2) The condition of an avoidance of the policy for the commencement of foreclosure proceedings was not limited to foreclosure proceedings of which the insured had notice at the time or before they were commenced, but it covered all such proceedings, the commencement of which he acquired knowledge of at any time before the loss occurred.

(February 23, 1903.)

ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in favor of plaintiffs in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Mr. S. B. Amidon, for plaintiff in error:

The foreclosure proceedings annulled the policy.

Titus v. Glens Falls Ins. Co. 81 N. Y. 410; 1 Jones, *Mortg.* 3d ed. § 425a; *Hartford F. Ins. Co. v. Clayton*, 17 Tex. Civ. App. 644, 43 S. W. 910; *Norris v. Hartford F. Ins. Co.* 55 S. C. 450, 33 S. E. 566; *North British & M. Ins. Co. v. Freeman* (Tex. Civ. App.) 33 S. W. 1091; *Gibson Electric Co. v. Liverpool & L. & G. Ins. Co.* 159 N. Y. 418, 54 N. E. 23, 20 App. Div. 625, 46 N. Y. Supp. 1092; *Springfield Steam Laundry Co. v. Traders' Ins. Co.* 151 Mo. 90, 52 S. W. 238; *Merchants' Ins. Co. v. Brown*, 77 Md. 79, 25 Atl. 992; *McKinney v. Western Assur. Co.* 97 Ky. 474, 30 S. W. 1004; *Meadows v. Hawkeye Ins. Co.* 62 Iowa, 387, 17 N. W. 600; *Payton v. Porter*, 17 Ky. L. Rep. 525, 31 S. W. 877; *McIntire v. Norwich F. Ins. Co.* 102 Mass. 230, 3 Am. Rep. 458; *May, Ins.* 4th ed. § 276; *Phoenix Ins. Co. v. Smith*, 9 Kan. App. 828, 61 Pac. 501; *German Ins. Co. v. Russell*, 65 Kan. 373, 58 L. R. A. 234, 69 Pac. 345; *Girard F. & M. Ins. Co. v. Hebard*, 95 Pa. 45.

Messrs. W. W. Padgett and S. H. Barr, for defendants in error:

Construing both the original policy and

*Headnotes by SANBORN, Circuit Judge.

NOTE.—As to effect of act of forfeiture of mortgagor upon interest of mortgagee in insurance policy, see also, in this series, *Phenix Ins. Co. v. Omaha Loan & T. Co.* (Neb.) 25 L. R. A. 670, and cases in note; *Eddy v. London Assur. Corp.* (N. Y.) 25 L. R. A. 686; *Syndicate Ins. Co. v. Bohn* (C. C. App. 8th C.) 27 61 L. R. A.

L. R. A. 614; *Southern Home Bldg. & L. Asso. v. Home Ins. Co.* (Ga.) 27 L. R. A. 844; *Hardy v. Lancashire Ins. Co.* (Mass.) 33 L. R. A. 241; *Oakland Home Ins. Co. v. Bank of Commerce* (Neb.) 36 L. R. A. 673; and *Whiting v. Burkhardt* (Mass.) 52 L. R. A. 788.

the mortgage clause together in the light of the plain purpose to insure the interest of the mortgagee, the commencement of foreclosure proceedings cannot be held to be a violation of any stipulation forbidding the mortgage.

Lancashire Ins. Co. v. Boardman, 58 Kan. 339, 49 Pac. 92; *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 52 L. R. A. 915, 62 S. W. 149; *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 36 L. R. A. 673, 66 N. W. 646; *Boyd v. Thuringia Ins. Co.* 25 Wash. 447, 55 L. R. A. 165, 65 Pac. 785.

The mortgagee had a contract with the insurance company separate from the interests of the mortgagor, and not affected by his acts.

Lancashire Ins. Co. v. Boardman, 58 Kan. 343, 49 Pac. 92; *Westchester F. Ins. Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682; *Hagan v. Scottish Union & Nat. Ins. Co.* 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. Rep. 862; *Jones v. Warnick*, 49 Kan. 70, 30 Pac. 115; *Wester v. Long*, 63 Kan. 876, 66 Pac. 1032; *Bellevue Roller-Mill Co. v. London & L. F. Ins. Co.* (Idaho) 39 Pac. 196; *North British & M. Ins. Co. v. Freeman* (Tex. Civ. App.) 33 S. W. 1091.

A forfeiture is not favored, either at law or in equity, and a provision for it in a contract will be strictly construed.

Union Casualty & Surety Co. v. Bragg, 63 Kan. 295, 65 Pac. 272; *Painter v. Industrial Life Assn.* 131 Ind. 68, 30 N. E. 876; *Phenix Ins. Co. v. Smith*, 9 Kan. App. 828, 61 Pac. 501; *Hosford v. Hartford F. Ins. Co.* 127 U. S. 405, 32 L. ed. 199, 8 Sup. Ct. Rep. 1202.

Sanborn, Circuit Judge, delivered the opinion of the court:

On September 15, 1899, the Delaware Insurance Company issued its policy of fire insurance to John A. Henderson, the owner of a half interest in a building, and of the land on which it was situated, in the sum of \$5,000. Henderson had made two mortgages upon the property,—one to James H. Truskett for \$1,000, and one to Greer, Mills, & Co., a copartnership, and the defendants in error in this case, for \$5,000. The insurance policy contained this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice be given of sale of any property covered by this policy by virtue of any mortgage or trust deed."

On February 28, 1900, Truskett commenced proceedings to foreclose his mortgage. On March 5, 1900, the summons in that suit was served upon the mortgagor, Henderson. Greer, Mills, & Co. were defendants in that action, and on May 7, 1900, they filed an answer and cross-petition, in which they prayed for the foreclosure of their mortgage. On June 5, 1900, a decree of foreclosure of both the mortgages was made, and Greer, Mills, & Co. filed a præcipe for an order of sale under that decree. On June 17, 1900, the building burned. 61 L. R. A.

Before the proceedings in foreclosure were commenced, the insurance company, at the request of the mortgagees, had attached to its policy the following clauses: "Loss, if any, payable to James H. Truskett, mortgagee, as his interest may appear." "Loss, if any, under this policy, payable to Greer Mills Live Stock Commission Company, as their interest may appear, subject to a prior mortgage held by James H. Truskett."

The insurance company had no notice or knowledge of the foreclosure proceedings until after the fire. Greer, Mills, & Co. brought an action on the policy to recover for the loss which they sustained by the fire.

The statement of these facts creates a strong impression that the insurance company was not liable under the contract upon which this action was based. Their agreement reads that, if foreclosure proceedings be commenced with the knowledge of the insured, the policy shall be void, unless otherwise provided by agreement indorsed thereon or added thereto. There was no other provision by any such agreement. Foreclosure proceedings were commenced. The insured knew that they had been commenced weeks before the fire. Is it not the logical conclusion that the policy was void when the fire occurred? The court below answered this question in the negative, and counsel for the defendants in error seek to sustain its conclusion upon three grounds: Their first proposition is that the mortgagees, Greer, Mills, & Co., were excepted from the operation of the foreclosure provision of the policy. They argue that a mortgage is an incident of a debt; that the right to foreclose is an attribute of a mortgage; that, when the insurance company agreed that the loss should be paid to the mortgagees as their interest might appear, they thereby consented to the exercise by them of their right to foreclose; and from these premises they draw the conclusion that the mortgagees were thereby excepted from the provision of the policy that it should be void if foreclosure proceedings were commenced with the knowledge of the insured. The soundness of the premises upon which counsel base their contention is conceded, but the alleged conclusion does not follow. On the other hand, the plain reading of the clauses of the policy is, and the evident intention of the parties to the contract was, in the first place, to concede the right of the mortgagees to foreclose their mortgage, and, in view of this situation, to clearly provide what the rights and relations of the parties should be if the mortgagees exercised their right to commence their proceedings to foreclose. The parties to the policy, in other words, recognized the right of the mortgagees to enforce the terms of their mortgage, and provided, in plain terms, that if they commenced proceedings for that purpose, and these proceedings came to the knowledge of the insured, the policy should be void. That this is the true construction of the contract is evident, both from the cus-

tomary meaning of its terms, and from the fact that, at the time it was made, there were two mortgage clauses in common use, —the one here selected, which subjects the insurance of the mortgagee to the risk of all the acts and omissions of the mortgagor, and the union mortgage clause, which, in express terms, excepts the insurance of the mortgagees from many or all of the deeds and delinquencies of the mortgagor. *Syndicate Ins. Co. v. Bohn*, 27 L. R. A. 614, 12 C. C. A. 539, 27 U. S. App. 564, 65 Fed. 173. The parties to this policy selected and appended to it the former clause, and by its legal effect their rights must be measured.

The cases of *Lancashire Ins. Co. v. Boardman*, 58 Kan. 339, 49 Pac. 92, and *Dodge v. Hamburg-Bremen F. Ins. Co.* 4 Kan. App. 415, 46 Pac. 25, arose upon policies containing the union mortgage clause, and are neither controlling nor persuasive upon the question at issue in the case before us.

The second contention of counsel for the defendants in error is that the mortgagees were excepted from the effects of the deeds and delinquencies of the insured specified in the policy, because that instrument contained the provision that "if, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto," and there was no stipulation attached or appended to the mortgage clause which in so many words declared that the insurance in favor of the mortgagees was subject to the same terms and conditions as that of the mortgagor. But the clause which these parties selected and attached to the policy had a known, definite, and adjudicated meaning, it had a settled legal effect when they chose and appended it to the contract—the meaning and effect that the indemnity thereby secured to the mortgagees was subject to the risk of every act and neglect of the mortgagor which would avoid the original policy in his hands. No form of words could have been devised or adopted, relating to the insurance of these mortgagees, which would so clearly and conclusively have expressed the intention of the parties to this contract to subject the indemnity secured by the mortgagees to the risk of the acts and omissions of the mortgagor, as the clause which they selected and attached to the policy, because a long line of adjudications, covering more than forty years, had established the fact that this was its true meaning and effect. *Grosvenor v. Atlantic F. Ins. Co.* 17 N. Y. 391, 393; *Bates v. Equitable F. & M. Ins. Co.* 10 Wall. 33, 36, 19 L. ed. 882, 883; *Smith v. Union Ins. Co.* 120 Mass. 90, 91; *Baldwin v. Phoenix Ins. Co.* 60 N. H. 164, 166; *Martin v. Franklin F. Ins. Co.* 38 N. J. L. 140, 142, 20 Am. Rep. 372; *State Ins. Co.* 61 L. R. A.

v. Maackens, 38 N. J. L. 564; *Loring v. Manufacturers' Ins. Co.* 8 Gray, 28; *Franklin Sav. Inst. v. Central Mut. F. Ins. Co.* 119 Mass. 240; *Brunswick Sav. Inst. v. Commercial Union Ins. Co.* 68 Me. 313, 28 Am. Rep. 56; *Fitchburg Sav. Bank v. Amazon Ins. Co.* 125 Mass. 431. The true construction of the clause "Loss, if any, payable to —, mortgagee, as his interest may appear," or of words of similar import, when attached to policies of fire insurance, is, and has been for more than forty years, that the mortgagee is thereby made the simple appointee of the mortgagor, and that his indemnity is at the risk of the acts and omissions of the latter which would avoid, terminate, or affect the mortgagor's insurance under the original policy.

The opinions in *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 36 L. R. A. 673, 66 N. W. 646; *Boyd v. Thuringia Ins. Co.* 25 Wash. 447, 55 L. R. A. 165, 65 Pac. 785; *Lancashire Ins. Co. v. Boardman*, 58 Kan. 339, 49 Pac. 92, and *Delaware Ins. Co. v. Truskett*, 65 Kan. 861, 70 Pac. 1131, which have been called to our attention in support of the opposite view, have been thoughtfully read and considered. The case of *Lancashire Ins. Co. v. Boardman* is not in point, because the court was there considering the union mortgage clause, which expressly provides that the insurance of the mortgagee shall not be invalidated by the acts or neglects of the mortgagor, of which he has no knowledge. The opinions in the other three cases fairly sustain the contention of counsel for the defendants in error, but they are opposed to the established rule and the great weight of authority, and they do not commend themselves to our judgment, because they repudiate the long-settled construction and established meaning of the mortgage clause attached to the policy in hand, and ignore the invariable rule that, where the intent of the parties to an agreement is clearly expressed by the use of unambiguous terms or of stipulation that had a known and adjudicated meaning when they used them, they must be held to have intended that which they expressed, and no room is left for construction. The clause which the parties to this action selected and attached to the policy clearly expressed the condition that the insurance of the interest of the mortgagees was subject to the conditions which governed the insurance of the mortgagor, and they must abide by their agreement.

Finally, counsel seriously argue that the true meaning of the provision in the policy that it should become void "if, with the knowledge of the insured, foreclosure proceedings be commenced," is that the policy should become void only when the insured has knowledge of the foreclosure proceedings, before or at the time when they are commenced. Their conclusion from this construction is that, since the mortgagor in this case never had any knowledge of the foreclosure proceedings until the summons was served upon him, a few days after the

suit in foreclosure was commenced, the prescribed condition precedent to the invalidity of the policy never existed, and the insurance company remained liable to pay the subsequent loss. In support of this position counsel have not failed to find the opinions of two courts: *Bellevue Roller-Mill Co. v. London & L. F. Ins. Co.* (Idaho) 39 Pac. 196, and *North British & M. Ins. Co. v. Freeman* (Tex. Civ. App.) 33 S. W. 1091. It is by no means impossible that, if the exigency of the case had required, the diligence of counsel would have been rewarded with the discovery of a ruling somewhere that the stipulation here under consideration really required that the mortgagor should not only know of the foreclosure proceedings before they were commenced, but that he should also institute them against himself. It is plain that the effect of such a construction is merely to cancel this provision of the policy, for defendants in foreclosure proceedings are seldom informed of the time and place of their commencement at the time or before they are begun. Contracts of insurance, however, are not made by or for casuists or sophists, and the obvious meaning of their plain terms is not to be discarded for some curious, hidden sense, which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover. "Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 463, 38 L. ed. 231,

235, 14 Sup. Ct. Rep. 379; *Fred J. Kiesel & Co. v. Sun Ins. Office*, 31 C. C. A. 515, 518, 60 U. S. App. 10, 88 Fed. 243, 246; *McGloth v. Provident Mut. Acci. Co.* 32 C. C. A. 318, 322, 60 U. S. App. 705, 89 Fed. 685, 689. The terms of the provision of the policy under consideration are clear and unambiguous. The meaning of these terms, when taken in their ordinary and popular sense, is that the policy becomes void if the foreclosure proceedings are instituted, and this fact becomes known to the insured, at any time before the fire occurs. The result is that, unless otherwise provided by agreement indorsed on or added to the policy, the insurance of a mortgagee under the customary clause, which reads, in substance, "Loss, if any, payable to — mortgagee as his interest may appear," ceases if foreclosure proceedings are instituted against the mortgagor, and the latter knows that they have been commenced, at any time before the fire which causes the loss occurs. *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410, 417; *Hartford F. Ins. Co. v. Clayton*, 17 Tex. Civ. App. 644, 43 S. W. 910; *Springfield Steam Laundry Co. v. Traders' Ins. Co.* 151 Mo. 90, 52 S. W. 238, 239; *Merchants' Ins. Co. v. Brown*, 77 Md. 79, 25 Atl. 992; *McKinney v. Western Assur. Co.* 97 Ky. 474, 30 S. W. 1004. The case under consideration falls fairly within this rule.

The judgment below is accordingly reversed, and, as this case is here upon an agreed statement of facts, the case is remanded to the Circuit Court, with directions to enter a judgment upon the merits in favor of the insurance company, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

Harry DONOVAN *et al.*, *Appts.*,
v.

PENNSYLVANIA COMPANY.

(120 Fed. 215.)

1. A railroad company may give the exclusive right to solicit patrons within its station to one hackman.
2. A railroad company is entitled to an injunction restraining hackmen, hotel runners, and baggagemen from congregating in and about the entrances to its stations so as to interfere with the ingress and egress of passengers and employees, although it has no right to complain of the obstruction of the public walks adjacent to such entrances,

which does not interfere with such ingress and egress.

(January 6, 1903.)

APPEAL by defendants from a decree of the Circuit Court of the United States for the Northern Division of the Northern District of Illinois, enjoining them from soliciting business in plaintiff's passenger station, and from congregating upon the sidewalk adjacent to its entrances. *Modified.*

The facts are stated in the opinion.

Argued before *Jenkins*, *Grosscup*, and *Baker*, Circuit Judges.

NOTE.—For conflicting decisions on the right of a carrier to discriminate between hackmen and similar solicitors of business, see *note* to *Cole v. Rowen* (Mich.) 13 L. R. A. 848.

For other cases in this series in favor of such exclusive right, see *Lucas v. Herbert* (Ind.) 37 L. R. A. 376; *New York, N. H. & H. R. Co. v. Scovill* (Conn.) 42 L. R. A. 157; *Kates v. Atlanta Baggage & Cab Co.* (Ga.) 46 L. R. A. 431; *Godbout v. St. Paul Union Depot* 61 L. R. A.

Co. (Minn.) 47 L. R. A. 534; *Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co.* (Va.) 50 L. R. A. 722; and *Boston & A. R. Co. v. Brown* (Mass.) 52 L. R. A. 418.

For denial of such exclusive privilege, see *Indianapolis Union R. Co. v. Dohn* (Ind.) 45 L. R. A. 427; *Lindsey v. Anniston* (Ala.) 27 L. R. A. 430; *State v. Reed* (Miss.) 43 L. R. A. 134; and *Pennsylvania Co. v. Chicago* (Ill.) 53 L. R. A. 223.

Messrs. Richard J. Cooney, Clarence S. Darrow, and William Thompson, for appellants:

The use of the streets of a city, whether for vehicles drawn by animals, or footmen, or the passage of cars, must be for the public. No corporation or individual can acquire an exclusive right to their use for merely private purposes.

Trotter v. Chicago, 33 Ill. App. 206, 136 Ill. 430, 26 N. E. 359; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Tugman v. Chicago*, 78 Ill. 405; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 200; *Kinmundy v. Mahan*, 72 Ill. 462; *East St. Louis v. Wehrung*, 50 Ill. 28.

The writ of injunction should not be converted into a legislative measure regulating the use of the streets and the occupations of the appellants.

Lindsay v. Anniston, 104 Ala. 257, 27 L. R. A. 436, 16 So. 545.

The use of the street with the consent and acquiescence of the municipal authorities cannot be enjoined at the suit of an abutting property owner.

Doane v. Lake Street Elev. R. Co. 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520; *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307; *Stetson v. Chicago & E. R. Co.* 75 Ill. 74; *Patterson v. Chicago, D. & V. R. Co.* 75 Ill. 588; *Chicago, B. & Q. R. Co. v. McGinnis*, 79 Ill. 269; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135; *Penn. Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138; *Corcoran v. Chicago, M. & N. R. Co.* 149 Ill. 291, 37 N. E. 68; *White v. Metropolitan West Side Elev. R. Co.* 154 Ill. 620, 39 N. E. 270; *Pittsburgh, C. C. & St. L. R. Co. v. Baekus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1414; *Truesdale v. Peoria Grape Sugar Co.* 101 Ill. 561; *World's Columbia Exposition v. United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654; *Dunning v. Aurora*, 40 Ill. 481; *Bliss v. Kennedy*, 43 Ill. 67; *Cook County v. Great Western R. Co.* 119 Ill. 218, 10 N. E. 564; *Tibbets v. West & South Town Street R. Co.* 54 Ill. App. 180; *Chicago v. Union Bldg. Asso.* 102 Ill. 380, 40 Am. Rep. 598; *Clark v. Donaldson*, 104 Ill. 639; *Union Coal Co. v. La Salle*, 136 Ill. 119, 12 L. R. A. 326, 26 N. E. 506; *Hesing v. Scott*, 107 Ill. 600; *Miller v. Webster City*, 94 Iowa, 162, 62 N. W. 648.

The law above cited applies to a corporation as well as to private individuals.

General Electric R. Co. v. Chicago City R. Co. 66 Ill. App. 362; *Pennsylvania Coal Co. v. Chicago*, 181 Ill. 289, 53 L. R. A. 223, 54 N. E. 825.

The appellee has an adequate remedy at law, and relief in equity will not be granted.

Richards v. Lake Shore & M. S. R. Co. 124 Ill. 516, 16 N. E. 909; *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750; *Lake Erie & W. R. Co. v. Scott*, 132 Ill. 429, 8 L. R. A. 330, 24 N. E. 78; *Chicago & A. R. Co. v. Robbins*, 159 Ill. 598, 43 N. E. 332; *Galt v. Chicago & N. W. R. Co.* 157 Ill. 125, 41 N. E. 643; *Rigney* 61 L. R. A.

v. Chicago, 102 Ill. 64; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Pittsburg, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157; *Ottawa Gaslight & Coke Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263; *Illinois C. R. Co. v. Grabill*, 50 Ill. 242.

Where the relief prayed for, if granted, would be of great injury to the appellants, and not of a corresponding benefit to the appellee, an injunction will be denied.

Pratt v. New York C. & H. R. R. Co. 90 Hun, 83, 35 N. Y. Supp. 557; *Gray v. Manhattan R. Co.* 128 N. Y. 509, 28 N. E. 498; *High, Inj.* 596; *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435; *Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 453, 24 N. E. 919; *Jacksonville, T. & K. W. R. Co. v. Adams*, 28 Fla. 656, 14 L. R. A. 533, 10 So. 465; *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 5 Inters. Com. Rep. 131, 64 Fed. 981; *Wason v. Sanborn*, 45 N. H. 171.

The outside facilities at a depot must be equal.

Godbout v. St. Paul Union Depot Co. 79 Minn. 188, 47 L. R. A. 532, 81 N. W. 835; 1 Fetter, Carr. Pass. § 245, p. 638.

A railroad or depot company cannot make arbitrary rules discriminating as to who may occupy stands as provided by such depot, and as to who shall solicit passengers therefrom.

Ray, Pass. Carr. §§ 113-115; *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. 209; *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209; *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106; *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L. R. A. 819, 47 N. W. 667; *Larson v. Metropolitan Street R. Co.* 110 Mo. 247, 16 L. R. A. 330, 19 S. W. 416; *Marriott v. London & S. W. R. Co.* 1 C. B. N. S. 499; *Re Palmer*, L. R. 6 C. P. 194; *Camblos v. Philadelphia & R. R. Co.* 9 Phila. 411; *New England Exp. Co. v. Maine C. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Summitt v. State*, 8 Lea, 413, 41 Am. Rep. 637; *State v. Reed*, 76 Miss. 211, 43 L. R. A. 134, 24 So. 308; *Indianapolis Union R. Co. v. Dohn*, 153 Ind. 10, 45 L. R. A. 427, 53 N. E. 937; *Lucas v. Herbert*, 148 Ind. 64, 37 L. R. A. 376, 47 N. E. 146; *Cole v. Rowen*, 88 Mich. 219, 13 L. R. A. 848, 50 N. W. 138; *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15; *Pennsylvania Coal Co. v. Chicago*, 181 Ill. 289, 53 L. R. A. 223, 54 N. E. 825; *Lindsay v. Anniston*, 104 Ala. 257, 27 L. R. A. 436, 16 So. 545; *Pittsburg, Ft. W. & C. R. Co. v. Cheevers*, 149 Ill. 430, 24 L. R. A. 156, 37 N. E. 49; *Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520; *Truesdale v. Peoria Grape Sugar Co.* 101 Ill. 561; *Chicago v. Union Bldg. Asso.* 102 Ill. 380, 40 Am. Rep. 598; *Dunning v. Aurora*, 40 Ill. 481; *Clark v. Donaldson*, 104 Ill. 639; *Union Coal Co. v. La Salle*, 136 Ill. 119, 12 L. R. A. 326, 26 N. E. 506; *Hesing v. Scott*, 107 Ill. 600.

Messrs. Frank J. Loesch, Edgar A. Baneroft, and Charles F. Loesch, for appellee:

Cabmen and expressmen have no right to enter a railroad station for the purpose of soliciting patronage without the consent of the railroad company.

Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; *Barker v. Midland R. Co.* 18 C. B. 46; *Marriott v. London & S. W. R. Co.* 1 C. B. N. S. 499; *Beadell v. Eastern Counties R. Co.* 2 C. B. N. S. 509; *Re Painter*, 2 C. B. N. S. 702; *The D. R. Martin*, 11 Blatchf. 233, Fed. Cas. No. 1,030; *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89; *Com. v. Carey*, 147 Mass. 40, note, 17 N. E. 97; *Fluker v. Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L. R. A. 843, 8 S. E. 529; *Griswold v. Webb*, 16 R. I. 649, 7 L. R. A. 302, 19 Atl. 143; *Smith v. New York, L. E. & W. R. Co.* 149 Pa. 249, 24 Atl. 304; *New York C. & H. R. R. Co. v. Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859; *New York C. & H. R. R. Co. v. Sheeley*, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185; *Brown v. New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 69; *Summitt v. State*, 8 Lea, 413, 41 Am. Rep. 637; *Lucas v. Herbert*, 148 Ind. 64, 37 L. R. A. 376, 47 N. E. 146; *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L. R. A. 157, 41 Atl. 246; *Snyder v. Union Depot Co.* 19 Ohio C. C. 368; *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 636, 46 L. R. A. 431, 34 S. E. 372; *Godbout v. St. Paul Union Depot Co.* 79 Minn. 188, 47 L. R. A. 532, 81 N. W. 835; *New York C. & H. R. R. Co. v. Warren*, 31 Misc. 571, 64 N. Y. Supp. 781; *Boston & A. R. Co. v. Brown*, 177 Mass. 65, 52 L. R. A. 418, 58 N. E. 189; *Boston & M. R. Co. v. Sullivan*, 177 Mass. 230, 58 N. E. 689; *New York, N. H. & H. R. Co. v. Bork*, 23 R. I. 218, 49 Atl. 965; *Express Cases*, 117 U. S. 1, sub nom. *Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *St. Louis Drayage Co. v. Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39.

Appellee has the legal right to a free and unobstructed entrance to its passenger station from Canal street. Such right is a property right, and the obstruction of such entrance by the appellants gathering there in large numbers to ply their vocations is a private nuisance.

Benjamin v. Storr, L. R. 9 C. P. 400; *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 602; *Fritz v. Hobson*, L. R. 14 Ch. Div. 542; *Jaques v. National Exhibit Co.* 15 Abb. N. C. 250; *Hallock v. Scheyer*, 33 Hun, 111; *Flynn v. Taylor*, 53 Hun, 167, 6 N. Y. Supp. 96, 127 N. Y. 596, 14 L. R. A. 556, 28 N. E. 418; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264; *Shook v. Cohoes*, 108 N. Y. 649, 15 N. E. 531; *Cohen v. New York*, 113 N. Y. 535, 4 L. R. A. 406, 21 N. E. 700; *Porth v. Manhattan R. Co.* 134 N. Y. 615, 32 N. E. 649; *Carter v. Chicago*, 57 Ill. 283; *Field v. Barling*, 149 Ill. 557, 24 L. R. 61 L. R. A.

A. 406, 37 N. E. 850; *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176; *Hart v. Buckner*, 5 C. C. A. 1, 2 U. S. App. 488, 54 Fed. 925; *McDonald v. Newark*, 42 N. J. Eq. 136, 7 Atl. 855; 2 Dill. Mun. Corp. 4th ed. §§ 587b, 656a; 1 Lewis, Em. Dom. 2d ed. pp. 170-196; *McQuaid v. Portland & V. R. Co.* 18 Cr. 237, 22 Pac. 899; 1 Am. & Eng. Enc. Law, 2d ed. pp. 225, 238; Elliott, Roads & Streets, 2d ed. 761; *Branahan v. Cincinnati Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528.

Injunction is the only adequate remedy in the case at bar.

2 Spelling, Inj. 2d ed. §§ 338, 340; 1 Am. & Eng. Enc. Law, 2d ed. p. 225; 2 Lewis, Em. Dom. 2d ed. § 609; 1 High, Inj. §§ 816, 820; Hilliard, Inj. 3d ed. § 328; 2 Dill. Mun. Corp. 4th ed. § 661; Elliott, Roads & Streets, 2d ed. § 709; *Pennsylvania Cool Co. v. Chicago*, 181 Ill. 289, 53 L. R. A. 223, 54 N. E. 825; *Carter v. Chicago*, 57 Ill. 283; *Edwards v. Haeger*, 180 Ill. 99, 54 N. E. 176; *Lowery v. Pekin*, 186 Ill. 387, 51 L. R. A. 301, 57 N. E. 1062; *Chicago General R. Co. v. Chicago, B. & Q. R. Co.* 181 Ill. 605, 54 N. E. 1026; *General Electric R. Co. v. Chicago, I. & L. R. Co.* 39 C. C. A. 345, 98 Fed. 907, 46 C. C. A. 629, 107 Fed. 771; *London & N. W. R. Co. v. Lancashire & Y. R. Co.* L. R. 4 Eq. 174; *New York C. & H. R. R. Co. v. Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859; *Brown v. New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 69, Affirmed in 151 N. Y. 674, 46 N. E. 1145; *New York C. & H. R. R. Co. v. Sheeley*, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185; *New York C. & H. R. R. Co. v. Warren*, 31 Misc. 571, 64 N. Y. Supp. 781; *Snyder v. Union Depot Co.* 19 Ohio C. C. 368; *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L. R. A. 157, 41 Atl. 246; *Boston & M. R. Co. v. Sullivan*, 177 Mass. 230, 58 N. E. 689; *Goodson v. Richardson*, L. R. 9 Ch. 221.

Baker, Circuit Judge, delivered the opinion of the court:

The temporary injunction appealed from, entered at the suit of appellee, a railroad corporation organized and existing under the laws of Pennsylvania, commands appellants, citizens of Illinois, to desist (1) from soliciting the custom of incoming passengers for cabs, carriages, express wagons, and hotels within appellee's passenger station at Chicago; and (2) from congregating upon the sidewalk in front of, adjacent to, or about the entrances, and there soliciting the custom of passengers.

1. Appellee has a contract with the Parmelee Transfer Company under which two agents of the transfer company are stationed within the depot building to solicit the custom of passengers. Those appellants who are hackmen have continuously asserted the right, over appellee's repeated objections, to have two of their number enter the building to solicit custom, and have acted accordingly, and threaten to continue.

Those appellants who are not hackmen claim no right to enter appellee's building for the purpose of plying their trades. The question on this branch of the case is the right of the hackmen to solicit business within the station, over appellee's protest. That appellee may exclude all hackmen is not denied. But it is insisted that appellee may not lawfully give an exclusive privilege to one hackman; that, by granting the privilege to one, it has waived its right of exclusion; and that its only remaining right is to promulgate and enforce reasonable rules and regulations under which all hackmen, without discrimination, shall be afforded equal facilities in soliciting patronage within the station. In support of this view (*Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. 209; *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106; *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L. R. A. 819, 47 N. W. 667; *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15; *Lindsay v. Anniston*, 104 Ala. 257, 27 L. R. A. 436, 16 So. 545; *State v. Reed*, 76 Miss. 211, 43 L. R. A. 134, 24 So. 308; *Indianapolis Union R. Co. v. Dohn*, 153 Ind. 10, 45 L. R. A. 427, 53 N. E. 937; *Pennsylvania Coal Co. v. Chicago*, 181 Ill. 289, 53 L. R. A. 223, 54 N. E. 825), as well as against it (*Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258; *Barker v. Midland R. Co.* 18 C. B. 46; *Marrriott v. London & S. W. R. Co.* 1 C. B. N. S. 499; *Beadell v. Eastern Counties R. Co.* 2 C. B. N. S. 509; *Re Painter*, 2 C. B. N. S. 702; *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *The D. R. Martin*, 11 Blatchf. 233, Fed. Cas. No. 1,030; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89; *Con v. Carey*, 147 Mass. 40, note, 17 N. E. 97; *Fluker v. Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L. R. A. 843, 8 S. E. 529; *Griswold v. Webb*, 16 R. I. 649, 7 L. R. A. 302, 19 Atl. 143; *Smith v. New York, L. E. & W. R. Co.* 149 Pa. 249, 24 Atl. 304; *New York C. & H. R. R. Co. v. Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859; *New York C. & H. R. R. Co. v. Sheeley*, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185; *Brown v. New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 69, 151 N. Y. 674, 46 N. E. 1145; *Summitt v. State*, 8 Lea, 413, 41 Am. Rep. 637; *Lucas v. Herbert*, 148 Ind. 64, 37 L. R. A. 376, 47 N. E. 146; *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L. R. A. 157, 41 Atl. 246; *Snyder v. Union Depot Co.* 19 Ohio C. C. 368; *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 630, 46 L. R. A. 431, 34 S. E. 372; *Godbout v. St. Paul Union Depot Co.* 79 Minn. 188, 47 L. R. A. 532, 81 N. W. 835; *New York C. & H. R. R. Co. v. Warren*, 31 Misc. 571, 64 N. Y. Supp. 781; *Boston & A. R. Co. v. Brown*, 177 Mass. 65, 52 L. R. A. 418, 58 N. E. 189; *Boston & M. R. Co. v. Sullivan*, 177 Mass. 230, 58 N. E. 689; *New York, N. H. & H. R. Co. v. Bork*, 23 R. I. 218, 40 Atl. 965; *Express Cases*, 117 U. S. 1, sub nom. *Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 61 L. R. A.

628; *St. Louis Drayage Co. v. Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39), our attention is directed to a large number of cases.

The asserted right of the hackmen necessarily postulates a correlative duty on the part of the railroad company. The company owes the duty to all persons, without discrimination, to carry them on equal terms of service and compensation. As a common carrier of passengers, the company must provide facilities for the reception, carriage, and discharge of its passengers, and must establish rates which are available equally to all who desire to become passengers. But the company does not owe to its passengers the duty to provide on its trains the opportunities for them to purchase newspapers, books, fruit, and the like, or to employ the services of a stenographer or of a barber, or to buy cab or express tickets. Much less does it owe the duty to anyone to permit him to pursue his vocation on the trains. And if not on the trains, then not in the station buildings. The relation of carrier and passenger continues, not merely on the train, but within the station at the end of the journey. The right of way on which the trains run, and the lands on which the depots are built, were obtained and are held for purposes of the same general character.

The fact that the person who asserts the right to carry on his business for his own profit upon the trains or within the station buildings is himself a common carrier does not affect the question. The railroad company is a common carrier of merchandise, but is not a common carrier of common carriers of merchandise. It owes no duty to express companies to haul their cars and safes and messengers. *Express Cases*, 117 U. S. 1, sub nom. *Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628. If it owed the duty it would have to treat all alike. Owing no duty, it may engage, or not, as it pleases, in the business of serving express companies, and may choose the company, and name the terms that are acceptable to it. It may, therefore, contract against its own negligence in injuring express messengers (*Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; *Louisville, N. A. & O. R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93, 44 N. E. 796; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, 47 N. E. 464), though public policy forbids such exemption in the case of passengers (*New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627). Similarly, a railroad company is not a common carrier of common carriers of passengers. It owes no duty to sleeping car companies to haul their cars and clerks and porters, and may, therefore, exempt itself from liability for negligence. *Russell v. Pittsburgh, C. C. & St. L. R. Co.* 157 Ind. 305, 55 L. R. A. 253, 61 N. E. 678. So, also, a railroad company is under no obligation

to issue passes, and may, therefore, exempt itself from liability for negligence. *Payne v. Terre Haute & I. R. Co.* 157 Ind. 616, 56 L. R. A. 472, 62 N. E. 472. Through all of these particulars, namely, the relations between railroad companies and news dealers, fruit venders, restaurateurs, hotel runners, hackmen, baggage agents, transfer companies, express companies, sleeping car companies, and pass holders, there runs one common principle: Whatever a railroad company does as a common carrier, it is compelled to do for all without discrimination. Whatever it may lawfully do outside of its obligations as a common carrier is a matter of favor. And by the term, favor goes not by right.

The true relations of the parties are the same, whether the suit be instituted by the one who seeks to participate in the favor, or by the railroad company that withholds it. No taint of uncleanness can justly attach to the complainant who asks protection in the possession of his own, on the ground that he declines to license the defendant to enter, though he licenses others. And if it were to be held that the granting of such favors was beyond the charter powers of a railroad company, appellants would not be helped. It is the part of the public authorities to restrain and punish *ultra vires* acts. No one can maintain that the law shall be violated with him as a *particeps criminis* because it is broken with another.

Appellee, a Pennsylvania corporation, comes into the Federal courts, not on account of its citizenship, for it has none, but by virtue of the irrebuttable presumption that all of its stockholders are citizens of states other than Illinois. If it were to be conceded that the question now under consideration is one of local law, we would nevertheless feel free to act as we see the right, because we do not find that the supreme court of Illinois has decided the question. No statute is referred to that touches the question. No case is cited in which the supreme court of Illinois has decided that hackmen have the right, over the objection of a railroad company, to ply their trade on trains and within stations unless all are excluded. In *Pennsylvania Coal Co. v. Chicago*, 181 Ill. 289, 53 L. R. A. 223, 54 N. E. 825, the company unsuccessfully prosecuted a suit and an appeal against the city to avoid an ordinance which established a hack stand in the street in front of a portion of the station. Certain hackmen were permitted to intervene and file an answer. They denied the invalidity of the ordinance, and asserted, in effect, that since the company had leased ground owned by it, and situated near its passenger depot, to an owner of hacks for use in his business, it could not contest the right of the city to establish a hack stand in the street adjoining its property. But no claim was set up in the hackmen's answer, or adjudicated in the decree appealed from, that hackmen, under any circumstances, could compel a railroad company to permit them to carry

on their business by soliciting patronage on the company's premises.

2. The main entrance to the station comprises three doorways, each 5 feet wide. Most of the thirty-odd thousand passengers a day go through this entrance. The building abuts upon the street. In the street, in front of the building, some distance from the entrance, is the hack stand established by the city ordinance. From 10 to 20 hackmen throughout each day have persisted in congregating about the entrance, to the material interference with the ingress and egress of passengers and railroad employees. The number has been swelled by the presence of baggagemen, hotel runners, and Parmelee agents. The Parmelee Company has no greater rights in the street and on the sidewalk than the others, and appellee has not undertaken to give it any. Every one who has an existing contract to deliver or receive a passenger has, through the passenger, the right of access and entry to serve the passenger. This the appellee concedes.

The title and the right of control of the streets for street purposes are in the city. If the streets are obstructed, the city should clear them. Appellee may not take upon itself the vindication of the city's or the public's rights. But to have a free and unobstructed entrance is a property right,—an easement appurtenant to the abutting realty. From continuous infractions of that right, appellee is entitled to relief. *Benjamin v. Storr*, L. R. 9 C. P. 400; *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662; *Fritz v. Hobson*, L. R. 14 Ch. Div. 542; *Jaques v. National Exhibit Co.* 15 Abb. N. C. 250; *Hallock v. Scheyer*, 33 Hun, 111; *Flynn v. Taylor*, 53 Hun, 167, 6 N. Y. Supp. 96; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264; *Shook v. Cohoes*, 108 N. Y. 649, 15 N. E. 531; *Cohen v. New York*, 113 N. Y. 535, 4 L. R. A. 406, 21 N. E. 700; *Flynn v. Taylor*, 127 N. Y. 596, 14 L. R. A. 556, 28 N. E. 418; *Porth v. Manhattan R. Co.* 134 N. Y. 615, 32 N. E. 649; *Carter v. Chicago*, 57 Ill. 233; *Field v. Barling*, 149 Ill. 557, 24 L. R. A. 406, 37 N. E. 850; *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176; *Hart v. Buckner*, 5 C. C. A. 1, 2 U. S. App. 488, 54 Fed. 925; *McDonald v. Newark*, 42 N. J. Eq. 136-138, 7 Atl. 855; 2 Dill. Mun. Corp. 4th ed. §§ 587b, 656a; 1 Lewis, Em. Dom. 2d ed. pp. 170-196; *McQuaid v. Portland & V. R. Co.* 18 Or. 237, 22 Pac. 899; 1 Am. & Eng. Enc. Law, 2d ed. pp. 225, 238; Elliott, Roads & Streets, 2d ed. 761; *Branahan v. Cincinnati Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528.

But a decree that enjoins appellants "from congregating on the sidewalk in front of, adjacent to, or about the entrances, and there soliciting the custom of passengers," appears to us to be too broad. If the congregating created only a public nuisance, that would be the public's concern. The congregating that may be restrained in this

suit of appellee is only such as interferes with the ingress and egress of passengers and employees.

Inasmuch as the decree, by its terms, is not limited to protecting appellee's private right of property, as above indicated, the second part thereof should be *modified* to

restrain appellants "from congregating upon the sidewalk in front of, adjacent to, or about the entrances of appellee's passenger station in Chicago, and from there soliciting the custom of passengers, so as to interfere with the ingress and egress of passengers and employees;" and it is so ordered.

FLORIDA SUPREME COURT.

PREFERRED ACCIDENT INSURANCE COMPANY of New York, *Plff. in Err.*,

v.

Henry ROBINSON.

(.....Fla.....)

*Under a policy of insurance against the effects of bodily injury caused solely by external, violent, and accidental means, wherein it is provided that the insurance does not cover injury, fatal or non-fatal, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled, no recovery can be had for injury resulting from inflammation of the eyes in consequence of accidentally coming in contact with poison ivy, whereby the irritating poison was absorbed into the eye.

(February 24, 1903.)

ERROR to the Circuit Court for Duval County to review a judgment in favor of plaintiff in an action brought to recover a claim under an accident insurance policy. *Reversed.*

Statement by **Taylor, Ch. J.:**

The defendant in error, Henry Robinson, sued the plaintiff in error, the Preferred Accident Insurance Company of New York, in the circuit court of Duval county. The declaration alleged as follows: "Henry Robinson, by Wm. B. Young, his attorney, sues the Preferred Accident Insurance Company of New York, a corporation created and existing under and by virtue of the laws of the state of New York, and having an agent residing in the city of Jacksonville, in said county, for that whereas, on the 9th day of April, 1897, the said defendant undertook and agreed, in writing, in consideration of the annual premium of \$24 then and there paid by the said plaintiff and accepted by said defendant, to insure the said plaintiff

for the term of twelve calendar months, beginning at 12 o'clock noon on said date, and ending at 12 o'clock noon on the 9th day of April, 1898, against the effects of bodily injury caused solely by external, violent, and accidental means, to wit, in the sum of \$25 per week, not exceeding one hundred and four consecutive weeks, where the injury received as aforesaid shall, independent of all other causes, and immediately following the receipt thereof, wholly and continuously disable him from transacting any and every kind of business pertaining to his occupation as president of a bank; and plaintiff avers that on, to wit, the 26th day of June, 1897, while out riding in said county, a foreign substance, to wit, poison ivy, was blown into plaintiff's left eye, which caused inflammation to immediately set in, extending to both eyes and to the face, by reason of which injury so sustained plaintiff was wholly and continuously disabled from transacting any and every kind of business pertaining to his said occupation for a long period, to wit, for ten consecutive weeks immediately following the said 26th day of June, 1897, and plaintiff upon the first day after receiving said injury upon which he was physically able to do so, to wit, the 27th day of August, 1897, gave notice in writing to the secretary of said company at New York city of said accidental injury, but the said defendant has wholly failed and refused to pay to plaintiff the said sum of \$25 per week for the said ten weeks during which said plaintiff was wholly and continuously disabled from transacting any and every kind of business pertaining to his said occupation, and has repudiated all liability upon its said contract of insurance, claiming that the insurance under said contract did not cover injury resulting from the said accident sustained by plaintiff, and plaintiff claims \$500 as damages."

Attached to the declaration as the cause of action sued on was a copy of the contract

*Headnote by **Taylor, Ch. J.**

NOTE.—As to what constitutes an accident within the meaning of an accident insurance policy, see also, in this series, *Fidelity & C. Co. v. Johnson* (Miss.) 30 L. R. A. 206, and *note*; *Mennelley v. Employers' Liability Assur. Corp.* (N. Y.) 31 L. R. A. 686; *Fidelity & C. Co. v. Waterman* (Ill.) 32 L. R. A. 654; *Modern Woodmen Acci. Assn. v. Shryock* (Neb.) 39 L. R. A. 826; *Kasten v. Interstate Casualty Co.* 61 L. R. A.

(Wis.) 40 L. R. A. 651; *Western Commercial Travelers' Assn. v. Smith* (C. C. App. 8th C.) 40 L. R. A. 653; *United States Mut. Acci. Assn. v. Hubbell* (Ohio) 40 L. R. A. 453; *Atlanta Acci. Assn. v. Alexander* (Ga.) 42 L. R. A. 188; *Feder v. Iowa State Traveling Men's Assn.* (Iowa) 43 L. R. A. 693; and *Fidelity & C. Co. v. Loewenstein* (C. C. App. 8th C.) 46 L. R. A. 450.

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of insurance, in the words and figures following:

No. 0013909.

Maximum Weekly Indemnity \$50 per week.
Maximum Death Benefit \$10,000.

The Preferred Accident Insurance Company
of New York.

In consideration of the agreement, statements, and warranties contained in the application for this policy and of the annual premium of twenty-four dollars, has accepted Henry Robinson of Jacksonville, state of Florida, a president, "bank" by occupation, and, subject to all of the provisions and conditions herein contained, or indorsed hereon, hereby insures him under preferred classification, for the term of twelve calendar months, beginning at twelve o'clock noon on the date hereof, and ending twelve o'clock noon on the 9th day of April, 1898, against the effects of bodily injury, caused solely by external, violent, and accidental means, to wit: (a) In the sum of \$25 per week, not exceeding one hundred and four (104) consecutive weeks, where the injury, received as aforesaid, shall, independently of all other causes, and immediately following the receipt thereof, wholly and continuously disable him from transacting any and every kind of business pertaining to the occupation above stated.

(b) Or, where the injury, received as aforesaid, shall independently of all other causes and immediately following the receipt thereof, continuously disable and prevent the insured from performing some one or more of the duties pertaining to the said occupation, the said company will pay the insured a weekly indemnity of not less than \$5 or more than \$20 during the continuance of such partial disablement not exceeding twenty-six (26) consecutive weeks,—the amount of such indemnity to be determined by said company as between the said maximum and minimum amounts, based upon the nature and severity of the injury and the consequent effect upon the occupation of the insured. (c) Or, the said company will pay the insured as a specific indemnity, in lieu of the above-mentioned weekly indemnities, if the injury, received as aforesaid, shall within ninety (90) days from the happening thereof, result (1) in the entire and permanent destruction of the sight of one eye, the sum of \$650; or (2) in the entire loss of one hand or one foot by complete severance thereof at or above the wrist or ankle, the sum of \$2,500; or, (3) in the entire and permanent destruction of the sight of both eyes, or in the entire loss of both hands or both feet, or one hand and one foot, by complete severance thereof, at or above the wrist or ankle, the sum of \$5,000; either of which payments shall terminate this policy. (d) Or, if death shall result from such injury within ninety (90) days from the date thereof, the said company will pay the sum of \$5,000 to Margaret A. Robinson (wife), if surviving, or, in the event of her prior death, to the executors, administrators, or assigns of the insured. (e) Or, (1) if such injuries shall be received by the insured while riding as a passenger in or on a public conveyance provided by a common carrier for passenger service, and propelled by steam, electricity, or cable; or, (2) if such injuries shall be received by the insured in consequence of the burning of a licensed hotel, while he shall be a guest therein, then the amount to be paid to the insured or his beneficiary, as the case may be, shall be double the amount that would otherwise be paid for such injury. The benefits accruing under clause "e" shall not, however, be applicable to any injury (fatal or nonfatal) which may result from an attempt to enter or leave any of the moving conveyances therein specified. This insurance does not cover disappearance; nor suicide, sane or insane; nor any case of disability or death whatever, except where the claimant shall furnish to the company direct and positive proof that such disability or death resulted proximately and solely from accidental causes; nor death or disability happening to the insured either while intoxicated, or in consequence of his being or having been under the influence of any intoxicant or narcotic; nor injury, fatal or nonfatal, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled; nor death nor loss of limb or sight, nor disability resulting either directly or indirectly, wholly or in part, from any of the following acts, causes, or conditions, or while so engaged or affected: Sunstroke, freezing, sleepwalking, hernia, fit, vertigo, lumbago, or bodily infirmity or disease of any kind; medical or surgical treatment (amputation made necessary by the particular injury for which claim is made and occurring within ninety days from date of such injury excepted); riding or driving in races of any kind; either football or polo playing; war, riot, duelling, fighting, wrestling; injury resulting from an altercation, feud, or quarrel; intentional injury inflicted upon the insured by himself or by any other person (assault by a robber or highwayman excepted); voluntary overexertion; either voluntary or unnecessary exposure to danger while violating law; while handling any explosive compound; while or in consequence of riding in or on any locomotive, freight car, or hand car; or while walking or being on the roadbed or bridge of any steam railway. If it shall be established that at the time when an accidental injury (either fatal or nonfatal) is received by the insured, he was guilty of embezzlement, or of any other criminal offense, this policy shall, in such case, be wholly void. This policy is issued subject to the foregoing provisions and to the conditions on the back hereof; its terms cannot be waived or altered by any agent or solicitor, and no modification or alteration of any of its provisions shall be valid, un-

garet A. Robinson (wife), if surviving, or, in the event of her prior death, to the executors, administrators, or assigns of the insured. (e) Or, (1) if such injuries shall be received by the insured while riding as a passenger in or on a public conveyance provided by a common carrier for passenger service, and propelled by steam, electricity, or cable; or, (2) if such injuries shall be received by the insured in consequence of the burning of a licensed hotel, while he shall be a guest therein, then the amount to be paid to the insured or his beneficiary, as the case may be, shall be double the amount that would otherwise be paid for such injury. The benefits accruing under clause "e" shall not, however, be applicable to any injury (fatal or nonfatal) which may result from an attempt to enter or leave any of the moving conveyances therein specified. This insurance does not cover disappearance; nor suicide, sane or insane; nor any case of disability or death whatever, except where the claimant shall furnish to the company direct and positive proof that such disability or death resulted proximately and solely from accidental causes; nor death or disability happening to the insured either while intoxicated, or in consequence of his being or having been under the influence of any intoxicant or narcotic; nor injury, fatal or nonfatal, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled; nor death nor loss of limb or sight, nor disability resulting either directly or indirectly, wholly or in part, from any of the following acts, causes, or conditions, or while so engaged or affected: Sunstroke, freezing, sleepwalking, hernia, fit, vertigo, lumbago, or bodily infirmity or disease of any kind; medical or surgical treatment (amputation made necessary by the particular injury for which claim is made and occurring within ninety days from date of such injury excepted); riding or driving in races of any kind; either football or polo playing; war, riot, duelling, fighting, wrestling; injury resulting from an altercation, feud, or quarrel; intentional injury inflicted upon the insured by himself or by any other person (assault by a robber or highwayman excepted); voluntary overexertion; either voluntary or unnecessary exposure to danger while violating law; while handling any explosive compound; while or in consequence of riding in or on any locomotive, freight car, or hand car; or while walking or being on the roadbed or bridge of any steam railway. If it shall be established that at the time when an accidental injury (either fatal or nonfatal) is received by the insured, he was guilty of embezzlement, or of any other criminal offense, this policy shall, in such case, be wholly void. This policy is issued subject to the foregoing provisions and to the conditions on the back hereof; its terms cannot be waived or altered by any agent or solicitor, and no modification or alteration of any of its provisions shall be valid, un-

less indorsed hereon by the president or secretary of the company.

In witness whereof, the Preferred Accident Insurance Company of New York has caused this policy to be signed by its president and secretary, and delivered at the office of the company, in the city of New York, state of New York, this 9th day of April, one thousand eight hundred and ninety-seven.

P. C. Lounsbury, President.

Kimball C. Attwood, Secretary.

[Conditions on Back of Policy.]

Conditions.

This policy is issued to and accepted by the insured subject to the following provisions and conditions: 1. The insured is permitted to travel by regular lines of passenger conveyance anywhere throughout the civilized world. 2. Notice of any accidental injury for which claim is to be made under this policy shall be given in writing, addressed to the secretary of the company at New York City, stating full particulars of the accident and injury, and failure to give such written notice within ten (10) days from the date of injury (whether fatal or nonfatal) shall invalidate any and all claims under this policy. Affirmative proofs of death or of injury and duration of disability, and that the same resulted proximately and solely from accidental causes within the terms of this contract shall be furnished to the company within the following limit of time:

(1) As to fatal injury, within two months from the date of death; (2) as to injury resulting in the entire loss of one or both hands, feet, or eyes, within four months from the date of such injury; and as to any other disabling injury, within thirty days after the termination of such disability—otherwise all claims based upon any of the foregoing injuries shall be forfeited.

Indorsed: "\$10,000. Combination partial disability and hotel policy. Read your policy. Notify secretary at once if injured. The Preferred Accident Insurance Co. of New York. Policy No. 0013909, issued in favor of Henry Robinson, Jacksonville, Fla."

To this declaration the defendant pleaded, among other things, (1) that it did not promise as alleged; (2) that the alleged injuries to plaintiff in his said declaration mentioned were not caused solely by external, violent, and accidental means, but was a disease or eruption of the body of the plaintiff.

Upon these pleas, issue was joined, and the cause tried to a jury, which resulted in a verdict and judgment for the plaintiff, to review which the defendant sued out writ of error from this court.

Messrs. Cooper & Cooper for plaintiff in error.

Mr. William B. Young for defendant in error.

Taylor, Ch. J., delivered the opinion of the court:

At the trial the plaintiff, to prove the al-

61 L. R. A.

legations of his declaration, offered in evidence the policy of insurance, copy of which was attached to his declaration, as the cause of action sued upon, but to the introduction of it in evidence the defendant objected on the grounds that said paper varied from the declaration; that the same did not correspond to the declaration; that the same was not the contract declared on as alleged in the declaration; that the same was not competent evidence of the contract set forth or declared on in the declaration. The judge overruled these objections and admitted the paper in evidence, to which ruling the defendant duly excepted.

The court gave to the jury the following charges, numbered as follows: "(2) The court instructs you that the policy of insurance given in evidence by plaintiff sustains the allegations of the contract alleged in the declaration." "(4) If you find that the plaintiff was injured accidentally by poison ivy striking him in the eye, and inflammation was the result solely from poison ivy striking or being wafted into plaintiff's eye, and being absorbed and inflammation resulting therefrom, you must find for the plaintiff." "(2) (At plaintiff's request.) Inflammation caused by the accidental wafting of poison ivy into the eye of the insured is covered by the contract of insurance offered in evidence."

All of these rulings and charges were duly and severally excepted to, and are severally assigned and argued as error. Whether these assignments of error are well taken depends upon the proper construction of the contract of insurance sued upon. The policy or contract of insurance contains, as will be observed, the following provisions: "The Preferred Accident Insurance Company of New York, in consideration," etc. ". . . and subject to all of the provisions and conditions herein contained, or indorsed hereon, hereby insures him [Henry Robinson] . . . against the effects of bodily injury, caused solely by external, violent, and accidental means. This insurance does not cover disappearance, nor suicide, sane or insane; nor any case of disability or death whatever, except where the claimant shall furnish to the company direct and positive proof that such disability or death resulted proximately and solely from accidental causes; nor death or disability happening to the insured either while intoxicated, or in consequence of his being or having been under the influence of any intoxicant or narcotic; nor injury, fatal or nonfatal, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled."

It is contended here for the defendant in error that under the decision of the courts of New York in the case of *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443, 20 N. E. 347, the injury received by the plaintiff below, as set out in his declaration, is covered by the policy of insurance sued upon, and is not excepted therefrom by the above-quoted provisions therein. With the rea-

soning in this, and other New York, Pennsylvania, and Illinois cases following it, we cannot at all agree. They hold, in effect, that an exception of certain classes of accidents out of the terms of a policy of insurance that insures expressly against accidents only, covers nothing but what is intentionally and consciously brought about by the insured, and therefore, consequently, that is not an accident. But even if the New York and other cases following it were sound law, the policy in litigation here seems to have been framed with a view to avoid the strained reasoning of the courts in those cases predicated upon the use of certain words and forms of expression in the policies therein considered. The policy in this case differs materially from the contracts construed in those cases.

A lucid and forceful *exposé* of the fallacy and unsoundness of the reasoning and conclusions in the New York, and other courts following her, will be found in the case of *McGlothter v. Provident Mut. Acci. Co.* 32 C. C. A. 318, 60 U. S. App. 705, 89 Fed. 685.

See also *Early v. Standard Life & Acci. Ins. Co.* 113 Mich. 58, 71 N. W. 500; *Westmoreland v. Preferred Acci. Ins. Co.* 75 Fed. 244.

Under our construction of the plain and unambiguous language of the contract of insurance sued upon in this case, the injury alleged to the plaintiff's eye from poison absorbed by accidentally coming in contact with poison ivy is expressly excepted from the accidents insured against, and, under the policy sued upon, no recovery can be had upon the allegations made in the declaration herein. It follows from what has been said that the court below erred in admitting the policy of insurance objected to in evidence in the cause, upon the ground of the objection made to its introduction, viz., that it varied from the contract alleged in the declaration, and that the court erred in giving each of the instructions quoted above.

For the errors found the judgment of the court below in said cause is reversed at the cost of the defendant in error.

GEORGIA SUPREME COURT.

C. H. DAVIS & COMPANY, *Plffs. in Err.*,
v.

A. M. MORGAN.

(.....Ga.....)

*1. Where a contract of employment is made for one year at a stipulated salary per month, an agreement during the term to receive less or to pay more than the contract price is void, unless supported by some change in place, hours, character of employment, or other consideration.

2. Protection to person and property is the duty of the state, and, in pursuance thereof, laws are made to protect property and award damages for breach of contract, but courts cannot enforce promises binding on the conscience, except in those cases where some pecuniary damage flows from the breach, or where, in addition to the moral obligation, the promise is also supported by a legal consideration.

(March 19, 1903.)

ERROR to the Superior Court for McIntosh County to review a judgment in favor of plaintiff in an action brought to recover wages alleged to be due and unpaid. *Reversed.*

The facts are stated in the opinion.

Messrs. Osborne & Lawrence, for plaintiffs in error:

The additional amount offered was a mere promise of a gift, which was never per-

fect by a delivery. It was not binding upon the defendant.

Bush v. Rawlins, 89 Ga. 117, 14 S. E. 886.

There was never any consideration for the proposed increase of wages.

Holliday v. Poole, 77 Ga. 159; *Davis v. Tift*, 70 Ga. 53; *Montgomery v. Martin*, 94 Ga. 219, 21 S. E. 513; *Blalock v. Jackson*, 94 Ga. 469, 20 S. E. 346; *Baer v. Christian*, 83 Ga. 322, 9 S. E. 790; *Tatum v. Morgan*, 108 Ga. 336, 33 S. E. 940.

Messrs. Gignilliat & Stubbs, for defendant in error:

The evidence shows that at the outset Morgan asked \$50 per month; Davis offered \$40 per month, with the statement that he had another man employed already to do part of the work. Later this man was put on another place and Morgan did the work of both. Surely this was a "valuable" consideration, and would support the promise to give him the \$50 per month, originally demanded.

Ga. Code. § 3658.

"A strong moral obligation" constitutes a "good" consideration.

Ibid.; *Parrott v. Johnson*, 61 Ga. 475; *Gray v. Hamil*, 82 Ga. 375, 6 L. R. A. 72, 10 S. E. 205.

Lamar, J., delivered the opinion of the court:

Davis & Co. employed Morgan for one year at \$40 per month. After the contract had been in force for some time, Morgan received an offer of \$65 per month from a company in Florida, and mentioned the fact to Davis, saying that of course he would not go without consent. Davis insists that he then said, if Morgan would stay out the bal-

*Headnotes by LAMAR, J.

NOTE.—As to sufficiency of moral obligation as consideration for promise, see also, in this series, *Trimble v. Rudy* (Ky.) 53 L. R. A. 353, and *note*.
61 L. R. A.

ance of the term, and work satisfactorily, he would give him \$120 at the end of the year. Morgan says that Davis stated, "I will add \$10 a month from the time you began, and owe you \$120 when your time is up." Davis & Co. discharged Morgan two or three weeks before the end of the term, because the latter had gone to Florida for several days without their consent. Morgan insists that he told Davis that he was going, and the latter made no objection. He claimed that he was discharged without proper cause, and brought suit for the extra compensation promised. The jury found a verdict in his favor, and, the court having refused to grant a new trial, Davis & Co. excepted.

If the promise contemplated that Davis & Co. were to pay Morgan \$10 per month for that part of the year which had already passed, and as to which there had been a settlement, it was manifestly *nudum pactum*; for a past transaction, the obligation of which has been fully satisfied, will not sustain a new promise. *Gay v. Mott*, 43 Ga. 254. And the result is practically the same whether Morgan or Davis was correct in the statement of the conversation. Both proved a promise to give more than was due, and to pay extra for what one was already legally bound to perform. The employer, therefore, received no consideration for his promise to give the additional money at the end of the year. Morgan had agreed to work for twelve months at the price promised, and, if during the term he had agreed to receive less, the employer would still have been liable to pay him the full \$40 per month. On the other hand, the employer could not be forced to pay more than the contract price. He got no more services than he had already contracted to receive, and according to an almost unbroken line of decisions the agreement to give more than was due was a *nudum pactum*, and void, as having no consideration to support the promise. The case is something like that of *Bush v. Rawlins*, 89 Ga. 117, 14 S. E. 886, where the landlord agreed to give the tenant certain property if he would pay his rent promptly; and it was held that such a promise was a gratuity, and void, as without consideration to support it. And see *Tatum v. Morgan*, 108 Ga. 336, 33 S. E. 940 (2); Civil Code 1895, § 3735. It is also within the principle of *Stilk v. Myrick*, 2 Campb. 317, where Lord Ellenborough held that an agreement to pay seamen extra for what they were bound by their articles to do was void. And so in *Bartlett v. Wyman*, 14 Johns. 260, a similar ruling was made in a case where a master agreed to give more wages if the seamen would not abandon the ship. See also *Ayres v. Chicago, R. I. & P. R. Co.* 52 Iowa, 478, 3 N. W. 522. There are cases holding that a new promise is binding where one of the parties to a contract refuses to perform, and, to save a loss, the innocent party agrees to pay more than the original contract price, if the actor will perform as originally agreed. *Goebel v. Linn*, 47 Mich. 489, 41 Am. Rep. 723, 61 L. R. A.

11 N. W. 284. But even if that line of cases should not be disregarded as tending to encourage a breach of contract, they do not affect the rights of Morgan here, because he does not bring himself within their ruling. Had there been a rescission or formal cancellation (*Vanderbilt v. Schreyer*, 91 N. Y. 402) of the old contract by mutual consent, and if a new contract with new terms had been made; or if there had been any change in the hours, services, or character of work, or other consideration to support the promise to pay the increased wages,—it would have been enforceable. But, as it was, Morgan proved that Davis promised to pay more for the performance of the old contract than he had originally agreed. Such a promise was not binding.

It was argued that the moral obligation would support the promise here, and undoubtedly there are cases in which such consideration has been held to be sufficient. For example, that arising from the duty of a father to support his bastard child. *Hargroves v. Freeman*, 12 Ga. 342. At one time Lord Mansfield was quoted as having said that all promises deliberately made should be held binding, but Lord Denman, in *Eastwood v. Kenyon*, 11 Ad. & El. 438, attempts to show that this was either a misquotation, or that, if such a doctrine could have been deduced from whatever he said, the court had refused to follow it in *Littlefield v. Shee*, 2 Barn. & Ad. 811. The cases holding in conformity with Lord Mansfield's supposed statement, while set out in *Hargroves v. Freeman*, 12 Ga. 342, are not adopted as law, because the court says that the principle to be adduced from the general current of authorities is that, for a moral obligation to constitute a sufficient consideration to support an express promise, it must be founded upon an antecedent valuable consideration, though respectable authority can be adduced on the other side. In an agreement by one partner to pay the other for extra work (*Gray v. Hamil*, 82 Ga. 375, 6 L. R. A. 72, 10 S. E. 205); in the promise by a landlord to refund to tenants money paid by them for worthless fertilizer (*Parrott v. Johnson*, 61 Ga. 475); and in the agreement by a brother to account to a sister for her interest as an heir at law in land which he had improperly induced the father to convey (*Brown v. Latham*, 92 Ga. 280, 18 S. E. 421)—the court recognized that there was a moral obligation to support the promise, but in each of the cases there was something very close akin to a legal obligation or to a trust. In *Pittman v. Elder*, 76 Ga. 371, it was shown that an agreement to pay a debt barred by the statute of limitations, or discharged in bankruptcy, was not supported by what was formerly called a "moral obligation," but by the antecedent obligation; the new promise to pay amounting simply to a waiver of the statute or of the discharge. Civil Code 1895, § 3658, defines a good consideration to be such as is founded on natural duty and affection or "on a strong moral obligation." In the light of

the authorities, however, the strong moral obligation here referred to seems to be one supported either by some antecedent legal obligation, though unenforceable at the time or by some present equitable duty. The section, however, does not relate to the moral obligation which inheres in every promise. *Austell v. Humphries*, 99 Ga. 416, 27 S. E. 736. While all courts recognize the obligation arising from any undertaking, they are, from the necessity of the case, forced to hold that naked promises must depend for their performance solely upon the will of the promisor, and not upon the tribunals which are organized to perform the "duty of government to protect person and property," and in pursuance thereof to award money damages for breaches of contracts. Civil Code 1895 § 5699. But they cannot enforce promises binding on the conscience, except in those cases where some pecuniary damage flows from the breach, or where, in addition to the moral obligation, the promise is also supported by a consideration. When one receives a naked promise, and such promise is broken, he is no worse off than he was. He gave nothing for it, he has lost nothing by it, and on its breach he has suffered no damage cognizable by courts. No benefit accrued to him who made the promise, nor did any injury flow to him who received it. Such promises are not made within the scope of transactions intended to confer rights enforceable at law. They are lightly made, dictated by generosity, courtesy, or impulse, often by ruinous prodigality. To enforce them by a judgment in favor of those who gave nothing therefor would often bring such imperfect obligations into competition with the absolute duties to wife and children, or into competition with debts for property actually received, and make the law an instrument by which a man could be forced to be generous before he was just. Both under the civil and the common law, courts were prohibited from enforcing contracts without consideration, and relegated the performance of such promises solely to those who made them.

Judgment reversed.

All the Justices concur, except **Lumpkin**, P. J., absent on account of sickness.

J. B. LOFTON *et al.*, *Pliffs. in Err.*,
v.

G. L. COLLINS *et al.*

(.....Ga.....)

*1. Where equity, by reason of the residence of one of several codefendants

*Headnotes by SIMMONS, Ch. J.

NOTE.—As to constitutionality of statute providing for dispensaries for sale of intoxicating liquors, see also, in this series, *McCullough v. Brown* (S. C.) 23 L. R. A. 410; *State ex rel. George v. Alken* (S. C.) 26 L. R. A. 345; *Plumb v. Christie* (Ga.) 42 L. R. A. 181; *Farmville v. Walker* (Va.) *ante*, 125. 61 L. R. A.

living in different counties, has obtained jurisdiction of a case, such jurisdiction is not lost by the death, removal, or resignation of the resident defendant.

2. A municipal corporation which has, under its charter, exclusive power to "control and direct" the sale of liquors within its limits, has no authority, under such a provision, to organize a dispensary by appointing commissioners and authorizing them to sell liquors under certain terms and conditions prescribed in the ordinance. This is especially true when the people of the county wherein the dispensary is located had, prior to its organization, adopted the local option law, which forbids the sale of liquors in that county.

3. The illegal sale of intoxicating liquors is a public nuisance, affecting the whole community in which the sale is carried on, and may be abated by process instituted in the name of the state.

(March 18, 1903.)

ERROR to the Superior Court for Early County to review a judgment refusing to enjoin the operation of a dispensary of intoxicating liquors. *Reversed.*

The facts are stated in the opinion.

Mr. Arthur Gray Powell, for plaintiffs in error:

Equity cases should be tried in the county where a defendant resides against whom substantial relief is prayed.

Ga. Const. Code, § 5871.

If, when the suit is brought, the court acquires jurisdiction of the parties, no subsequent change can affect that jurisdiction.

Newton Mfg. Co. v. White, 47 Ga. 400; *Gibson v. Thornton*, 112 Ga. 328, 37 S. E. 406; *Bivins v. Marvin*, 96 Ga. 268, 22 S. E. 923; *Clarke v. Mathewson*, 12 Pet. 164, 9 L. ed. 1041; *Hardenbergh v. Ray*, 151 U. S. 112, 113, 38 L. ed. 93, 14 Sup. Ct. Rep. 305.

Courts of equity have inherent jurisdiction over cases of public nuisance.

2 Story, Eq. Jur. §§ 921, 922; *Columbus v. Jaques*, 30 Ga. 506; *Minor v. DeVaughn*, 72 Ga. 208; *Kavanagh v. Mobile & G. R. Co.* 78 Ga. 271, 2 S. E. 636; *Legg v. Anderson* (Ga.) 42 S. E. 720; *Cannon v. Merry*, 116 Ga. 288, 42 S. E. 274; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

The illegal sale of intoxicating liquors is a public nuisance.

Fears v. State, 102 Ga. 283, 29 S. E. 463; *Cannon v. Merry*, 116 Ga. 288, 42 S. E. 274; *Legg v. Anderson* (Ga.) 42 S. E. 720; *Wood, Nuisances*, §§ 24, 25; *Georgia R. & Bkg. Co. v. Maddox* (Ga.) 42 S. E. 315; 21 Am. & Eng. Enc. Law, 2d ed. p. 705; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Columbus v. Jaques*, 30 Ga. 506; *Hill v. McBurney Oil & Fertilizer Co.* 112 Ga. 788, 52 L. R. A. 398, 38 S. E. 42; *Waycross v. Houk*, 113 Ga. 963, 39 S. E. 577.

The court will take judicial cognizance of the fact that the provisions of the local option liquor law (§§ 1541-1550 of the Code) are in force in Calhoun county.

Menken v. Atlanta, 78 Ga. 668, 2 S. E. 559; *Butler v. Merritt*, 113 Ga. 238, 38 S. E. 751.

Neither the general-welfare clause of a town charter, nor the authority to "regulate and control the sale of intoxicating liquors," authorizes a municipal corporation to operate a dispensary.

Leesburg v. Putnam, 103 Ga. 110, 29 S. E. 602; *Barnesville v. Murphey*, 113 Ga. 779, 39 S. E. 413.

Municipal corporations can exercise no powers in respect to intoxicating liquors, unless expressly conferred.

Henderson v. Heyward, 109 Ga. 373, 47 L. R. A. 366, 34 S. E. 590; *Turner v. Forsyth*, 78 Ga. 683, 3 S. E. 649.

At the time the charter of Arlington was adopted dispensaries were too few for it to be conceived that they were in the mind of the legislature when they passed the charter.

Butler v. Merritt, 113 Ga. 238, 38 S. E. 751; *Richmond v. Southern Bell Teleph. & Teleg. Co.* 174 U. S. 775, 43 L. ed. 1167, 1168, 19 Sup. Ct. Rep. 778; 20 Am. & Eng. Enc. Law, 2d ed. p. 1141.

Messrs. J. A. Laing and L. L. Lyon also for plaintiffs in error.

Mr. Samuel S. Bennett, for defendants in error:

In *Leesburg v. Putnam*, 103 Ga. 110, 29 S. E. 602, and *Barnesville v. Murphey*, 113 Ga. 779, 39 S. E. 413, the dispensaries were established and operated by the municipal corporations acting as corporations, while in the case at bar the dispensary is established and operated, not by the municipal corporation, either directly or through legal agents, but by public officials who are in no sense the agents of the municipal corporation, but who are performing governmental functions under a legislative enactment.

Administrative functions are those which relate to corporate property, such as public buildings, public revenues, and the like, and corporate duties, such as the payment of public debts, and the like. In so far as any municipal corporation deals with those corporate rights and corporate duties, it acts in an administrative capacity.

Governmental functions are those where the municipal corporation deals with its governmental rights and duties,—such as the making of laws and the execution of such laws, and the like.

Collins v. Macon, 69 Ga. 542; *Cook v. Macon*, 54 Ga. 469; *McElroy v. Albany*, 65 Ga. 389, 38 Am. Rep. 791; *Love v. Atlanta*, 95 Ga. 129, 22 S. E. 29; *Ison v. Griffin*, 98 Ga. 625, 25 S. E. 611.

Authorized ordinances are legislative enactments.

1 Dill. Mun. Corp. 4th ed. §§ 245, 308; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 758; *Taylor v. Carondelet*, 22 Mo. 110; *Heland v. Lowell*, 3 Allen, 408, 81 Am. Dec. 670; 17 Am. & Eng. Enc. Law, p. 236; *St. Johnsbury v. Thompson*, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571; *Tacoma v. Lillis*, 4 Wash. 797, 18 L. R. A. 372, 61 L. R. A.

31 Pac. 321; *Milne v. Davidson*, 5 Mart. N. S. 409, 16 Am. Dec. 189; *Bearden v. Madison*, 73 Ga. 184.

The charter of Arlington authorizes the ordinance in the record.

General welfare clause, Acts 1890-91, § 10, p. 870; Liquor clause, Acts 1890-91, § 13, p. 871; *Chambers v. Barnesville*, 89 Ga. 739, 15 S. E. 634; *Leesburg v. Putnam*, 103 Ga. 115, 29 S. E. 602; *Plumb v. Christie*, 103 Ga. 698, 42 L. R. A. 181, 30 S. E. 759; *Butler v. Merritt*, 113 Ga. 238, 38 S. E. 751.

The ordinance is not a corporate act,—not an act of the town itself,—but an act of the mayor and aldermen as the legislative agents of the general assembly. It derives its force, not from the town of Arlington, but from the general assembly of the state.

17 Am. & Eng. Enc. Law, p. 236.

The title to the liquors and the profits vests in the dispensary officers officially, and their successors in office.

Cooley. Const. Lim. 5th ed. p. 291, *237; 15 Am. & Eng. Enc. Law, p. 989.

The dispensary officers, being public officials performing governmental functions, are not bound by the local-option law.

Butler v. Merritt, 113 Ga. 238, 38 S. E. 751.

Mr. H. M. Calhoun also for defendants in error.

Simmons, Ch. J., delivered the opinion of the court:

The town of Arlington, Georgia, is situated partly in Early county and partly in Calhoun county. Under its charter it has a mayor and five aldermen as a governing board. In December, 1902, the mayor and aldermen passed an ordinance establishing a dispensary for the purpose of selling intoxicating liquors upon the terms and under the conditions and restrictions imposed by the ordinance. They elected three commissioners, one of whom resided in Early county and the other two in Calhoun county. These commissioners elected a dispensary manager, as provided for in the ordinance, this manager being a resident of Calhoun county. One of the aldermen resided in Early county, the others in Calhoun. The dispensary went into operation on January 1, 1903, when the sale of intoxicating liquors therein began. Shortly thereafter the solicitor general of the Pataula circuit, of which circuit the county of Early composes a part, filed an information in the name of the state against the mayor and aldermen and the dispensary commissioners and manager, seeking to enjoin the sale of liquors in such dispensary on the ground that such sale was illegal, and a public nuisance. Judge Sheffield, of the Pataula circuit, granted a rule nisi. The petition was served upon all the parties, and the hearing set for January 15th. On the 13th—two days prior to the hearing—the alderman who resided in Early county, and the dispensary commissioner who resided in that county, resigned their offices, and their resignations were accepted. The defendants residing in

Calhoun county filed a plea to the jurisdiction on the ground that because of the resignation of the only defendants residing in Early county (the county in which the petition was filed) the court had no jurisdiction of the case. The defendants who resided in Early county, and who had resigned their offices, asked that the proceedings be dismissed as to them, and that their names be stricken from the petition as parties defendant. The trial judge refused the injunction on the ground that he had no jurisdiction. Affidavits were filed which tended to show that the dispensary was a public nuisance. The judge refused to consider these affidavits, basing this ruling on the ground just mentioned. The state, through its solicitor general, excepted to these rulings, and assigned error thereon, further assigning as error the refusal of the judge to grant the injunction upon all of the grounds alleged in the petition.

1. We think the trial judge was clearly wrong in refusing to entertain the petition or to grant the injunction, after the resignation of the Early county defendants, on the ground that he was without jurisdiction. The petition had been filed in that county, and had been served upon all the defendants, including the two residing in that county. This gave the court of Early county jurisdiction, not only of the defendants resident in that county, but of those residing in Calhoun county. The mayor and aldermen of Arlington represented the municipality, which was located in both counties, the town being partly in each county. The petition was filed against them in their capacity as officers of the corporation and its governing board. As far as appears, the corporation is suable in either county, as it has at the same time residence in both counties. Our Code provides that, if a party resides in one county a portion of the year and the remainder of the year in another, he may be sued in either. This corporation resides in both counties all of the time. The act of incorporation does not prescribe where its principal office shall be located. When, therefore, the corporation was served with the petition by a process emanating from Early county, the court had full jurisdiction over it as an entity. But be this as it may, we are clear that the service of process upon the alderman residing in Early county, substantial relief being prayed against him, was sufficient to give the court jurisdiction, although the other aldermen and the mayor resided in another county. All of them having been served with process before the hearing and before the resignation of the one resident in Early county, such resignation could not deprive the court of jurisdiction. After a court once acquires jurisdiction of the person and subject-matter, the death, removal from the county, or resignation from office of one of the defendants will not abate the suit, and the court will have power and authority to proceed to final judgment or decree. The nuisance complained of here was within the corporate limits of the 61 L. R. A.

town. It was that nuisance which it was sought to abate. If the state's petition could be defeated by the resignation of an officer after the court had acquired jurisdiction, it would never be practicable to abate the nuisance. If this were the rule, and, after the resignation of the Early county defendants, a petition were filed in Calhoun county, there would be nothing to prevent the defendants residing in that county from resigning, so as to defeat the jurisdiction of the court in that action. If, after suit has been commenced against a municipal corporation or its mayor and aldermen, the terms of office of such mayor and aldermen expire before the trial, then, according to the ruling of the judge below, the suit would abate. This cannot be the law. The same reasoning would apply as well to the effect of the resignation of the dispensary commissioner, who resided in Early county. He, with two others, under the pretended authority of the mayor and aldermen, had established what we shall hereafter show is a public nuisance. After service, he resigned his pretended office, and his resignation was accepted. His resignation was an effort to allow the other wrongdoers to carry on and maintain the nuisance while he, the only one who resided in the county, by his resignation, deprived the court of jurisdiction of the case. When the petition was filed, he, in connection with others, had established and was maintaining the public nuisance sought to be abated. The aim and object of the petition was to suppress the nuisance, and to prevent him and the others from carrying it on. It was, therefore, erroneous to hold that the nuisance could not be abated simply because of the resignation of one of the parties who had been maintaining it even up to and after the service of the petition.

2. We might with propriety stop here, and not pass upon the other branches of the case, but, inasmuch as the bill of exceptions assigns error on the refusal of the judge to grant the injunction on all the grounds alleged, and inasmuch as counsel on both sides requested the court to decide the other questions, we shall dispose of them also. The mayor and aldermen of Arlington adopted an ordinance establishing a dispensary in the town for the sale of intoxicating liquors. The question is whether they had power to adopt such an ordinance. They claim that under the charter power, giving them exclusive right to control and direct the sale of liquors, they had the right to establish this dispensary. Their counsel who represented them in this court made an earnest and ingenious argument to show that under this clause in their charter they had power to establish the dispensary. He claimed that the mayor and aldermen were a part of the government of the state; that power had been given them by the legislature to act for the latter in legislating upon all local matters, and, the sale of liquors being under their exclusive control and direction, they could either allow the sale in barrooms or appoint their own agents to conduct a dis-

pensary; that they had chosen the latter method, and were authorized to do so. He contended that, the mayor and aldermen being merely agents of the state, they could appoint other agents, and make them state officers; and that state officers operating a dispensary were not within the inhibition of the local option law. We have given considerable attention to the points made, but are unable to accept as sound the contentions of the learned counsel. We think it was not the intention of the legislature, by giving the mayor and aldermen the exclusive right to control and direct the sale of liquors, to authorize their sale in a dispensary of this kind. The context shows conclusively to our minds that this grant of power applied only to the power to control and direct the sale of liquors by private persons, real or artificial. The clause in § 13 of the act (see 2 Acts 1890-91, p. 871) immediately following this grant of power shows this. The section provides "that the mayor and aldermen of said town shall have exclusive power and authority to control and direct the sale of ardent spirits, malt liquors, wines, beers, cider, and all other intoxicants, within the corporate limits of said town; to issue license for the sale of said articles and charge for the same a sum not less than \$500 on each barroom, to be fixed by said mayor and council; to impose such restrictions, charges, conditions, and penalties as they, or a majority of them, may deem proper, whenever the exercise of the powers herein granted shall not be repugnant to the Constitution or laws of this state." This clearly shows that the legislature had in mind the control and direction of barrooms or saloons, and not of a public dispensary. Besides, construing this act with reference to the time it was enacted, we know, as matter of history, that in this state dispensaries were very rare, perhaps only one existing at that time, and that it existed by express authority of a legislative enactment made at the same session of the legislature at which was adopted the act now under consideration. This dispensary, expressly authorized, was established in Athens by a special act, and not as an amendment to the charter of the city in which it was to be located. A grant of power to a municipal corporation must be construed strictly, and such a corporation can exercise no powers except such as are expressly given, or are necessarily implied from express grants of other powers. No power to establish a dispensary was here expressly given, and we think that none was necessarily implied. Before the adoption of this ordinance, the people of the county of Calhoun, in which this dispensary is located, had adopted the provisions of the general local-option law, which prohibits the sale of liquors in the county after its adoption. It is admitted by both sides that the adoption of that law prohibited the sale of liquors in that county, and prohibited the mayor and aldermen of Arlington from issuing licenses for the sale of liquors in that county. There is no doubt that this is true, 61 L. R. A.

for the power given the mayor and aldermen to license the sale was repealed by the adoption of the local-option law as long as that law is of force in that county. It was argued, however, that this law has no application to this case, because it does not apply to the state, the state not being named therein; that the mayor and aldermen, being agents of the state, had a right under their charter to establish a dispensary, and make it a state dispensary. It is true, as we have said above, that the mayor and aldermen have power to pass any laws, local in their nature, which would benefit the local community, and which are not inconsistent with the laws of the state. But we do not apprehend that any one could successfully maintain that the power thus given them could be exercised to repeal a law of the state. Indeed, the very section under which is claimed the power to establish the dispensary provides that the ordinances passed thereunder shall not be repugnant to the Constitution or laws of this state. Here, then, we have the assumption on the part of the agents of the state, to wit, the mayor and aldermen of Arlington, of the power to repeal a general law of the state forbidding the sale of liquors in that county. Had the legislature endeavored to do so, it could not have conferred such a power on a municipal corporation; nor, indeed, could the legislature itself have repealed a general law by the enactment of a special one. If the lawmaking power of the state could not constitutionally do this, it certainly could not confer the power to do so upon a subordinate body. While the mayor and aldermen may be the agents of the state to legislate for the welfare, peace, and good order of the town, they have no power to create other corporations or appoint other agents to do acts contrary to the laws of the state. While the mayor and aldermen knew that they could not establish a dispensary and run it as a town institution, they attempted to do the same thing by electing three commissioners to maintain the dispensary, providing for salaries to these commissioners, and also providing that the proceeds of the business should be turned over to the municipal authorities. The case of *Chambers v. Barnesville*, 89 Ga. 739, 15 S. E. 634, does not conflict with these views. In that case it appeared that there was at that time no law altogether forbidding the sale of liquors in Barnesville. The charter of the town authorized the municipal authorities "to regulate and control the sale in Barnesville of [liquors] for medicinal, mechanical, and sacramental purposes only." This court said that these words might be construed as conferring upon the mayor and council the power to restrict and limit sales to the purposes mentioned, and to that end to pass and enforce an ordinance prohibiting sales for any other purpose. The municipal authorities passed an ordinance giving the right to sell for these purposes to one of their own agents in a dispensary. Chambers was not this agent, but kept what is now commonly

known as a "blind tiger." He was convicted before the police court of Barnesville, and the conviction sustained upon certiorari. The case was brought to this court, where it was decided that, under the power given, the mayor and council had a right to prohibit the sale of liquor by anyone except the agent they had appointed. The only authority the municipal corporation of Barnesville had was to regulate and control the sale of liquor for the above-mentioned purposes. While it is true that the mayor and council afterwards undertook to run a dispensary for the sale of intoxicating liquors on a large scale, they had no authority to do so, and this court so held in *Barnesville v. Murphy*, 113 Ga. 779, 39 S. E. 413.

3. The petition alleged that the sale was illegal, and was a public nuisance injurious to the people of the whole community. No one was shown to have been specially injured or damaged by the illegal sale. The affidavits tendered in evidence by the plaintiffs in error showed how the injury or damage was inflicted upon the people. It is claimed by counsel for the defendants in error that, although this may be true, if the sale is illegal the sellers may be punished under the penal law, and that equity will not restrain the commission of a crime. This position would have been tenable had the proceeding been instituted by a private individual, no property rights being involved. Equity, generally, will not interfere with the administration of the criminal law. The state, how-

ever, has an interest in the welfare, peace, and good order of its citizens and communities, and has provided in its laws for the abatement of nuisances when the public generally is injured. Section 3858 of the Civil Code of 1895 provides that "generally, a public nuisance gives no right of action to any individual, but must be abated by a process instituted in the name of the state." See also § 4761, providing that the petition to enjoin a public nuisance must proceed for the public on information filed by the solicitor general of the circuit. Even before the adoption of the Code, in the case of *Columbus v. Jaques*, 30 Ga. 506, this court held that a court of equity has jurisdiction, and in a proper case may, by injunction, restrain a public nuisance upon information filed by the solicitor general. The reasoning of Lyon, J., in that case is clear and satisfactory to our minds on the proposition that equity will restrain a public nuisance whenever a proper case is made. See also the authorities cited in his opinion. We have in the present case an information filed by the solicitor general of the circuit, and the nuisance is a public one, injuring the entire community. We see no reason why equity should not take jurisdiction, and enjoin the nuisance.

Judgment reversed.

All the Justices concur, except Lumpkin, P. J., absent on account of sickness.

INDIANA SUPREME COURT.

Frank L. STREET, *Appt.*,
v.

VARNEY ELECTRICAL SUPPLY COMPANY.

(.....Ind.....)

Municipal corporations cannot be required by the legislature to pay more for common labor employed on public improvements than it is worth in the market. Such legislation unconstitutionally deprives the taxpayers of their privileges and immunities, and of their property without due process of law, interferes with their right of contract, and is invalid as class legislation.

(April. 1, 1903.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Wayne County in favor of defendant in an action brought to recover the statutory penalty for neglect to pay plaintiff the wages fixed by statute for labor performed by him. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to right of legislature to fix by statute compensation which city must pay for labor or other service, see also, in this series, *People ex rel. Rodgers v. Coler* (N. Y.) 52 L. R. A. 814.

As to constitutionality of eight-hour law as affecting municipal corporations, see *Re Dalton* 61 L. R. A.

Mr. Samuel C. Whitesell, for appellant:

The minimum wage law is not "class legislation."

State v. Schlemmer, 42 La. Ann. 1166, 10 L. R. A. 135, 8 So. 307; *Warren v. Sohn*, 112 Ind. 213, 13 N. E. 863; *People v. Phyfe*, 48 N. Y. S. R. 350, 20 N. Y. Supp. 461.

A municipal corporation, being a mere creature of the legislature, established for the purpose of government, is entirely subject to the legislative will, and cannot claim protection under the provision of the Federal Constitution.

New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75; *Hagerstown v. Sehner*, 37 Md. 180; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 23 N. E. 253; *People v. Warren*,

(Kan.) 47 L. R. A. 380, and *Cleveland v. Clements Bros. Constr. Co.* (Ohio) 59 L. R. A. 775.

As to power of legislature to impose burdens on municipalities, and to control their local administration and property, see note to *State ex rel. Bulkeley v. Williams* (Conn.) 48 L. R. A. 465.

77 Hun, 120, 28 N. Y. Supp. 303; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000.

A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature.

Williams v. Eggleston, 170 U. S. 304, 310, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; *Re Protestant Episcopal Public School*, 46 N. Y. 178; *People v. Phyfe*, 136 N. Y. 554, 19 L. R. A. 141, 32 N. E. 978; *Payne v. Treadwell*, 16 Cal. 221; *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650; *Jones v. Lake View*, 151 Ill. 663, 38 N. E. 688; *Frederick v. Groshon*, 30 Md. 436, 96 Am. Dec. 591; *Groff v. Frederick City*, 44 Md. 67; *State Bank v. Madison*, 3 Ind. 43; *Lushman v. Shelby County Towing Dist.* 2 Lea. 425; *Berlin v. Gorham*, 34 N. H. 266; *Jersey City v. Jersey City & B. R. Co.* 20 N. J. Eq. 360; *Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. L. 385; *State ex rel. Cleveland v. Jersey City Bd. of Finance & Taxation*, 38 N. J. L. 259; *Re Dalton*, 61 Kan. 257, 47 L. R. A. 380, 59 Pac. 336.

If the legislature has the power to pass a law regulating the compensation of laborers employed by the state, it has the same right to insist that a municipality or its "contractors pay the rate of wages to its laborers," which it requires shall be paid.

Clark v. State, 142 N. Y. 101, 36 N. E. 317; *Hibbard v. Suffolk County*, 163 Mass. 34, 39 N. E. 285; *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47.

There is nothing in the state or United States Constitution conflicting with the legislative discretion in directing how, when, and where a trade or business shall be conducted, intimately connected with public safety or public prosperity, or, indeed, to prohibit and suppress such business altogether, if deemed essential to the public good.

Metropolitan Bd. of Excise v. Barrie, 34 N. Y. 666; *State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488; *Com. v. Alger*, 7 Cush. 53.

The 14th Amendment created no new rights whatever.

18 Am. & Eng. Enc. Law, p. 755; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

In this state the "internal affairs of cities" are absolutely subject to the will of the legislature. It may, unless prohibited by some superior rule, or organic law, compel a subordinate municipal corporation to pay for property or services from which the public has received, or may receive, advantage or profit.

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Guthrie v. New Vienna Bank, 4 Okla. 194, 38 Pac. 4.

The legislature, when it enacts a law, is, and should be, governed by the condition of affairs as it exists, and takes into consideration the fact that it may make such laws as will remedy evils which have grown up with resulting wrong and oppression.

State v. Peel Splint Coal Co. 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000; *Townsend v. State*, 147 Ind. 634, 37 L. R. A. 294, 47 N. E. 19.

The minimum wage law may be sustained by the police-power doctrine.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *Elliott, Roads & Streets*, § 421.

If the legislature deems the laborer at some disadvantage in his relations towards the employer, it may enact a law to protect him from any advantage the employer may be constrained to take of him because of such disadvantage.

Knowville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Holden v. Hardy*, 169 U. S. 366, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383.

The general assembly is the sole exclusive judge of the time and manner in which the police power of the state shall be exerted, and its actions must be liberally construed.

Garrett v. Aby, 47 La. Ann. 618, 17 So. 238; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L. ed. 394, 404; *Pickles v. McLellan Dry Dock Co.* 38 La. Ann. 412; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 662.

Mr. Wilfred Jessup, with *Messrs. Russell T. MacFall* and *Murat W. Hopkins*, for appellee:

The right to make a contract is one of the privileges and immunities guaranteed by the Constitution.

Re Parrott, 6 Sawy. 349, 1 Fed. 481; *Butchers' Union S. H. & L. S. L. Co. v. Orscent City L. S. L. & S. H. Co.* 111 U. S. 746-764, 28 L. ed. 585-589, 4 Sup. Ct. Rep. 652.

The right to make a contract is "liberty" and "property," and as such is protected by the Constitution.

Blythe v. State, 4 Ind. 525; *Howard County v. Pollard*, 153 Ind. 371, 55 N. E. 87; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Re Preston*, 63 Ohio St. 428, 52 L. R. A. 523, 59 N. E. 101; *State ex rel. Bramley v. Norton*, 5 Ohio N. P. 183; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Com. v. Isenberg*, 4 Pa. Dist. R. 579; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Julen*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Ex*

parte Jentzsch, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 58 N. E. 1007; *Bessette v. People*, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Tilt v. People* (Ill.) 40 N. E. 462; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 51 N. E. 275; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716, 56 App. Div. 98, 67 N. Y. Supp. 701; *People v. Biesecker*, 58 App. Div. 301, 68 N. Y. Supp. 1067; *People ex rel. Fleischman v. Caldwell*, 64 App. Div. 46, 71 N. Y. Supp. 654; *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 44 L. ed. 560, 564, 20 Sup. Ct. Rep. 385; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; *Powell v. Pennsylvania*, 127 U. S. 678-684, 32 L. ed. 253-256, 8 Sup. Ct. Rep. 992, 1257; *Printing & N. Registering Co. v. Simpson*, L. R. 19 Eq. 465.

The equal protection of the law includes the right to make a contract.

Re Parrott, 6 Sawy. 349, 1 Fed. 481; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

A law enacted for the benefit of a single class of laborers, not based upon claims to legislative consideration peculiar to that class alone, grants to that class privileges and immunities contrary to article 23 of the Bill of Rights.

Evansville v. State, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274; *Re Leach*, 134 Ind. 665, 21 L. R. A. 701, 34 N. E. 641; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Com. v. Isenberg*, 4 Pa. Dist. R. 579; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Van Harlingen v. Doyle*, 134 Cal. 53, 54 L. R. A. 771, 66 Pac. 44; *Shaver v. Pennsylvania Co.* 71 Fed. 931.

An enactment is not "due process of law" or "the law of the land," unless equally applicable to all in the same natural class.

Bessette v. People, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People* 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 61 L. R. A.

N. E. 624; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Bailey v. People*, 190 Ill. 28, 54 L. R. A. 838, 60 N. E. 98; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 58 N. E. 1007.

A law which prohibits and invalidates future contracts without constitutional warrant impairs the obligation of contracts as guaranteed by § 10, art. 1, of the Constitution of the United States, and by § 24, art. 1, of the Constitution of Indiana.

Com. v. Perry, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1120; *Atkins v. Randolph*, 31 Vt. 226; *Com. v. Isenberg*, 4 Pa. Dist. R. 579.

The right to make a contract is a natural and fundamental right, not derived from society, unalienated and inalienable, and an indispensable incident of "life, liberty, and the pursuit of happiness."

Declaration of Independence; Ind. Const. art. 1, § 1; *Beebe v. State*, 6 Ind. 501, 63 Am. Dec. 391; *Re Leach*, 134 Ind. 665, 21 L. R. A. 701, 34 N. E. 641; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 276, 15 L. ed. 372, 374; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746-764, 28 L. ed. 585-589, 4 Sup. Ct. Rep. 652; *Com. v. Isenberg*, 4 Pa. Dist. R. 579; *Com. v. Brown*, 8 Pa. Super. Ct. 339; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126.

The guaranty of the right to contract extends to private corporations.

Wheeling Bridge & Terminal R. Co. v. Gilmore, 8 Ohio C. C. 658; *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

It is for the court to determine whether an enactment falls within the police power, and in doing so it is to determine whether the law reasonably tends to protect the lives, health, and property of the citizens, and to preserve good order and the public morals of the citizens of the entire state.

Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 51 N. E. 275; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Bessette v. People*, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215; *Tilt v. People* (Ill.) 40 N. E. 462; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Wilshire*, 103 Fed. 620; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546.

The court is not bound by the legislative statement of the purpose of the law.

Re Parrott, 6 Sawy. 349, 1 Fed. 481; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. Civ. App. 178, 23 S. W. 282; *Com. v. Brown*, 8 Pa. Super. Ct. 339; *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781.

If the reasons which will sustain the authority of the legislature to enact this law are equally cogent in support of a law fixing the wages of other unskilled labor, or of all labor, this is not a proper exercise of the police power, but is class legislation.

Cooley, Const. Lim. 6th ed. 484; *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. Civ. App. 178, 23 S. W. 282; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *State ex rel. McCue v. Ramsay County Sheriff*, 44 Minn. 236, 51 N. W. 112; *State ex rel. Luria v. Wagener*, 69 Minn. 206, 38 L. R. A. 677, 72 N. W. 67; *State ex rel. Randolph v. Wood*, 49 N. J. L. 85, 7 Atl. 286; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716, 56 App. Div. 98, 67 N. Y. Supp. 701; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Ex parte Jentsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *Tilt v. People* (Ill.) 40 N. E. 462; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Bailey v. People*, 190 Ill. 28, 54 L. R. A. 838, 60 N. E. 98.

A law enacted for the benefit of a class of laborers is not a proper exercise of the police power.

Gifford Drainage Dist. v. Shroer, 145 Ind. 572, 44 N. E. 636; *Re House Bill No. 203*, 21 Colo. 27, 39 Pac. 431; *Re Eight Hours Bill*, 21 Colo. 29, 39 Pac. 328; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Com. v. Brown*, 8 Pa. Super. Ct. 339; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356; *Bessette v. People*, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707; *People v.*

Biesecker, 58 App. Div. 391, 68 N. Y. Supp. 1067; *People ex rel. Fleischman v. Caldwell*, 64 App. Div. 46, 71 N. Y. Supp. 654; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 51 N. E. 275; *Re Preston*, 63 Ohio St. 428, 52 L. R. A. 523, 59 N. E. 101; *Wheeling Bridge & Terminal R. Co. v. Gilmore*, 8 Ohio C. C. 658; *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. Civ. App. 178, 23 S. W. 282.

The right of local self-government by counties, cities, and towns is fundamental, and cannot be taken away by the legislature.

Cooley, Const. Lim. 6th ed. 225-227; Dill. Mun. Corp. § 39; *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Stimson v. Muskegon Booming Co.* 100 Mich. 347, 59 N. W. 142; *O'Leary v. Marquette Fire & Water Comrs.* 79 Mich. 281, 7 L. R. A. 170, 44 N. W. 608; *Barron v. Detroit*, 94 Mich. 601, 19 L. R. A. 452, 54 N. W. 273; *Blades v. Detroit Water Comrs.* 122 Mich. 366, 81 N. W. 271; *Cook Farm Co. v. Detroit*, 124 Mich. 426, 83 N. W. 130.

In matters of a business character, affecting property and private contract rights, municipal corporations are not subject to the arbitrary control of the legislature, but are protected by all the constitutional guaranties.

People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *Dartmouth College v. Woodward*, 4 Wheat. 518, 581, 694, 4 L. ed. 629, 645, 673; *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Grogan v. San Francisco*, 18 Cal. 590; *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695; *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Atkins v. Randolph*, 31 Vt. 226; *Milam County v. Bateman*, 54 Tex. 153.

The erection of a municipal lighting plant is a business transaction of the citizens of the city, rather than a political function of the municipality.

People ex rel. Park Comrs. v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; *O'Leary v. Marquette Fire & Water Comrs.* 79 Mich. 281, 7

L. R. A. 170, 44 N. W. 608; *Barron v. Detroit*, 94 Mich. 601, 19 L. R. A. 452, 54 N. W. 273; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 185, 72 Am. Dec. 730; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 895; *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278.

Taxation for private use is unconstitutional.

McClelland v. State, 138 Ind. 321, 37 N. E. 1089; *State ex rel. Tieman v. Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Warner v. Curran*, 75 Ind. 309; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455.

It is for the courts to determine whether it is for a public or private use.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; *McClelland v. State*, 138 Ind. 321, 37 N. E. 1089.

Dowling, J., delivered the opinion of the court:

The only question for decision on this appeal is the constitutionality of the act of March 9, 1901 (Acts 1901, p. 282, chap. 122, Burns's Rev. Stat. 1901, §§ 7055a, 7055b), commonly called the "minimum wage law." It is raised by a demurrer to the complaint for want of facts, and the ruling of the court sustaining the same. The material averments of the complaint are these: The appellee, the Varney Electrical Supply Company, is a private domestic corporation. The city of Richmond is a municipal corporation organized under the general laws of this state. Between October 1, 1901, and January 10, 1902, the appellee was engaged in constructing, as one of the public works of said city, an electric-light plant, to be used in lighting the public streets, highways, and other public places of said city. The said work was done under a contract between the Varney Electrical Supply Company and the said city of Richmond. The appellant during said period performed work and labor as an unskilled laborer at the request of the appellee, the Varney Electrical Supply Company, by digging holes in which to place the poles of the electric-light plant, and in shoving poles. He so labored for 540 hours, and was entitled to receive 20 cents per hour for such labor. The Varney Electrical Supply Company refused to pay him 20 cents per hour, on the ground that the statute fixing the minimum wages for such labor at that rate was unconstitutional, and the appellant was paid 15 cents an hour for his said labor. Upon these facts, the appellant demands judgment for \$54, the penalty given by the statute, and \$300 for his attorney's fees.

The statute upon which the action is founded is as follows:

"Sec. 1. Be it enacted," etc., "that from and after the passage of this act, unskilled labor employed upon any public work of the state, counties, cities, and towns, shall receive not less than 20 cents an hour for said labor, which may be enforced in a proper action, and in case a suit shall be necessary 61 L. R. A.

for the recovery of the compensation herein provided for, and where the compensation is recovered, the person suing shall recover also a reasonable attorney's fee, together with a penalty not exceeding double the amount of wages due: provided, that boards of commissioners, common councils of towns or cities, are prohibited from making contracts with such laborers by the week, or any definite length of time, wherein a price is agreed upon at a rate less than as provided herein.

"Sec. 2. Any contractor or other person in charge of public work of the state, counties, cities, or towns, whose duty it is to contract with, employ, and pay the unskilled labor on such public work, who shall violate the provisions of § 1 of this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined in any sum not exceeding \$10, to which may be added imprisonment in the county jail not exceeding thirty days.

"Sec. 3. All laws and parts of laws in conflict with this act are hereby repealed."

Some of the objections taken to the statute by the appellee are that it unlawfully abridges the privileges and immunities of the citizen, that it deprives persons of liberty and property without due process of law, that it denies to a large class of citizens the equal protection of the law, that it grants to a class of citizens privileges and immunities which upon the same terms do not equally belong to all citizens, and that it impairs the obligations of contracts. All these objections are founded upon the provisions of the Federal and state Constitutions, and it is insisted by the appellee that the act is therefore unconstitutional and void. These propositions are denied by the appellant. He claims that the statute does not restrict the liberty of contract, and that its enactment was a legitimate exercise of the police power of the state.

The provisions of the Constitution of the United States alleged to be violated by the statute are those contained in article 14, which prohibits the state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, and from depriving any person of life, liberty, or property without due process of law, or denying to any person within its jurisdiction the equal protection of the law. The provisions of the state Constitution supposed to be involved here are found in § 1, art. 1, which declares that all men are endowed with certain inalienable rights, and that among them are life, liberty, and the pursuit of happiness; and in § 23, art. 1, which forbids the granting by the general assembly to any citizen or class of citizens of privileges or immunities which upon the same terms shall not equally belong to all citizens.

The act of March 9, 1901, undertakes to fix the minimum rate of compensation to be paid to a particular and limited class of laborers employed upon any public work of the state, counties, cities, and towns, with-

out regard to the actual value of such labor, or the rate paid by other persons, natural or artificial, for the same kind of labor in the same vicinity. It prohibits boards of commissioners and common councils of cities from making contracts with unskilled laborers by the week, or for any definite length of time, wherein a price is agreed upon at a rate less than the compensation fixed by the statute. Its restrictions reach beyond the state, counties, cities, and towns, and extend to any contractor or other person in charge of any public work whose duty it is to contract with, employ, and pay any unskilled laborer employed on such work. It not only imposes a penalty, but punishes by fine and imprisonment any contractor or other person in charge of public work of the state, counties, cities, or towns, whose duty it is to employ and pay unskilled labor on such public work, who contracts with any unskilled laborer for a rate of compensation for his services less than 20 cents per hour. It is not contended, and it could not be maintained, that the restrictions in this act upon the right of contract would be valid if the act applied to the work and affairs of private citizens. Even if no express provision of any Constitution forbade such legislative interference with the right of contract, it would be void, for the reason that the authority to fix by contract the prices to be paid for property, including human labor, is not ordinarily within the domain of legislation. But such enactments are also held to be in violation of § 1, art. 1, of the state Constitution, securing to every citizen of the state the inalienable right to personal liberty and to the pursuit of happiness.

But it is argued in support of the validity of the act that no specific provision of the Federal or state Constitution inhibits this species of legislation, and that counties, cities, and towns are mere political and municipal subdivisions of the state, through which the government is administered. It is said that the state has the power to fix the salaries of its officers, and the wages it will pay to its agents and employees; therefore it has the right to declare what rate of wages shall be paid to the agents and employees of a county, city, or town employed upon any public work.

While the counties, cities, and towns are political and municipal subdivisions of the state, they are not governmental agencies in such sense as to subject the management of their local affairs, involving the making of contracts for labor and materials to be used upon local improvements, and the payment of the same out of the revenues of the county, city, or town, to the arbitrary and unlimited control of the legislature. They are corporations as well as political and governmental subdivisions and agencies, and, as such corporations, they have the power to make contracts by which the rate of compensation for property sold to them is fixed. With regard to such contracts for the purchase of property or the employment of labor, counties, cities, and towns stand much

upon the same footing as private corporations; and they cannot be compelled by an act of the legislature to pay for any species of property more than it is worth, or more than its market value at the time and in the place where it is contracted for. The power to confiscate the property of the citizens and taxpayers of a county, city, or town, by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price, in excess of the market value, is not one of the powers of the legislature over municipal corporations, nor the legitimate use of such corporations as agencies of the state. If an act compelled counties, cities, and towns to pay to all stone masons not less than \$2 per perch for stone to be used on any public work, when the market price of stone was but \$1.50 per perch, or to the brickmaker not less than \$12 per thousand for brick, when brick of the same quality could be bought for \$10 per thousand, or to the hardware merchant not less than 6 cents per pound for iron, when iron of the same quality could be had for 4 cents per pound, such legislation would shock every reasonable mind, and would be universally condemned as unwarranted and unconstitutional. For the same reasons, an act fixing the price of unskilled labor on all public works at not less than 20 cents an hour is a legislative interference with the liberty of contract by counties, cities, and towns, which finds no sanction or authority in the doctrine that counties, cities, and towns are municipal and political subdivisions of the state.

In the very recent case of *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716, the court of appeals of New York, in considering this question, said (O'Brien, J., delivering the opinion of the court): "The legislature does not possess unrestricted power to bind a city hand and foot with respect to all its local business affairs. It cannot fix by statute the price which it must pay for materials or property that it may need, or the compensation that it must pay for labor or other services that it may be obliged to employ, at least when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. If it could do all these things, it could virtually dispose of all the revenues of the city for such purposes as it thought best, and local self-government would be nothing but a sham and delusion. . . . The right which is conceded to every private individual and every private corporation in the state to make their own contracts and their own bargains is denied to cities and to contractors for city work; and moreover, if the latter attempt to assert such right, the money earned on the contract is declared to be forfeited to the city, without the intervention of any legal process or judicial decree. The exercise of such a power is inconsistent with the principles of civil liberty, the preservation and enforcement of which was the main purpose in view when the Constitution was

enacted. If the legislature has the power to deprive cities and their contractors of the right to agree with their workmen upon rates of compensation, why has it not the same power with respect to all private persons and all private corporations? That question can be answered in the language which this court used when a case with features somewhat similar was under consideration: 'Such legislation may invade one class of rights today, and another tomorrow; and, if it can be sanctioned under the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when government prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet, and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions.' *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. . . . The power to deprive master and servant of the right to agree upon the rate of wages which the latter was to receive is one of the things which can be regarded as impliedly prohibited by the fundamental law, upon consideration of its whole scope and purpose, as well as the restrictions and guaranties expressed."

In discussing the proposition that the several municipal governments of the state are not in themselves independent and sovereign, but are subdivisions of the general government, created by it with enumerated powers, and possessing none except such as may be fairly drawn from their charters, the supreme court of Ohio, in *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L. R. A. 775, 65 N. E. 885, 887, said: "The fallacy of this contention lies in the assumption that the compulsory authority of the legislature over municipal corporations is so absolute and arbitrary that it may dictate the specific terms upon which such municipality shall contract, and may prescribe what stipulations and conditions its contracts shall contain, although such contracts may, as in this case, relate only to matters of purely local improvement. This is a misapprehension of the legislative authority, for no such right or power has been delegated to, or is possessed by, the general assembly."

The liberty to contract, subject only to such limitations as may be imposed by the legislature in the legitimate exercise of the police power for the public welfare, is not only secured by the Constitution of this state, but is undoubtedly within the protection of the Federal Constitution, also, and is covered by the 14th Amendment thereof, which provides that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. art. 14, § 1; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 61 L. R. A.

34, 2 N. E. 29; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257, per Field, J.; *Hooper v. California*, 155 U. S. 648, 662, 39 L. ed. 297, 303, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Bailey v. People*, 190 Ill. 28, 54 L. R. A. 838, 60 N. E. 98; *Kuhn v. Detroit*, 70 Mich. 537, 38 N. W. 470; *People v. Rosenberg*, 138 N. Y. 410, 416, 34 N. E. 285; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 21, 52 L. R. A. 814, 59 N. E. 716; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313.

Corporations both private and public, are entitled to the benefit of this provision for the preservation and protection of their right to make contracts affecting their local affairs. *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 704, 28 L. ed. 585, 589, 4 Sup. Ct. Rep. 652; *Blythe v. State*, 4 Ind. 525; *Howard County v. Pollard*, 153 Ind. 371, 55 N. E. 87; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

If the legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price of labor, it may also regulate the prices of flour, fuel, merchandise, and land. But these are powers which have never been conceded to the legislature, and their exercise by the state would be utterly inconsistent with our ideas of civil liberty. Among the most odious and oppressive laws ever enacted by the English Parliament, in the worst of times, were the statutes of labor of Hen. VI. and Edw. III. These enactments fixed a maximum rate of wages for the laboring man, prohibited him from seeking employment outside of his own county, required him to work for the first employer who demanded his services, and punished every violation of the statute with severe penalties. In the very nature and constitution of things, legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions. The circumstance that the act of March 9, 1901, reverses the conditions of the statutes of labor of Hen. VI. and Edw. III., and lays the burden and the penalty upon the employer instead of the laborer, does not render it any less pernicious and objectionable as an invasion of natural and constitutional rights. Statutes similar to this have been before the courts of other states, and in nearly every instance have been held unconstitutional. *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *State ex rel. Bramley v. Norton*, 5 Ohio N. P. 183; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Jones v. Great Southern Fireproof Hotel Co.* 79 Fed. 477; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Shaver v. Pennsylvania Co.* 71 Fed. 931; *Atkins v. Randolph*, 31 Vt.

237; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L. R. A. 775, 65 N. E. 885.

The statute of March 9, 1901, is obnoxious to the further objection that through its operation a citizen may be deprived of his property without due process of law. If the minimum price to be paid by municipal subdivisions of the state for unskilled labor on public works exceeds the rate at which such labor can be obtained by other persons at the same place, then the excess so paid for labor on public improvements is taken from the citizens assessed for such works, not by due process of law, but by a mere legislative fiat. The citizens of the state, who must, through assessments made upon their property, pay for the public works of counties, cities, and towns, are entitled to have such work done at such rate of wages as the local agents and official representatives of such municipal subdivisions of the state may be able to secure by contract. They cannot be required arbitrarily to pay higher wages than laborers employed on private works or improvements in their particular district demand, any more than they could be compelled by similar legislation to pay a minimum rate of wages to laborers employed by them in their private business. If the minimum rate fixed by the statutes exceeds the market value of such wages, the excess is a mere donation exacted under color of law from the citizens liable to assessment for the public improvement, and bestowed upon the unskilled laborer. Public revenues cannot be applied in this way. *McClelland v. State*, 138 Ind. 321; 37 N. E. 1089; *State ex rel. Tieman v. Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Warner v. Curran*, 75 Ind. 309.

Lastly, we think the statute obnoxious to the objection of class legislation. In fixing the minimum rate of wages to be paid for unskilled labor to be employed by counties, cities, and towns on public improvements, a classification is made which is unnatural

and unconstitutional. The laboring men of the state may, for some purposes, constitute a class concerning which particular legislation may be proper. This classification has been recognized and sustained in statutes requiring the payment of wages in lawful money of the United States, forbidding the assignment of future and unearned wages, and in similar acts. But no legal and sufficient reason can be assigned for placing unskilled labor in a class by itself for the purpose of fixing by law the minimum rate of wages at which it shall be employed by counties, cities, and towns on their public works. Why exclude the skilled mechanic from the benefit of the act? Why compel the payment of a higher rate of wages to the unskilled laborer than may be demanded by the skilled mechanic for more difficult and important work, requiring special training, experience, and a higher degree of intelligence? Unless the legislature has the power to fix the minimum rate of wages to be paid by counties, cities, and towns to carpenters, stone masons, brick layers, plumbers, and painters employed on local improvements, treating each trade as a separate class, it has not the power to enact laws fixing the compensation of unskilled laborers employed on similar works. No sufficient reason has been assigned why the wages of the unskilled laborer should be fixed by law, and maintained at an unalterable rate, regardless of their actual value, and that all other laborers should be left to secure to themselves such compensation for their work as the conditions of supply and demand, competition, personal qualities, energy, skill, and experience may enable them to do.

After the most careful and thorough examination of all the questions of law presented by the demurrer in this case, we are satisfied that the ruling of the lower court was not erroneous, and its judgment is therefore affirmed.

Jordan and Gillett, JJ., upon the facts, concur in the result.

KENTUCKY COURT OF APPEALS.

TRADEWATER COAL COMPANY, *Appt.*,

v.

J. C. JOHNSON.

(.....Ky.....)

1. Leaving coal hanging in a mine in such a way as to be likely to fall on employees who attempt to work in proximity to it is negligence as matter of law.
2. Failure of loaders to perform their duty and remove loose coal hanging in a mine, which renders the place unsafe

for other employees to work in, is the negligence of the master, and not of the fellow servant of a machine man's helper; so that the master is not relieved from liability for injury to him, caused by such negligence, on the theory that the injury was caused by the act of his fellow servant.

3. Gross negligence is not necessary to render a master liable for injury to an employee through his failure to furnish a safe place in which to work.

(February 26, 1908.)

NOTE.—As to necessity of furnishing safe place for miners to work, see also, in this series, *Lehigh & W. Coal Co. v. Hayes* (Pa.) 5 L. R. A. 441; *Consolidated Coal & Min. Co. v. Floyd* (Ohio) 25 L. R. A. 848; *Petaja v. Aurora Iron Min. Co.* (Mich.) 32 L. R. A. 435; *Williams v. Thacker Coal & Coke Co.* (W. Va.) 40 L. R. A. 812; *Ellsworth v. Metheny* (C. C. App. 6th

C.) 51 L. R. A. 889; and *Wellston Coal Co. v. Smith* (Ohio) 55 L. R. A. 99.

As to liability of master for negligence of servant performing or failing to perform one of master's personal duties, see cases in note to *Lafayette Bridge Co. v. Olsen* (C. C. App. 7th C.) 54 L. R. A. 38.

APPPEAL by defendant from a judgment of the Circuit Court for Union County in favor of plaintiff in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Affirmed.*

The facts are stated in the opinion.

Mr. H. X. Morton, for appellant:

If the men were engaged in the same line of service the company is not liable at all for the neglect, and, if in a different line of service, then only for the gross neglect of the servant whose act caused the injury.

Louisville & N. R. Co. v. Robinson, 4 Bush, 508; *Volz v. Chesapeake & O. R. Co.* 95 Ky. 188, 24 S. W. 119; *Casey v. Louisville & N. R. Co.* 84 Ky. 80; *Fort Hill Stone Co. v. Orm*, 84 Ky. 183.

If the injury complained of results from the careless act of a fellow servant which has rendered the premises unsafe, the master is not liable.

Loranger v. Lake Shore & M. S. R. Co. 104 Mich. 80, 62 N. W. 137; 2 Bailey, Personal Injuries Relating to Master & Servant, p. 1011; *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397.

The failure to exercise ordinary care is not gross neglect, and, if appellant's liability is made to depend upon the negligence of Bryant, as the superior of appellee, either in failing to discover the dangerous condition of the room, or to tell appellee of it, his neglect must be gross.

Illinois O. R. Co. v. Coleman, 22 Ky. L. Rep. 878, 59 S. W. 13.

Messrs. B. F. Saunders, H. M. Davis, and Drury & Drury, for appellee:

It is the duty of the master to furnish his servant a safe place to work, and that duty is personal to the master, and cannot be delegated to another so as to relieve the master.

Ashland Coal & I. R. Co. v. Wallace, 101 Ky. 626, 42 S. W. 744; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 955, 6 Sup. Ct. Rep. 590; *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866.

The question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master.

Hale, Torts, p. 527; 7 Am. & Eng. Enc. Law, p. 824; *Indiana Car Co. v. Parker*, 100 Ind. 191.

It is the duty of the master to warn or instruct an inexperienced servant of the dangers to which he will be exposed. If he neglects to do so he will be liable for the injuries which the servant may receive, and, if he put his inexperienced servant at work with and under another, then this other is not the fellow servant of the inexperienced one, but is the vice principal or agent of the master.

Missouri P. R. Co. v. Perego, 36 Kan. 424, 14 Pac. 7; *Brennan v. Gordon*, 13 61 L. R. A.

Daly, 208; *McKinney, Fellow Servants*, §§ 39, 40; 1 Lawson, Rights, Rem. & Pr. § 326.

Paynter, J., delivered the opinion of the court:

Whilst in the employ of the appellant as laborer, the appellee was injured in a coal mine,—had his leg broken and crushed. He was inexperienced, having worked only about two hours in the mine when the accident occurred. One Bryant was in the employ of the appellant,—was what is commonly called a “machineman.” Appellee was his helper,—commonly called his “hostler.” The mines are divided into rooms. The machineman and his hostler enter a room. The machineman so manipulates the machine as to make an excavation under the vein of coal for a distance of 5 or 6 feet. While thus boring under the vein, dirt is brought out, and it is the business of the hostler to remove it. After this is done, the shooter or driller enters the room, and drills holes into the face of the coal near the top of the vein to the depth of the undermining or excavation which has been made by the machineman. The driller then places an explosive in the holes made by him, and touches it off, which results in breaking the coal from the vein between the holes and undermining. This is followed by the loaders, whose business it is to remove any loose coal hanging to the vein resulting from the shots. In the room where the injury took place, the driller had bored the holes 18 inches further back than the undermining had been extended, so, when the explosion took place, some coal was left hanging on it, partially detached from the vein. The loaders made this discovery, and, when Bryant entered the mine, they told him of its condition. Notwithstanding this, he proceeded to undermine it, and, after working on it awhile, the loose coal gave way, causing the injury stated. The appellee had no knowledge of coal mining, and his inexperience did not lead him to discover the condition of the coal. The uncontradicted testimony is that the room was in an unsafe and dangerous condition,—such a condition that Bryant should not have proceeded with the work until the loose coal was removed. There being no conflict in the evidence, and it being of such a character that reasonable men could not differ as to the conclusions or inferences to be drawn therefrom, the court can, as a matter of law, say that the injury in this case was the result of negligence. If the master is responsible for the negligence which resulted in the injury, then it necessarily follows that the jury did not err in finding for the appellee.

It is urged that Bryant and the loaders were fellow servants of the appellee, and therefore there can be no recovery, and, furthermore, if they were not the fellow servants of the appellee, but superior in authority to the appellee, then the court failed to submit to the jury the question of gross

negligence. It is the duty of the master to furnish his servant a reasonably safe place in which to perform the work assigned to him, and the servant has the right to presume that the master has performed this duty; and, if an injury results from failure to perform it, the master is liable, unless a reasonably prudent and intelligent man, under like circumstances, would have been able to discern the defects, and failed to do so, thereby contributing to his injury. It is the duty of the appellant to have the rooms in the mines inspected, and see that they are in reasonably safe condition for the servants to work in. *Ashland Coal & I. R. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207. This was a duty that the master could not rid himself of by casting it upon a servant in his employ, as that was a duty which the master owed. If he in-

trusted the performance of the duty to one who was negligent, it was the negligence of the master. In contemplation of law, in such cases, the acts of the servant were those of the master. There is no question of fellow servant in this case, because the servants guilty of the negligence represented the master. This doctrine was recognized in the case of *Van Dyke v. Memphis, N. O. & O. Packet Co.* 24 Ky. L. Rep. 1283, 71 S. W. 441. As the injury in this case, in contemplation of law, was the result of the master's failure to furnish a safe place for the servants to work, it was not necessary to show gross negligence, to entitle the appellee to recover. There was no error in the instruction prejudicial to the rights of the appellant.

Judgment is affirmed.

MAINE SUPREME JUDICIAL COURT.

William CARRIGAN, Admr.,

v.

Cleveland S. STILLWELL.

(97 Me. 247.)

1. Immediate death, within the requirements of a statute authorizing a suit by a personal representative of deceased for such death caused by negligence, is sufficiently charged by an allegation that, because of absence of fire escapes, deceased, who was rightfully in defendant's building, "was then and there burned to death and consumed by fire, and then and thereby lost her life."
2. The owner of a building required by statute to be provided with fire escapes is not relieved from liability for their absence by the fact that the building was in possession of a tenant, where the statute requires notice to be given to him in case they are found to be unsafe, and imposes a penalty upon him for neglect to comply with recommendations in regard to them.
3. Failure to perform a duty as to fire escapes, imposed by statute for the benefit of persons employed in the building, which is the proximate cause of the death of an employee, which death is the natural and ordinary consequence of the failure, is evidence of negligence to be submitted to the jury.
4. Action by the municipal authorities is not necessary to charge the owner of a building with liability for failure to provide fire escapes, under a statute requiring buildings to be equipped with them, and directing such authorities to make, annually, careful inspection of the safeguards provided, pass upon their sufficiency, and no-

tify the owner of the building in case they are insufficient, and imposing a penalty on him for failure to comply with their recommendations.

(January 1, 1903.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Penobscot County sustaining a demurrer to a declaration filed to recover damages for the negligent killing of plaintiff's intestate. *Sustained.*

The facts are stated in the opinion.

Messrs. Martin & Cook and Matthew McCarthy, for plaintiff:

There is nothing in the statute creating the liability which requires the plaintiff to allege that the death was immediate.

The defendant was bound to provide his house with a fire escape. He was not permitted to wait until he should be directed by the commissioners to provide one.

Willy v. Mullydy, 78 N. Y. 310, 34 Am. Rep. 536; *Rose v. King*, 49 Ohio St. 213, 15 L. R. A. 160, 30 N. E. 267; *McLaughlin v. Armfield*, 58 Hun, 376, 12 N. Y. Supp. 164; *Abrahan v. Manufacturers' Nat. Bank*, 16 N. Y. S. R. 750; *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555.

As to whether the plaintiff's intestate assumed the risk by working in a building upon which there were no fire escapes is a question not for the court, but for the jury.

Willy v. Mullydy, 78 N. Y. 310, 34 Am. Rep. 536; *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501; *Abrahan v. Manufacturers' Nat. Bank*, 16 N. Y. S. R. 750.

Mr. Charles H. Bartlett, for defendant:

In order to recover, the death must be "immediate."

Sawyer v. Perry, 88 Me. 42, 33 Atl. 660.

At common law no one was required to erect fire escapes on any building.

13 Am. & Eng. Enc. Law, 2d ed. p. 82;

NOTE.—As to liability for injuries caused by absence of fire escapes on buildings, see also, in this series, *Rose v. King* (Ohio) 15 L. R. A. 160, and *note*; *Pauley v. Steel Gauge & Lantern Co.* (N. Y.) 15 L. R. A. 194; *Jones v. Millsaps* (Mass.) 23 L. R. A. 157, and *note*; *Schmalzried v. White* (Tenn.) 32 L. R. A. 782; *Weeks v. McNulty* (Tenn.) 43 L. R. A. 185; and *Arms v. Ayer* (Ill.) 58 L. R. A. 277.
61 L. R. A.

Jones v. Granite Mills, 126 Mass. 84, 30 Am. Rep. 661.

Neither landlord nor tenant is liable in this action, because the notice required by Rev. Stat. chap. 26, § 28, was not given by the board of fire engineers of the city of Bangor.

Perry v. Bangs, 161 Mass. 35, 36 N. E. 683; *McCulloch v. Ayer*, 96 Fed. 178; *Maker v. Slater Mill & Power Co.* 15 R. I. 112, 23 Atl. 63; *DeGinther v. New Jersey Home for Feeble-Minded Children*, 58 N. J. L. 354, 33 Atl. 968; *Greenhaus v. Alter*, 30 App. Div. 585, 52 N. Y. Supp. 268; 13 Am. & Eng. Enc. Law, 2d ed. p. 84, note 1.

This statute must be strictly construed, and is not to be regarded as including anything which is not within its letter as well as its spirit, which is not clearly and intelligently described in the very words of the statute, as well as manifestly intended by the legislature.

Wing v. Weeks, 88 Me. 115, 33 Atl. 779; *Potter's Dwarr. Stat.* p. 245.

As the statute is too uncertain upon whom the duty is charged, there can be no recovery under it.

McCulloch v. Ayer, 96 Fed. 181; *Maker v. Slater Mill & Power Co.* 15 R. I. 112, 23 Atl. 65.

If there be any liability under this statute, or in this action, the liability must be upon the tenant, rather than upon the landlord.

Lee v. McLaughlin, 86 Me. 410, 26 L. R. A. 197, 30 Atl. 65; 13 Am. & Eng. Enc. Law, 2d ed. p. 84.

Wiswell, Ch. J., delivered the opinion of the court:

This is an action under chapter 124, Pub. Laws 1891, to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the fault of the defendant. The defendant filed a general demurrer to the declaration, which was sustained *pro forma* by the court at nisi prius, and the case comes here upon the plaintiff's exception to this ruling. It will only be necessary to consider the objections to the declaration that are urged by counsel in support of his demurrer.

1. It is contended that the declaration contains no such sufficient allegation of the immediate death of the deceased as is necessary in actions under this statute, under the construction thereof by this court in *Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660, and *Conley v. Portland Gaslight Co.* 96 Me. 281, 52 Atl. 656. The negligence complained of was the failure of the defendant to provide and maintain suitable fire escapes upon a building owned, controlled, and under the management of the defendant, by reason whereof, it is alleged, the deceased, being properly in the third story of the building at the time that the fire broke out therein, and without fault upon her part, lost her life. The allegation is that the deceased, by reason of such fault of the defendant, "was then and there burned to death and

consumed by said fire, and then and thereby lost her life."

It is, of course, well settled that the statute under which this action was brought gives only a right of action to the personal representative of a deceased person whose immediate death was caused by the negligence or fault complained of, and it necessarily follows that the declaration must contain a sufficient averment of such immediate death. But it is not necessary that any particular words should be used if it necessarily appears from the averment that the death of the deceased was immediate. Even in criminal pleading it is well settled that a statutory offense may be sufficiently set out without using the precise language of the statute, by the employment of language which is the full equivalent thereof. In this case we think that the necessary meaning of the allegation above quoted is that the immediate death of the deceased, within the meaning of the statute, was caused in the manner described. Not that the deceased received injuries from which she subsequently, however shortly thereafter, died, but that she then and there lost her life by being "burned to death and consumed."

2. The action is against the defendant, as owner of the building described. The declaration contains sufficient averments as to the defendant's ownership; that the building was one in which a business was carried on "requiring the presence of workmen above the first story;" that it was the duty of the defendant to provide and maintain suitable fire escapes for such building; that the defendant failed to perform this duty; and that by reason thereof the deceased, without fault upon her part, lost her life. The contention of the defendant is that this building was, at the time of the fire in which the deceased lost her life, in the possession of a tenant; that it was the duty of the tenant, if of anybody, to provide fire escapes; and that, therefore, this action cannot be maintained against the owner. Strictly, the question does not arise upon demurrer, because it does not appear from the declaration that the building was in the possession of a tenant at the time of the fire. But, as the question will necessarily arise later, if such was the case, and as both sides have fully argued it, we deem it proper and advisable to decide the question now, in view of our conclusion.

The duty of maintaining fire escapes upon certain buildings was created by statute. By Rev. Stat. chap. 26, § 26, as amended by chapter 89, Pub. Laws 1891, "every building in which any trade, manufacture, or business is carried on, requiring the presence of workmen above the first story," as well as certain other classes of buildings, "shall at all times be provided with suitable and sufficient fire escapes, outside stairs, or ladders from each story or gallery above the level of the ground, easily accessible to all inmates in case of fire or of an alarm of fire." The next two sections of the chapter provide that in towns having no organized fire de-

partment the municipal officers, and in cities, towns, and villages having an organized fire department, the board of fire engineers, shall annually make an inspection of the safeguards required by the preceding section, pass upon their sufficiency and state of repair, and direct such alterations, additions, and repairs as they adjudge necessary, and shall give written notice to the occupant of such building, "also to the owner thereof, if known," of their determination as to the sufficiency of the precautions and safeguards required, and as to the alterations, additions, and repairs that they adjudge necessary. By the next section a penalty is provided for any owner or occupant who neglects to comply with such order of these officers within the time allowed, and for any owner who lets or occupant who uses such building in violation of this order.

The question is whether, by these sections of the Revised Statutes, the duty of providing and maintaining sufficient fire escapes upon buildings to which the statutes are applicable, where the building is in possession of a tenant, or where, being in the possession of a tenant, it is so used as to bring it within the application of the statutes, is imposed upon the owner. The question is by no means free from difficulty, and little assistance can be obtained from the decisions of the courts of other states, construing statutes of the same general nature, because the statutes of the different states upon this subject differ in respects more or less essential as bearing upon this question.

It will be noticed that the first section relating to the subject does not specifically enjoin the duty upon any particular person. It simply requires that the classes of buildings enumerated, and the buildings used for the purposes specified, "shall at all times be provided with suitable and sufficient fire escapes." The next two sections relate to the enforcement of this requirement by certain officers. Section 28 provides that such officers shall give "written notice to the occupant of such building, also to the owner thereof, if known," of their determination as to the sufficiency of such fire escapes, and as to the changes that they adjudge necessary. We think that this section throws some light upon the legislative intent. Why, when such a building is in the possession of someone other than the owner, should the statute require notice to the owner, unless it was the intention of the legislature to impose this duty upon him?

The next section, as we have seen, imposes a penalty upon "any owner or occupant who neglects to comply" with the order of the designated officers within the time limited, and further provides that, "if the owner or occupant of said building lets or uses the same in violation of such order," he shall be subject to a penalty. If it is made an offense, and subjects the owner to a penalty, for him to let a building without complying with the order relative to the sufficiency of the fire escapes, it would seem to follow that the duty in relation thereto

enjoined by the 1st section was imposed upon him.

In *Lee v. Smith*, 42 Ohio St. 458, 51 Am. Rep. 830, where the court, in the construction of a statute which imposed upon the owners of factories and workhouses the duty of providing fire escapes, held that the statute was not applicable to the owners of premises in the possession of lessees, the court bases its reasoning and conclusion to a considerable extent upon the fact that by the language of the statute the duty is not imposed upon the owner of a building, but upon the owner of a factory or workshop, and that a factory or workshop is not synonymous with a building. And *Schott v. Harvey*, 105 Pa. 222, 51 Am. Rep. 201, in which the court reached the same conclusion, in construing a similar statute, is based upon the same reasoning. But the language of our statute is entirely different in this important respect. These safeguards are not merely required upon factories and workshops, but upon any building in which any trade, manufacture, or business is carried on "requiring the presence of workmen above the first story."

In Illinois the statute in relation to this subject is somewhat similar to the one in this state. One section requires that certain buildings shall be provided with fire escapes, without more specifically imposing the duty of providing such fire escapes upon any particular person. Another section provides for notice to be given by the designated authorities to "the owners, trustees, lessee, or occupant, or either of them." The court held in *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501, that the owners of a building were not relieved from liability for a failure to perform this duty, because a part of the premises was in the possession and under the control of tenants of the owners instead of being directly in their possession. It is said in the opinion: "The injunction being in the alternative, the notice may be given to the one as well as to the other, and therefore to the owner as well as to the lessee, or occupant." In *Arms v. Ayer*, 192 Ill. 601, 58 L. R. A. 277, 61 N. E. 851, this construction of the statute is reaffirmed.

By our statutes, as we have seen, the penalty for failure to comply with the order of the municipal officers or fire engineers is imposed, in the alternative, upon the owner or occupant. And the provision in regard to the notice in writing, especially applicable to cases where the owner is not in possession, requires that, notwithstanding that fact, such notice must be given to the owner, if known. Upon the whole, we are of the opinion that the statutes which we have referred to impose the duty upon the owner of a building, within the application of these sections, or which, by reason of its use, is brought within their application, to provide and maintain suitable and sufficient fire escapes upon such a building, notwithstanding it is in the possession of a tenant. We do not decide, because apparently the question does not arise, that this would be

so if a building, not itself belonging to one of the classes specified, and not let by the owner for any purpose mentioned in the section, should come within the provisions of the law by reason of its use by the tenant for any of such purposes without the knowledge or consent of the owner.

If the defendant's failure to perform a duty imposed upon him by statute for the benefit of persons lawfully employed in the building was the proximate cause of the death of the plaintiff's intestate, and if her death was the natural and ordinary consequence of this failure upon the part of the defendant, then it is at least evidence of actionable negligence upon his part to be submitted to a jury.

3. Finally, it is contended by counsel for defendant that by these sections of the statutes no duty is imposed upon either owner or occupant until after action shall have been taken by the municipal officers or fire engineers, and notice given as provided therein. We do not think that this is so. The first section imposes the duty to provide certain buildings with fire escapes. The provisions of the subsequent sections show, we think, that it was the intention of the legislature to impose this duty upon the owner, even if the building was in the possession of a tenant. It is undoubtedly true that under the provisions of the subsequent sections relative to the enforcement of the law and to penalties for failures to comply with it, the owner is not subject to the penalty provided by § 29 until he shall have failed to comply with the orders of the officers designated for a space of sixty days. But the very language of the section which makes it the duty of the municipal officers

or fire engineers to "annually make careful inspection of the precautions and safeguards provided in compliance with the foregoing requirements, and pass upon their sufficiency as to arrangement and number, and upon their state of repair," presupposes that these safeguards are to be provided before such inspection, and that their duty is to inspect safeguards already supplied, and pass upon their sufficiency in number and other respects.

Under these sections it is not the duty of the officers named to determine what buildings shall be provided with fire escapes; that is done by the statute itself; but to see that the requirements of the law are complied with, and to pass upon the sufficiency of safeguards already provided. The duty of an owner to place fire escapes upon the buildings designated does not depend upon the action of the municipal officers or fire engineers, or upon their failure to take action. Such has generally been the construction of similar statutes in other states. *Willy v. Mulledy*, 78 N. Y. 310, 314, 34 Am. Rep. 536; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Arms v. Ayer*, 192 Ill. 601, 58 L. R. A. 277, 61 N. E. 851; *Rose v. King*, 49 Ohio St. 213, 15 L. R. A. 160, 30 N. E. 267. The Massachusetts statute construed by the court in *Perry v. Bangs*, 161 Mass. 35, 36 N. E. 683, is so different from the one in this state in this respect that that case, somewhat relied upon by counsel for defense, is not an authority upon this question.

For these reasons we think that the demurrer should have been overruled.

Exceptions sustained. Demurrer overruled.

MISSOURI SUPREME COURT.

Anna Isabel JOHNSTON *et al.*, *Appts.*,

v.

Daniel JOHNSTON *et al.*, *Respts.*

(.....Mo.....)

1. A gift of money by a man to his wife makes it her separate estate as between them or their privies in blood or estate, where no rights of creditors are involved.
2. Money entering into a loan for which a note and trust deed are made to husband and wife may be found to be the property of the wife, where the husband signed an account of the items in the loan, which stated that she advanced that amount, the loan is for a period of two years, and he made no attempt to collect it when due, nor until after her death, although he states that the note was made to himself and

wife in order to make provision for her by survivorship in case he predeceased her.

3. Estates by the entirety may, under the Missouri statutes, be created in personal as well as in real property, and between husband and wife as well as between strangers.
4. An estate by entirety is not created by the giving of a note secured by deed of trust to a husband and wife jointly to secure repayment of a loan, a portion of which was advanced by each, where by statute a man has no control of his wife's property; and it is immaterial that she knew of, and consented to, the form of the security.
5. Where, upon foreclosure of a deed of trust given to a husband and wife to secure loans, the husband bids in the property, and is permitted to credit the amount of the loan on the bid, the wife's money is traced into the property so that her heirs can claim an interest in it.
6. Testimony of a husband in his own behalf, in an action brought after the death of his wife to adjust their respective rights in a note secured by deed of trust given for money loaned, a part of which was contributed by each, is precluded by a statute providing that in actions where one of

NOTE.—As to tenancy by entireties, see also, in this series, *Hiles v. Fisher* (N. Y.) 30 L. R. A. 305, and *note*; *Fulper v. Fulper* (N. J. Eq.) 32 L. R. A. 701; *Simons v. Bollinger* (Ind.) 48 L. R. A. 234; and *Re Parry* (Pa.) 49 L. R. A. 444.
61 L. R. A.

the original parties to the contract or cause of action in issue and on trial is dead, the other party shall not be admitted to testify in his own favor.

7. An objection to the testimony of the surviving party to a cause of action in his own behalf, which is forbidden by statute, is not waived by cross-examining him only as to matters covered by his examination in chief.
8. Persons who wait seven years after the deed is foreclosed before asserting their claim to the share of a deceased wife, in property bid in under a deed of trust given to secure money loaned by her and her husband, during which time money has been loaned by a third person on security of the whole property, in ignorance of their claim, will be subordinated to the rights of such person.
9. The heir, and not the administrator, is the proper one to bring an action to declare a resulting trust in land, although it arises out of the bidding in of property covered by a deed of trust given to secure a loan of money, a part of which was advanced by the ancestor.

(February 18, 1903.)

A PPEAL by plaintiffs from a judgment of the St. Louis Circuit Court dismissing a bill brought to establish a resulting trust in certain real estate. *Reversed.*

Statement by **Marshall, J.:**

This is a bill in equity, the purpose of which is to establish a resulting trust in favor of the plaintiffs in lots 13 to 16, inclusive, in city block 968, in the city of St. Louis, having an aggregate front, on the south line of Stoddard street, of 110 feet. The circuit court dismissed the bill, and the plaintiffs appealed.

The undisputed facts in this case are as follows: The plaintiffs are the children (and their husbands) of the defendant Daniel Johnston and his former wife, Mary Ann Johnston, *née* Fury. The defendants are the said Daniel Johnston and his third wife, Mary Ann Theresa Johnston, *née* Gheraty, and the Lincoln Trust Company. The defendant Daniel Johnston's first wife was a sister of his second wife, the plaintiffs' mother. The latter was a widow when Johnston married her in 1873. She died in 1885, intestate, leaving the plaintiffs as her only heirs. No administration was ever had upon her estate, and none was necessary, as it appears that she owed no debts. Prior to and on December 12, 1881, Ann Fury, the mother of Daniel Johnston's second wife, Mary Ann, and the plaintiffs' grandmother, owned the land in question as her separate property. Prior thereto, to wit, between July 27, 1877, and that date, Daniel Johnston loaned his mother-in-law, Ann Fury, or her husband, Michael Fury, \$2,206.08. His wife, Mary Ann Johnston, had also turned over to her father or mother \$1,800. Michael Fury then died, and Ann Fury was on December 12, 1881, a widow. On that date Daniel Johnston presented to his mother-in-law, Ann Fury,

an itemized statement of the amount he had loaned or advanced to Michael Fury and Ann Fury, and what he claimed was due him as rent, amounting to \$2,206.08. To this statement was appended at the end thereof the following: "Add money advanced to Ann Fury by Mary Ann Johnston, \$1,800. Total amount due by Ann Fury to Daniel Johnston and Mary Ann Johnston, as per above statement, on January 1, 1882, \$4,006.08. For which amount said Ann Fury has given her note, dated January 1, 1882, secured by deed of trust of date December 12, 1881." This was signed and sealed by Daniel Johnston and Mary Ann Johnston. The note was payable to Daniel Johnston and Mary Ann Johnston, and the deed of trust securing the note described them as beneficiaries. The note was payable at two years, and there were also semi-annual interest notes. At the time this settlement was had, and this note and deed of trust was executed, there was a prior mortgage on the land for \$5,000. Thus the matter stood when Mary Ann Johnston died in 1885. Daniel Johnston married his present wife in October, 1886. In August, 1893, the trustee under the deed of trust of December 12, 1881, being alleged to have removed from the state, Daniel Johnston procured the sheriff of St. Louis to be substituted as trustee, and caused him to foreclose the deed of trust, and at the sale Elizabeth Robeson, acting for Daniel Johnston, and not for herself, purchased the property and immediately deeded it to him. The bid was for \$5,000, but Johnston paid the sheriff only \$85 cash, and had the balance of the bid credited upon the note of Ann Fury to himself and his deceased wife. During the years 1884, 1885, and 1886 (which was partly before and partly after the death of Mary Ann Johnston), Daniel Johnston paid off the first deed of trust on the land, paying for that purpose, it is charged, \$7,350. He also paid the taxes on the land and other expenses incident thereto, and on the other hand has received the rents. On May 23, 1899, Daniel Johnston borrowed \$7,020 from the Lincoln Trust Company, and secured it by a deed of trust on the land. He tore down the house or houses that were on the land, and with the money borrowed from the trust company, and perhaps other money of his own, and, as he alleges, with \$3,000 of his present wife's money, he put up new buildings on the land. This suit was begun to the February term, 1900, of the St. Louis circuit court.

The only disputed fact in the case is whether the \$1,800 aforesaid was the money of Mrs. Mary Ann Johnston or of Daniel Johnston. He claims and testified that she never had any money, and his witnesses testified that they never heard of any property or money belonging to her. He testified upon the trial of this case that he "fetched home money to give to her father, so he could pay the mechanics as the cellar would be built, and as the joists were put on, and different payments to them, so she could

have it to hand to him," and that it was his money, and that he only placed it in her custody to be handed by her to her father, for the purpose of paying for a house that her father was putting up on the land in question, which belonged to his wife, Ann Fury. On the other hand, the plaintiffs introduced a transcript of the evidence thereby preserved in the case of *Fredericka Schmidt et al. v. Daniel Johnston*, from which it appeared that he testified that his former wife, Mary Ann Johnston, advanced \$1,800 of the \$4,006.08 covered by the note and deed of trust of Ann Fury, dated December 12, 1881; that he could not say exactly when she advanced it; that she told him the amounts she gave, and he lumped it all together and added it to his itemized account; that "she saved most of the money from housekeeping and such as that;" that she had no money except what she saved. And when his attention was called to the fact that in 1877 he himself was in the market as a borrower, and he was asked to reconcile that fact with his claim of having loaned his father-in-law \$4,000, he answered as follows:

A. There was a large portion of that she had saved previous to that, housekeeping money.

Q. She would not let you use it, and preferred to have you borrow the money from Mr. Schmidt or your father-in-law?

A. She had an idea of having some money saved up for cash money herself, and when her father wanted to build she gave it to him.

This admission, together with the physical facts in the case, constitute the evidence upon which the plaintiffs rely to prove that the \$1,800 was their mother's money, and that such money had gone into the land, by reason of the purchase by the defendant of the land at the trustee's sale, and the crediting of the bid upon the note, and therefore they claim a resulting trust of nine-twentieths in the land.

Messrs. Alexander J. B. Garesche, Jones, Jones, & Hocker, and A. H. Roubeshush, for appellants:

Personal savings and profits made by the wife in her domestic management, which her husband allows her to apply to her own separate use, will be held to vest in her against the claim of the husband.

Gentry v. McReynolds, 12 Mo. 533; *Welch v. Welch*, 63 Mo. 60; *McCoy v. Hyatt*, 80 Mo. 135; *Thomas v. Thomas*, 107 Mo. 462, 18 S. W. 27; 2 Story, Eq. Jur. § 1375; *Ingals v. Ferguson*, 59 Mo. App. 308, 138 Mo. 365, 39 S. W. 801; *Slanning v. Style*, 3 P. Wms. 337; 2 Roper, Husb. & W. 137; *Mangey v. Hungerford*, 2 Eq. Cas. Abr. 156.

A resulting trust arises in favor of one whose money is used by another in the purchase of land when the conveyance is taken to himself instead of to, or for, the person who furnished the money.
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Key v. Jennings, 66 Mo. 356; *Baumgartner v. Guessfeld*, 38 Mo. 36; *Johnson v. Quarles*, 46 Mo. 423; *Shoemaker v. Smith*, 11 Humph. 81; *Kelly v. Johnson*, 28 Mo. 249; 1 Perry, Tr. § 132; 1 Beach, Tr. § 152.

Where the husband purchases property with the separate means of his wife, but takes the title in his own name, he is regarded in equity as trustee for his wife.

Broughton v. Brand, 94 Mo. 169, 7 S. W. 119; *Scrutchedfield v. Sauter*, 119 Mo. 615, 24 S. W. 137; *Seay v. Hesse*, 123 Mo. 450, 24 S. W. 1017, 27 S. W. 633; *DeBerry v. Wheeler*, 128 Mo. 84, 30 S. W. 338; *Clowser v. Noland*, 133 Mo. 221, 34 S. W. 64; *Alkire Grocer Co. v. Ballenger*, 137 Mo. 369, 38 S. W. 911; *McGregor-Noe Hardware Co. v. Horn*, 146 Mo. 129, 47 S. W. 957.

Because the investment is joint no estate by the entirety can result, whether the funds are invested in either realty or personality.

Estates by the entirety never obtained as to personality.

Price v. Kane, 112 Mo. 412, 20 S. W. 609; *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261; *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990; *State ex rel. Toebben v. Brady*, 53 Mo. App. 202; *Wilcox v. Murtha*, 41 App. Div. 408, 58 N. Y. Supp. 784; *Re Albrecht*, 136 N. Y. 91, 18 L. R. A. 331, 32 N. E. 632; *Schouler*, Dom. Rel. 111, 113; *Petty v. Styward*, 1 Rep. in Ch. 57, 1 Eq. Cas. Abr. 290; *Wms. Pers. Prop.* 3; *Dwight, Persons & Pers. Prop.* pp. 457, 458; *Darlington, Pers. Prop.* p. 305; *Schouler, Pers. Prop.* p. 195; 4 Kent, Com. 14th ed. Harp. 361; *Smith, Pers. Prop.* 33.

The right to enforce this trust exists in the heirs of Mary Ann Johnston. It was not necessary that the suit be brought by the executor.

Broughton v. Brand, 94 Mo. 169, 7 S. W. 119; *Seay v. Hesse*, 123 Mo. 456, 24 S. W. 1017, 27 S. W. 633; *Hart v. Leete*, 104 Mo. 335, 15 S. W. 976; *Ford v. Hennessy*, 70 Mo. 581; *Richardson v. Cole*, 160 Mo. 377, 61 S. W. 182.

But if a defect as to parties plaintiff existed it was waived by failure to raise the point by demurrer or answer.

Rogers v. Tucker, 94 Mo. 346, 7 S. W. 414; *Mechanics' Bank, use of Davis v. Gilpin*, 105 Mo. 17, 16 S. W. 524; *Young Men's Christian Asso. v. Dubach*, 82 Mo. 475; *Gregory v. McCormick*, 120 Mo. 657, 25 S. W. 565; *Scott-Force Hat Co. v. Hombs*, 127 Mo. 392, 30 S. W. 183; *Graham v. Allison*, 24 Mo. App. 516; *Rothschild v. Lynch*, 76 Mo. App. 339; *State ex rel. Napton v. Hunt*, 46 Mo. App. 617; *Galbreath v. Newton*, 45 Mo. App. 312; *New England Loan & T. Co. v. Brown*, 59 Mo. App. 461; *State ex rel. Saline County v. Sappington*, 68 Mo. 457; *Butler v. Lawson*, 72 Mo. 247; *Mississippi Planing Mill v. Presbyterian Church*, 54 Mo. 524.

Messrs. Daniel Dillon and John Dillon, for respondents:

On the death of his wife, Mary Ann Johnston, in 1885, the note for \$4,006.08, in con-

troversey, became the property of Daniel Johnston alone, regardless of who furnished the consideration for the giving of the note, or what the consideration was. A note payable to husband and wife, on the death of either belongs to the survivor.

Shields v. Stillman, 48 Mo. 82; *Wells v. Moore*, 68 Mo. App. 499; *Arn v. Arn*, 81 Mo. App. 133; *Fiedler v. Howard*, 99 Wis. 388, 75 N. W. 163; *Farr v. Grand Lodge, A. O. U. W.* 83 Wis. 446, 53 N. W. 738; *Abshire v. State*, 53 Ind. 64; *Bramberry's Estate*, 156 Pa. 628, 22 L. R. A. 594, 27 Atl. 405; *Gillan v. Dixon*, 65 Pa. 395; *Allen v. Tate*, 58 Miss. 585; *Pender v. Dicken*, 27 Miss. 252; *Sanford v. Sanford*, 45 N. Y. 723; *Roman Catholic Orphan Asylum v. Strain*, 2 Bradf. 34; *Draper v. Jackson*, 16 Mass. 480; *Pike v. Collins*, 33 Me. 38; 2 Dan. Neg. Inst. 4th ed. p. 221, § 1184; *Freeman, Cotenancy & Partition*, 2d ed. p. 133, § 68; *Schouler, Husb. & W.* § 399; *Schouler, Dom. Rel.* 5th ed. p. 299, § 193; *Schouler, Pers. Prop.* 3d ed. § 156, pp. 191, 192; 2 Kent, Com. 14th ed. *351; *Wms. Pers. Prop.* 4th Am. ed. *302, *303; 1 Wait, Act. & Def. § 8, p. 76; 1 Beach, Modern Law of Contracts, § 668, p. 809.

The note was personal property, and on the death of Mary Ann Johnston her interest therein would go to her administrator, and not to her heirs.

State, use of Coste v. Fulton, 35 Mo. 323; *Hanenkamp v. Borgmier*, 32 Mo. 569; *State ex rel. Hounoom v. Moore*, 18 Mo. App. 406; *Becroft v. Lewis*, 41 Mo. App. 552; *Green v. Tittman*, 124 Mo. 372, 27 S. W. 391.

A court of equity will not aid a complainant in obtaining an inequitable advantage, though based on a claim perfectly valid at law. Equity will leave him to his legal remedies.

Fehlig v. Busch, 165 Mo. 170, 65 S. W. 542; 2 Beach, Eq. Jur. §§ 566-569; *Bispham*, Eq. 6th ed. §§ 371-375; 2 Story, Eq. Jur. 13th ed. §§ 742, 169, p. 89; *Conger v. New York, W. S. & B. R. Co.* 120 N. Y. 29, 23 N. E. 983; *Miles v. Dover Furnace & Iron Co.* 125 N. Y. 294, 26 N. E. 261; *Columbia College v. Thacher*, 87 N. Y. 317, 41 Am. Rep. 365; *Willard v. Taylor*, 8 Wall. 564, 19 L. ed. 501.

Mr. Henry Caulfield also for respondents.

Marshall, J., delivered the opinion of the court:

1. The primary question presented by this record is whether the \$1,800 was the money of Daniel Johnston or of his wife, Mary Ann Johnston. If it was his, that is an end of this case. If it was hers, the foundation is laid for the plaintiffs' claim, and then other questions raised in the case must be passed upon. The defendant's contention that the money was his rests upon his testimony in this case that he "fetched" the money home and placed it in his wife's custody, to be by her turned over to her father to be used by him in paying for the building of a house upon the land involved in this case, 61 L. R. A.

which belonged to Ann Fury. He supplements his testimony with the testimony of others to the effect that his wife never had any money or property, or, at any rate, that they never heard of her having any, and they were intimate with her and her family affairs. On the contrary, the plaintiffs produced the testimony of Daniel Johnston himself, given in the case of Schmidt against him, a short time after the note and deed of trust were executed, wherein he swore that this \$1,800 was his wife's money, which she had saved "from housekeeping and such as that." And when his attention was called to the fact that in 1877 he was a borrower, and he was asked how that could be if his wife had any money saved "from housekeeping and such as that," he replied that she would not let him have it because "she had an idea of having some money saved up for cash money herself, and when her father wanted to build she gave it to him." So that, so far as the direct testimony is concerned, it all rests upon what Daniel Johnston himself said about it. His first statement was made shortly after the transaction occurred, and was also made in the trial of a case wherein it was charged that the money was his, and not his wife's. His last testimony was made in the trial of this case. It may be said that both statements were in one sense statements in his own interest; but in another sense his first statement also contains some of the elements of a statement or admission against interest, and is therefore prima facie true. But if these statements offset each other, which is the utmost the defendant could possibly claim, then the case is left with only the statements of the defendant's witnesses, above set out, to the effect that, although intimate with Mrs. Johnston and her family affairs, they never knew or heard of her having any property or money, supporting the defendant's claim, while, on the other hand, are the physical facts in the case, which all support the plaintiffs' contention.

Those physical facts are these: First. The itemized statement of account made by the defendant Johnston himself, upon which the settlement was made with Mrs. Ann Fury, and for the payment of which the deed of trust and note were executed, which distinctly recites the fact to be that the \$1,800 was "money advanced to Ann Fury by Mary Ann Johnston;" not money placed in Mrs. Johnston's custody by Daniel Johnston, to be by her turned over to her father, as he now claims, but "money advanced to Ann Fury by Mary Ann Johnston." This statement is signed and sealed by both Daniel Johnston and Mary Ann Johnston. It was made by him when his wife and her mother, Ann Fury, were alive, and knew whose money it was, and is of much more probative force than his self-serving statement, made upon the trial of this cause, after his wife and Ann Fury were dead, and therefore unable to contradict him or to tell their side of the transaction. Second. The next physical fact is that the note and deed of trust were made

payable to Daniel Johnston and Mary Ann Johnston, his wife. The defendant tries to parry the effect of this fact by contending that he intended to create an estate or interest by the entirety, with the correlative right of survivorship, in the longest liver, and thus to make provision for his wife if he predeceased her, and, on the other hand, to preserve it all for himself if he survived her. If the \$1,800 was his money, it would have been most praiseworthy for him to make such a provision for his wife, and it would have been a legal and valid arrangement. *Case v. Espenschied*, 169 Mo. 215, 69 S. W. loc. cit. 277. But the trouble is that the major premise of his syllogism is disputed, and is the very essential and vital point in this case, and no conclusion or deduction can properly or logically be drawn from such controverted premises; nor can the rule of law involved in the conclusion afford any evidence of the existence of the disputed premises. The effect of making the note and deed of trust payable to both, if the \$1,800 was the wife's money, will be discussed hereinafter; for if it was her money, and not his, the construction he puts upon this physical fact necessarily fails. Without such a construction, this physical fact, read in the light thrown upon it by the settlement and receipt aforesaid, tends strongly to support the plaintiffs' contention that the \$1,800 was the wife's money, and also tends to indicate that, instead of each taking security for the amount each had advanced, they took the one note and deed of trust payable to the two for the aggregate amount of their advances, and without any idea of creating any right by the entirety, with its accompanying incident of survivorship. Third. The next physical fact is that, as long as his wife lived, which was for more than four years after the note and deed of trust were made, and was for about two years after the maturity thereof, he never foreclosed the deed of trust or set up any claim of a right by survivorship. If the deed of trust had been foreclosed during the life of his wife, there could be no possible right of survivorship. The portion of the money advanced by each would immediately have been payable to each, and the trustee would have been obliged to pay the share advanced by each to them separately. In other words, the fact that the note was made payable in two years is in itself persuasive evidence that the husband had no idea of making a provision for his wife if she survived him, and of retaining the fund by survivorship if he survived her. If the idea of making provision for his wife had been present in his mind at that time, he would most likely have had the note made payable to her alone, as was the fact in *Case v. Espenschied*, *supra*. And, when the fact that the note was made payable in two years is considered in connection with the last-mentioned consideration, it seems measurably certain that he expected that he and his wife would each get back, out of the security, the amount each had advanced, while they were

both alive, and that by the foreclosure of the deed of trust, both being alive, all possibility of a right of survivorship would be cut off and cease.

It is not at all significant or important whether the wife saved this money out of "housekeeping and such as that," or whether the husband gave it to her in lump. No rights of his creditors are involved here, and therefore, as between them or their privies in blood or estate, the gift by him to her made it as much her separate estate under the married woman's act of 1875 (*Laws* 1875, p. 61) as if she had received it as a gift from any stranger or had inherited it. *Bettes v. Magoon*, 85 Mo. 580; *Clark v. Clark*, 86 Mo. loc. cit. 123; *Thomas v. Thomas*, 107 Mo. 463, 18 S. W. 27; *Sanguinett v. Webster*, 127 Mo. loc. cit. 38, 29 S. W. 698. The physical facts, the record and statements of the husband and wife and of Ann Fury, made when the settlement was had and the deed of trust and note were executed, and the conduct of the defendant since then, and especially in not foreclosing the deed of trust during his wife's life, even without taking into account at all the admissions of the defendant, point surely and convincingly to the conclusion that the \$1,800 was the wife's money, and not the defendant's.

2. The next question in this case is whether a right of survivorship exists in personal property. The defendant Johnston contends that the weight of authority is that such a right may be created and will be enforced, and in support of the contention he cites a great number of cases, of which *Allen v. Tate*, 58 Miss. 585; *Draper v. Jackson*, 16 Mass. 480; and *Abshire v. State*, 53 Ind. 64, —are fair types. He also refers to Schouler, *Pers. Prop.* 3d ed. § 156, and *Freeman, Cotenancy & Partition*, 2d ed. § 68. On the other hand, the plaintiffs claim that while, at common law, estates by the entirety existed, with the incident of survivorship, still, as between husband and wife, there could be no estate by the entirety in personal property, because the wife's personal property became the property of the husband immediately upon his reducing it to possession. The plaintiffs also claim that the cases cited and relied on by the defendant Johnston are not applicable to this case, because they were all cases where one party, either the husband or the wife, had advanced the whole consideration for the security or note which was made payable to both the husband and wife, and that as in cases of the purchase of land by the two, each furnishing their own funds for their part, and the title being taken in the names of both, so as to securities or notes, where each advanced a part of the consideration and the note was taken in their joint names, a tenancy in common and not a joint tenancy or right by the entirety, will arise, and a court of equity will protect and decree the interest of each. In support of these contentions the plaintiffs cite many cases, among them *Wilcox v. Murtha*, 41 App. Div. 408, 58 N. Y. Supp.

loc. cit. 784; *Re Albrecht*, 136 N. Y. 91, 18 L. R. A. *loc. cit.* 331, 32 N. E. 632; *Wait v. Bovee*, 35 Mich. 425. The defendant Johnston, however, calls attention to the *note* to the case of *Re Albrecht*, 18 L. R. A. 329, wherein it is said: "The above decision does not seem to have any direct precedent, other than that cited in the opinion." And in the opinion the court says no reported case has been found in that state where the same question was presented, but refers to *Wait v. Bovee*, 35 Mich. 425, as authority. Therefore the defendant Johnston questions the correctness of those cases, and claims they do not harmonize with the weight of authority.

The questions of law thus presented are not only interesting from a historical or philosophical point of view, but are most serious from a practical point of view, and a review of the law upon this subject is not only proper, but necessary. Speaking of joint tenants and the doctrine of survivorship, with respect to personal chattels as well as real estate, Chancellor Kent (vol. 4, 14th ed., pp. 360 *et seq.*) says: "The doctrine of survivorship, or *jus accrescendi*, is the distinguishing incident of title by joint tenancy; and therefore, at common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance. The whole estate or interest held in joint tenancy, whether it was an estate in fee, or for life, or for years, or was a personal chattel, passed to the last survivor, and vested in him absolutely. It passed to him free, and exempt from all charges made by the deceased cotenant. The consequence of this doctrine is that a joint tenant cannot devise his interest in the land; for the devise does not take effect until after the death of the devisor, and the claim of the surviving tenant arises in the same instant with that of the devisee, and is preferred. If a joint tenant makes a will, and he then becomes solely seised by survivorship, the will does not operate upon the title so acquired without the solemnity of republication. The same instantaneous transit of the estate to the survivor bars all claim of dower on behalf of the widow of the deceased joint tenant. But the charges made by a joint tenant, and judgments against him, will bind his assignee, and him as survivor. The common law favored title by joint tenancy, by reason of this very right of survivorship. Its policy was averse to the division of tenures, because it tended to multiply the feudal services and weaken the efficacy of that connection. But in *Haws v. Haws*, 1 Ves. Sr. 13, Lord Hardwicke observed that the reason of that policy had ceased with the abolition of tenures; and he thought that even the courts of law were no longer inclined to favor them, and at any rate they were not favored in equity, for they were a kind of estates that made no provision for posterity. As an instance of the equity view of the subject, we find that the rule

of survivorship is not applied to the case of money loaned by two or more creditors on a joint mortgage. The right of survivorship is also rejected in all cases of partnerships, for it would operate very unjustly in such cases. In this country, the title by joint tenancy is very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except where it is proper and necessary, as in the case of titles held by trustees. In New York, as early as 1786, estates in joint tenancy were abolished, except in executors and other trustees, unless the estate was expressly declared, in the deed or will creating it, to pass in joint tenancy. The New York Revised Statutes have re-enacted the provision, and with the further declaration that every estate vested in executors or trustees as such shall be held in joint tenancy. The doctrine of survivorship incident to joint tenancy (excepting, I presume, estates held in trust) is abolished in the states of Connecticut, Pennsylvania, Virginia, Kentucky, Indiana, Missouri, Mississippi, Tennessee, North Carolina, and Alabama. In the states of Maine, New Hampshire, Massachusetts, Rhode Island, Vermont, New Jersey, Michigan, Illinois, and Delaware joint tenancy is placed under the same restrictions as in New York, and it cannot be created but by express words, and, when lawfully created, it is presumed that the common-law incidents belonging to that tenancy follow. The English law of joint tenancy does not exist at all in Ohio and Louisiana, and it exists in full force in Georgia, Mississippi, and Maryland. The destruction of joint tenancies, to the extent which has been stated, does not apply to conveyances to husband and wife, which, in legal construction, by reason of the unity of husband and wife, are not strictly joint tenancies, but conveyances to one person. They cannot take by moieties, but they are both seised of the entirety, and the survivor takes the whole; and, during their joint lives, neither of them can alien so as to bind the other. If the husband be attainted, his attainder does not affect the right of the wife, if she survive him; nor is such an estate, so held by the husband and wife, affected by the statutes of partition. If an estate be conveyed expressly in joint tenancy to a husband and wife and to a stranger, the latter takes a moiety, and the husband and wife, as one person, the other moiety. But, if the husband and wife had been seised of the lands as joint tenants before their marriage, they would continue joint tenants afterwards as to that land, and the consequences of joint tenancy, such as severance, partition, and the *jus accrescendi*, would apply. It is said, however, to be now understood that husband and wife may by express words be made tenants in common by a gift to them during coverture. Joint tenancy may be destroyed by destroying any of its constituent unities, except that of time."

Schouler, *Pers. Prop.* 3d ed. p. 191, §§ 156 *et seq.*, thus treats the subject: "As

there can be no 'estate' in personal property, many of those technical distinctions which are made in the books between joint estates for life, in tail, or in fee have no application to our present subject. But any interest which may be lawfully created in chattels, whether immediate or expectant, is itself susceptible of joint as well as sole ownership; and, as we take occasion to show the reader elsewhere, personal property may be limited in modern times to very much the same effect as lands, notwithstanding the natural and technical differences between them. Household furniture, merchandise, animals, and other movables of a corporeal character, may therefore be so vested in two or more persons as to constitute them joint owners thereof. There may likewise be joint owners of a promissory note, of a patent right, of a legacy, of stock, of an insurance policy, of a bank deposit, and, in short, of any chattel, whether of a corporeal or incorporeal nature, whether in the nature of a chose in possession or of a chose in action, so long, indeed, as that chattel can be the subject of ownership at all, unless special reason to the contrary exists. Nor does the principle apply only to chattels personal; for chattels real, such as a lease for years, may be owned by two or more jointly. It is the fundamental principle of a joint tenancy that, while the parties constitute but one person, so to speak, as far as the rest of the world is concerned, with regard to themselves each is entitled to an equal share of the rents, income, and profits, so long as he lives; and, when one dies, the survivor takes the entire interest, to the complete exclusion of the heirs or personal representatives of the party deceased. This right of survivorship is the great clog upon property vested in joint owners, as distinguished from those who own in common; for it seems very unreasonable on the face of it that, while both are equally owners, the longest liver should have the whole. And the modern policy of the law, strengthened and enforced by numerous local statutes, is to regard property which has been given or sold, granted or devised, to two or more persons, without words indicating how it shall be held, as a tenancy or ownership in common, rather than a joint tenancy or ownership. And an exception which has long been made in favor of trade or agriculture, is to regard the implements and stock used in any joint undertaking of this sort as exempted from the rule of survivorship, though here the modern principles to be applied are those peculiar to the law of partnership, which we shall examine hereafter. But it must be conceded that the policy of discouraging survivorship has been applied in practice more directly to lands than chattels; and this we have no doubt is mainly for the reason that a strict joint ownership (not a partnership) in chattels is seldom created, so as to occasion hardship or last any considerable length of time, except it be by will. The construction of wills involves chiefly the question of testamentary intent; and be-

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quests and legacies, dependent upon the contingency of one or another's death, are by no means unusual in various other connections. The doctrine of survivorship might apply well enough, then, to gifts of this sort, if so the testator intended it, though intolerable when enforced where two persons had bought and paid for goods and chattels together, and thus jointly acquired a title by purchase. Subject to the exceptions made in favor of trade and agriculture, the rule has, it is true, been laid down that if personal property, whether of a corporeal or incorporeal character, be given to A and B simply, without the use of other words, they will be joint owners, having equal rights as between themselves during the joint ownership, and being with respect to third persons but a single individual in the legal sense. Whether, however, this would amount to a presumption in favor of survivorship, as against a quasi partnership in the property, the decided cases leave it rather difficult to determine; and the more so from the circumstance that the term 'joint ownership' is frequently used in an indefinite sense, so far as personal property is concerned, as it certainly ought not to be,—consequently embracing both the technical joint ownership and the ownership in common. The modern rule of equity is certainly to defeat a joint tenancy wherever it is possible; and in this country the incident of survivorship is destroyed by statute almost entirely, except in the case of legacies or devises, and where persons are appointed co-executors or cotrustees or coguardians, or when one expressly creates the incident."

Dwight's Law of Persons & Personal Property, p. 458, after speaking of the general rule as to joint tenancy, says: "In creating a joint interest, it is a rule of construction that a grant of a chattel to two or more makes them joint tenants, rather than tenants in common. This rule is modified by the principles of equity jurisprudence, where each of the parties advances a part of the consideration to purchase the chattel. In this case, there is a tenancy in common."

Smith on Personal Property, p. 33, § 26, says: "The operation of survivorship in diverting the interest of a deceased owner from his next of kin, to whom it naturally belongs, is generally regarded as unreasonable and unjust, and hence is not favored by courts or legislatures. Numerous statutes have been passed, providing, in effect, that where property is given or sold, granted or devised, to two or more persons, without words expressly, or by necessary implication, creating a joint tenancy or ownership, it shall be held to constitute a tenancy or ownership in common, rather than a joint tenancy or ownership. And, in the absence of legislation on the subject, courts generally incline to a construction of instruments that will establish a tenancy or ownership in common, in preference to a joint tenancy or ownership." But the doctrine of survivorship is well adapted to executors, administrators,

trustees, and others, acting in a fiduciary capacity, who have the legal title, but no equitable interest in the property; and hence they are generally held and treated as joint owners.

Williams on Personal Property, 4th ed. *306, says: "Indeed, as a general rule, joint ownership is not favored in equity, on account of the right of survivorship which attaches to it. If, therefore, two persons advance money by way of mortgage or otherwise, and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased of the share advanced by him. And where the intention is that the survivor should receive the whole, a declaration should be inserted that his receipt alone shall be a sufficient discharge for the money secured."

The author cites in support of the text the case of *Petty v. Styward*, 1 Rep. in Ch. 57. This is peculiarly applicable to the case at bar, for the facts are similar. The report of this case is as follows: "That the defendant, Nicholas Styward and one Simeon Styward (whose executor the plaintiff is) lent £2,500 to Sir Thomas Glenham, £1,450 of the said money being the proper money of the said Simeon, and £550 residue was the defendant's money, and for security the said Sir Thomas Glenham mortgaged lands to the said Simeon afterwards, and the defendant Styward and their heirs, redeemable at a day prefixed upon payment of £2,630; that the said Simeon, before the day of redemption, made his will and disposed of the said £550, and therein recited that the £1,450 was delivered by him to the said defendant, his father, which appeared by a note under both their hands; and that, if the said lands should be redeemed by payment of the said £2,500, with interest, then the said £1,450, with its interest, should be delivered into the plaintiff's hands for the uses in the said will. The very day of redemption the said lands were redeemed, and the whole money and interest paid unto the defendant, which the said defendant claimeth by survivorship. This court is clearly of opinion that by equity in a case of this nature there ought to be no survivorship, in respect the same was but a mortgage, and the money was repaid at the day, and the note under both the said parties' hands, and the will of the said Simeon sheweth plainly a trust each in the other, and an intention that, if the money was repaid, either of them should have his money again, with interest, and decreed the defendant to pay to the plaintiff the £1,450 and interest so by him received."

The rule thus laid down in Williams on Personal Property is quoted and adopted in *Darlington on Personal Property*, pp. 305, 306. See also *Minor*, Inst. vol. 3, pt. 1, p. 31.

Thus it appears that at common law joint tenancies, with the incident of survivorship, obtained as to both real and personal property, but that in a majority of the states of the Union joint tenancies have been abol-

ished by statute absolutely, or the estate declared to be a tenancy in common, unless expressly declared in the grant or devise to be a joint tenancy. The latter is the statute law in Missouri as to real estate (Rev. Stat. 1899, § 4600), except as to conveyances to executors, trustees, or husband and wife. Construing this statute, this court, per Black, J., in *Rodney v. Landau*, 104 Mo. loc. cit. 259, 15 S. W. 964, said: "The policy of the American law is opposed to survivorship, and that policy is clearly indicated in our statutes. While joint tenancies are not abolished in this state, still to create such a tenancy there must be an express declaration to that effect in the deed or will creating the estate."

It will be observed that under our statute executors and trustees and husband and wife are excepted from the requirement of the statute that the joint tenancy shall be expressly declared in the grant. The statute has been in this form since 1835, except as to husband and wife, and it was amended in 1865 so as to except husband and wife. *Russell v. Russell*, 122 Mo. loc. cit. 237, 26 S. W. 677; *Lemmons v. Reynolds* (Mo.) 71 S. W. 135. In *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302, it was held that the interest of a husband in land by the entirety could be sold under execution, but that his wife, surviving him, would take the entire estate. And in *Russell v. Russell*, 122 Mo. loc. cit. 237, 26 S. W. 677, it was held that, "owing to this legal unity of husband and wife, it is said to be impossible, even by express words, to convey land to them, so as to make them tenants in common with each other." But it will be observed that the effect of the married woman's acts of 1875 (Laws 1875, p. 61), 1883 (Laws 1883, p. 113), and 1889 (Rev. Stat. 1889, § 6869), was not considered in that case, probably because the conveyance then undergoing adjudication was made before the passage of those acts. In *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342, the grant was made after the passage of the married woman's acts, and the court held that "the statute abolishes the legal unity between the husband and wife, which gave rise to estates by the entirety, but the estate itself has not been abolished." Perhaps a more accurate statement would be that since the passage of the married woman's act in husband and wife must be held to have the same right to hold a joint estate an estate by the entirety, with the incident of survivorship, that any other persons have, but that, under Rev. Stat. 1899, § 4600, a grant to the husband and wife need not be expressly declared to be a joint tenancy.

The sum of the matter, therefore, is that estates by the entirety may be created in Missouri, in personal as well as in real property, and between husband and wife as well as between strangers, but that as to real property a grant or devise to two or more persons will be held to be a tenancy in common, unless by the terms of the grant or devise it is expressly declared to be a joint

tenancy, except as to grants or devises to executors, trustees, or husband and wife, which are excepted from the operation of the statute, and that as to personal property the common law has not been changed by statute except by the married woman's acts, which have placed a husband and wife on the same footing in this regard as any other persons; that is, the husband's common-law right to the wife's personal property and choses in action is taken away, except as to such as she had, and he had a vested right to reduce to possession, before the passage of the married woman's acts. *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788, 141 Mo. 574, 42 S. W. 1074.

3. The next question arising upon this record is whether an estate by the entirety existed in this case as to the note and deed of trust. The premises are that Mary Ann Johnston furnished \$1,800, and Daniel Johnston furnished \$2,206.08, and that they took the note of Ann Fury for \$4,006.08, secured by deed of trust, payable to Daniel Johnston and Mary Ann Johnston, and that both Daniel and Mary Ann signed the receipt for the note and deed of trust as a settlement of their respective claims. In *Scruthefield v. Sauter*, 119 Mo. 615, 24 S. W. 137; *Seay v. Hesse*, 123 Mo. 450, 24 S. W. 1017, 27 S. W. 633, and *McGregor-Noe Hardware Co. v. Horn*, 146 Mo. 129, 47 S. W. 957, it was held that if the husband invested the money of his wife, acquired by her after the passage of the married woman's acts, and in the manner specified in those acts, without the knowledge or written consent of the wife, in real estate, and took the title in their joint names, it did not create a joint tenancy or estate by the entirety, but that a court of equity would decree the wife a resulting trust in the land in the proportion that her money so invested bore to the total purchase price. This rule was followed in the case of *McLeod v. Venable*, 163 Mo. 530, 63 S. W. 847, and the fact that after the unauthorized investment the wife learned of the fact and refused to join in a deed of severance of their respective interests was held immaterial. So that, notwithstanding the provisions of the statute (Rev. Stat. 1899, § 4600), this has now become a rule of law as well as of property in this state, so far as real estate is concerned.

The state of the law as to personal property is as follows: In *Shields v. Stillman*, 48 Mo. 82, it appeared that the wife owned separate real estate. She leased the land and took the rent notes payable to herself and her husband. She died, and the husband instituted a suit in his own name under the landlord and tenant act before a justice of the peace to recover the possession of the land, and to recover the rent in arrear evidenced by two of the rent notes aforesaid. The defendant insisted that the husband was not entitled to possession of the land at all, because upon the death of Mrs. Shields intestate the land immediately descended to her daughter, including the rents reserved. The husband, however, 61 L. R. A.

claimed that, as the rent notes were made payable to him and his wife, the legal effect thereof was that they were payable to him alone, and that the rents were thus appropriated to his use by his wife's appointment. The court, however, held that the appointment was not to the husband alone, but to the husband and wife jointly, and hence the plaintiff's theory was untenable; but the court adopted a theory not suggested by either party, and held that the taking of the notes payable to the husband and wife made an estate by the entirety, and that upon the death of the wife the husband was entitled to the whole by right of survivorship, and accordingly held that the husband was entitled to a judgment for the notes, although he was not entitled to a judgment for the possession of the land. It must be observed, however, that this case arose before the passage of the married woman's acts, and that the wife furnished the whole consideration for the notes, and that the court did not put the decision upon the common-law right of the husband to reduce the wife's choses in action to possession, but treated it as if they were mere strangers to each other.

Counsel for defendant also cite many cases from other jurisdictions which hold that where either of the married couple, or where any one of two persons, furnishes the consideration for a note or mortgage or personal property, and makes the note or mortgage payable to both, or takes the title to the property in the names of both, an estate by the entirety will thereby be created in law. On the other hand, counsel for plaintiffs, while admitting that this is the rule of law if the whole consideration is furnished by only one of the two persons, denies that such is the law where each of the two persons furnishes a part of the consideration; and, in support of this contention, counsel cite *Wilcox v. Murtha*, 41 App. Div. 408, 58 N. Y. Supp., loc. cit. 784; *Re Albrecht*, 136 N. Y. 91, 18 L. R. A. loc. cit. 331, 32 N. E. 632; and *Wait v. Bovee*, 35 Mich. 425, where this distinction is made. It will be noted that *Petty v. Styward*, 1 Rep. in Ch. 57, lays down the same rule. Schouler, Pers. Prop. p. 192, § 156, speaking of the right of survivorship, says: "The doctrine of survivorship might apply well enough, then, to gifts of this sort, if so the testator intended it, though intolerable when enforced where two persons had bought and paid for goods and chattels together, and thus jointly acquired a title by purchase." And the same author (p. 193) says: "The modern rule of equity is certainly to defeat a joint tenancy wherever it is possible." Dwight on the Law of Persons & Personal Property, p. 458, says: "This rule is modified by the principles of equity jurisprudence, where each of the parties advances a part of the consideration to purchase the chattel." Williams on Personal Property, 14th ed. *306, says: "Indeed, as a general rule, joint ownership is not favored in equity, on account of the right of survivorship which attaches to it. If, therefore, two persons advance money by

way of mortgage or otherwise, and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased of the share advanced by him." *Darlington, Personal Prop.* p. 305, adopts the rule thus stated by Williams.

Therefore, outside of this state, an exception to the general rule of the right of survivorship has grown up, in equity, where each of the two persons furnishes a part of the money with which the personal chattel is purchased, or which makes up the note or mortgage. In Missouri, since the passage of the married woman's acts, it has been uniformly held that, if a husband invests any of his wife's separate money acquired by her after said acts took effect and in the manner therein specified, together with money of his own, in real estate in their joint names, without her express written consent so to do, it will not create an estate by the entirety, but the wife will, by a court of equity, be decreed a resulting trust in the land to the extent represented by her money. In *Winn v. Riley*, 151 Mo. 61, 52 S. W. 27, it was held that, if the husband takes his wife's money arising as aforesaid, and uses it in his business, his wife could treat him as her debtor or as her trustee, as she chose. In all of these later cases, except *Winn v. Riley*, the investment of the wife's separate money, with other money of the husband, was in real estate, while here it was in personal property. But this is an immaterial difference. For at common law there was no difference between the right of survivorship as to real property or as to personal chattels. And as hereinbefore shown, § 4600, Rev. Stat. 1899, excepts grants to husband and wife, and leaves the rule as to them as it was at common law, so far as real estate is concerned, and the married woman's acts have abolished the common-law unity of the husband and wife, and placed married women, as to their separate personal, as well as their real, property, on the same footing toward their husbands as any other persons occupy towards each other.

The result is that, not only in the other jurisdictions referred to, and according to the text writers quoted from, but also by the more recent decisions of this court, an estate by the entirety does not arise, nor does the right of survivorship exist, as to real estate, where the land is purchased by the husband without the wife's express written consent, partly with her separate money and partly with the money of the husband, but the wife will be decreed a resulting trust in the land by a court of equity in the proportion that her money bears to the total purchase price of the land. There is no good reason why the same rule should not obtain where the wife's separate money is so invested in personal property. Under such circumstances it cannot be assumed or inferred that she intended to create a right of survivorship, for she did not act at all, but it was the unauthorized act of the husband; and, as he could not directly reduce her separate property to

his possession or obtain title thereto without her express, written consent, so he could not indirectly do so by investing it in their joint names, and thus create a right by survivorship in himself. It will be noted that in all the cases cited the wife was ignorant of and took no part in the investment of her separate money with her husband's money, while in the case at bar the wife knew that the note and deed of trust representing their joint investment were made payable to her husband and herself, and consented to that arrangement, and signed the written settlement upon which the note and deed of trust were based and for the payment of which they were given. This case, therefore, is in this regard unlike any of the cases heretofore decided in this state, but falls within the exception to the general rules in reference to estates by the entirety heretofore quoted from the cases decided in other jurisdictions and from the text writers, to the effect that the right of survivorship does not obtain where each of the two persons contributes a part of the money invested, and that a court of equity will always decree to each his proportionate part of the investment. This exception, as herein pointed out and as stated by Schouler's *Personal Property*, rests upon the principle that it would be intolerable that the doctrine of survivorship should be applied where two persons bought and paid for goods and chattels together, and thus jointly acquired a title by purchase. The conclusion follows that under the circumstances of this case an estate by the entirety or a right by survivorship was not created, but that each was entitled to their proportionate share of the note and deed of trust. It also follows that, as the husband paid only \$85 in cash, and had the balance of the bid of \$5,000 credited upon the note, the money has been thus traced into the land, and that the heirs of the wife are entitled to the same interest in the land that they had in the note and mortgage; that is, the wife is entitled to a share equal to nine twentieths thereof and the husband to the remainder.

4. Over the objection of the plaintiffs the husband was permitted to testify in his own behalf, and this is assigned as error. Section 4652, Rev. Stat. 1899, provides "that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him." The contract or cause of action in issue and on trial in this case was the note and deed of trust given by Ann Fury to Daniel Johnston and Mary Ann Johnston, and the rights of those two payees in the note and deed of trust, and in the land into which the money represented by the note and deed of trust had become merged by the act of Daniel Johnston. Mrs. Johnston was dead. Consequently, under the statute, Daniel Johnston was an incom-

petent witness. *Ourd v. Brown*, 148 Mo. *loc. cit.* 95, 49 S. W. 990. The plaintiffs cross-examined him only as to matters covered by his examination in chief, and therefore they have not waived their right to insist on this objection. The record does not support the claim that the plaintiffs recalled him as their witness after he had finished testifying when called by the defendants. He was recalled to the witness stand after an adjournment of the court; but it appears that he was still on the stand undergoing cross-examination when the adjournment was had, and what took place afterwards was only a continuation of his unfinished examination.

5. Inasmuch as the plaintiffs waited from 1893, when the deed of trust was foreclosed, until 1900, when this suit was begun, and permitted the title to stand in the name of Daniel Johnston, their rights must be subordinated to the rights of the Lincoln Trust Company, that loaned the \$7,020 to him upon the faith of the whole property. But,

as there must be an accounting in this case between the plaintiffs and Daniel Johnston, and as in that accounting all such questions must be settled, it is unnecessary to determine the rights of the plaintiffs and Johnston as to such matters of accounting at this stage of the proceedings.

6. The heirs, and not the administrator, are the proper parties to prosecute this action. This is a bill in equity to declare a resulting trust in land, and not an action to recover Mrs. Johnston's interest in personal chattels or for damages for a conversion of a chose in action, and therefore the heirs, and not the administrator, must sue.

For these reasons the *judgment of the Circuit Court is reversed*, and the cause remanded, to be proceeded with in accordance herewith.

All concur.

Rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Charles Y. TRICE *et al.*, *Appts.*,
v.

Charles W. COMSTOCK *et al.*

(121 Fed. 620.)

- *1. Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.
2. A violation of this inhibition, and the acquisition by one of the parties, by means of interest or information acquired through the fiduciary relation, of any property or interest which prevents or hinders his correlate in accomplishing the object of the agency, charges the property thus acquired with a constructive trust for the benefit of the latter, which may be enforced or renounced by him, at his option.
3. The test of such a trust is the fiduciary relation, and a betrayal of the confidence imposed under it to acquire the property. Neither a legal nor equitable interest by either party, during the relation, in the property subsequently acquired, nor authority in either to buy or sell it, nor

*Headnotes by SANBORN, Circuit Judge.

NOTE.—As to rule that agent must not profit at his principal's expense in the matter of his agency, see also, in this series, *Tyler v. Sanborn* (Ill.) 4 L. R. A. 218, and *note*; *McNutt v. Dix* (Mich.) 10 L. R. A. 680; *Jansen v. Williams* (Neb.) 20 L. R. A. 207; *Boswell v. Cunningham* (Fla.) 21 L. R. A. 54; *Kimball v. Ranney* (Mich.) 46 L. R. A. 493; and *Holmes v. Cathcart* (Minn.) 60 L. R. A. 734.

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damage to the party betrayed, nor the existence of the fiduciary relation at the time the confidence is abused, is indispensable to the existence and enforcement of the trust. The existence of the relation, and a subsequent abuse of the confidence bestowed under it for the purpose of acquiring the property, are alone sufficient to authorize the enforcement of the trust.

4. Real-estate dealers who were engaged in procuring from owners options to purchase their property at fixed prices, and in selling it at higher prices, retaining the difference themselves as their profits, employed a resident of another state as their agent to solicit and conduct to their county probable purchasers of lands, and agreed to pay him his traveling expenses and 50 cents an acre on all the lands sold to the customers he brought. The agent conducted a probable purchaser to his principals. He and the possible customer were shown a tract of 1,925 acres by his principals, which was for sale at the rate of \$20 an acre by the owners, but in which the principals had no interest and upon which they had no contract. In this way the agent learned the location and value of the land. He was paid the expenses of his trip by his principals under the contract of agency. Three months later he renounced his agency, and one month thereafter, and while his principals were still endeavoring to sell the land to the possible customer whom he had conducted to them, the agent bought the land of the owners for himself at the price of \$20 an acre. *Held*, the title to the land obtained by the agent was charged with a constructive trust for the use and benefit of his principals, which a court of equity would enforce.

5. The principle, "He who comes into equity must do so with clean hands," repels a complainant only when his iniquity consists of wrongful conduct in the acts or transactions which raise the equity he seeks to enforce.

6. The actual payment before notice of the purchase price is indispensable to the maintenance of the claim that one is a bona fide purchaser of property for value, without notice.

(March 24, 1903.)

APPEAL by plaintiffs from a decree of the Circuit Court of the United States for the Western District of Missouri dismissing a bill filed to charge the title of certain real estate with a trust for the benefit of complainants. *Reversed.*

Statement by **Sanborn**, Circuit Judge:

This is an appeal from a decree which dismissed a bill exhibited by Charles Y. Trice and David A. Beamer to charge the title of 1,925 acres of land, held by the defendant James C. Comstock, with a trust for the use and benefit of the complainants. The pleadings contained many allegations and denials, but the evidence disclosed these facts:

Trice and Beamer were engaged in dealing in real estate at Lamar, in Barton county, Missouri. They were in the habit of obtaining the right to purchase lands at fixed prices from the owners, of selling them at higher prices, and of making the difference themselves. Sometimes they procured contracts from the owners whereby it was stipulated that they might sell the lands and retain for their compensation the difference between the prices fixed in the agreements and the prices at which they were able to sell them. The land in controversy in this suit was situated in Barton county. It consisted of 1,925 acres, and the title to it was in Alfred P. Reid and Eoline G. Green, the executor and executrix of the will of Henry B. Buckwater, who had died in 1897. George E. Bowling, of Barton county, had been the agent of Buckwater to rent and care for these lands for many years prior to his death, and was the agent of the executors for the same purpose after his decease. Bowling claimed that he had power from the executors to sell the lands, but this claim is not sustained by the evidence. The lands were for sale by the executors at the price of \$20 per acre, and the complainants were aware of this fact. Bowling informed Trice and Beamer that he had the right to sell the lands for that price, and made an agreement with them to the effect that they should have the option or right to purchase them at that rate, and Trice and Beamer supposed that he had the power to make this contract. George H. Reitmeyer was a dealer in real estate at Maquoketa, in the state of Iowa. C. W. Comstock was a banker at Lost Nation, in that state, and James C. Comstock was his brother.

In this state of the case, the complainants, Trice and Beamer, made an agreement with Reitmeyer and C. W. Comstock to the effect that the complainants appointed Reitmeyer and Comstock their agents to procure and conduct to Barton county, Missouri.

ri, purchasers for lands controlled by Trice and Beamer in that county, and agreed to pay them for their services one half the railroad fare of the intending purchasers, all the railroad fare and traveling expenses of the agents in conducting the customers from Iowa to Missouri and return, and \$1 per acre for all lands in Barton county, Missouri, sold to customers furnished by Reitmeyer and Comstock. In May, 1899, Reitmeyer and Comstock entered upon the discharge of their duties as agents for the complainants under the contract. The complainants wrote a general description of the 1,925 acres of land here in controversy to Comstock, and he conducted to Barton county a Mr. Shirk for the purpose of inducing him to buy this tract of land. The complainants took Comstock and Shirk to the lands, drove them around and over a portion of them, showed the corn-cribs, the products of the property, its character and quality, and the rents it was likely to produce. They were not successful at that time in inducing Mr. Shirk to purchase, but continued their endeavors to sell the land to him after he returned to Iowa. C. W. Comstock learned the character, quality, and location of this land, its rental value, its occupation, the probable amount of rents it would produce, and essentially all the facts he ever learned concerning its value, under and by virtue of his services as one of the agents of Trice and Beamer to conduct customers to the land for the purpose of enabling them to sell it. The complainants paid Comstock his railroad fare and traveling expenses from Iowa to Barton county, Missouri, and return, and a portion or all of the expense of Mr. Shirk. In August, 1899, Comstock conducted a party of land seekers from Iowa to Barton county, and the complainants displayed the lands which they controlled to them, and endeavored to induce them to purchase. At that time Comstock notified the complainants that he would bring no more customers to Barton county, and that all relations between them were closed. But Reitmeyer and Trice and Beamer were still negotiating to persuade Mr. Shirk to buy these lands. While these negotiations were pending, and on September 15, 1899, Comstock bought an option to purchase the land from Reid and Green, the executors of the will of Buckwater, and paid \$75 for it. About October 12, 1899, C. W. Comstock assigned this option to his brother, James C. Comstock. On or about October 16, 1899, C. W. Comstock paid Reid and Green \$1,925 on account of the purchase of this land, and on January 4, 1900, James C. Comstock deposited \$10,000 with C. W. Comstock, out of which, he testifies, the \$2,000 was paid back to C. W. Comstock. About March 1, 1900, James C. Comstock paid, out of this deposit of \$10,000, \$6,000 in part payment of the purchase price of the land, and secured a deed to it from Reid and Green. At the same time he executed his note for the sum of \$30,000, and a trust deed or mortgage of the land to Reid and

Green to secure its payment. Before he obtained this deed or paid the \$6,000 he was notified of the claim of Trice and Beamer, which is presented in this suit. James C. Comstock never paid C. W. Comstock anything for the option on the land, although the latter estimated its value at far in excess of its purchase price. C. W. Comstock conducted the negotiations and managed all the business relative to the land after he assigned the option to his brother, as before.

On April 30, 1900, the complainants exhibited their bill against C. W. Comstock and James C. Comstock to the judges of the circuit court, in which they prayed that the defendants might be decreed to hold the title to these lands in trust for their use and benefit, and that they might be directed to convey them accordingly. The court below held that the foregoing facts disclosed no equity which entitled the complainants to relief, and dismissed the bill.

Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Messrs. Reuben B. Robinson, H. H. McCluer, and Berry G. Thurman, for appellants:

C. W. Comstock unquestionably had some kind of a relation to Trice & Beamer which brought him to Barton county to assist in selling this land to Shirk. No matter what the relation is called, he cannot, after learning about the land from complainants through this relation, buy it without becoming trustee for complainants.

Ewell's Evans, Principal & Agent, p. 369; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Thornton v. Irwin*, 43 Mo. 153; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 623; *Lockhart v. Rollins*, 2 Idaho, 503, 21 Pac. 413; *McCendon v. Bradford*, 42 La. Ann. 160, 7 So. 78, 8 So. 256; *Winn v. Dillon*, 27 Miss. 494; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192.

Although the agency and all relations between them may have been terminated prior to the purchase, Comstock could not use against them the information obtained by him while acting as their agent and assistant.

Eoff v. Irvine, 108 Mo. 378, 18 S. W. 907; *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 25 Pac. 135; *Brock v. Barnes*, 40 Barb. 521.

Complainants need not have any positive interest in the land to sustain this case.

Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; *Crosby v. Clark*, 132 Cal. 1, 63 Pac. 1022; *Prince v. Dupuy*, 163 Ill. 417, 45 N. E. 298; *McKinley v. Williams*, 20 C. C. A. 312, 36 U. S. App. 749, 74 Fed. 94.

The defense of innocent purchaser is an affirmative plea, and the burden of proof is on James C. Comstock.

Jewett v. Palmer, 7 Johns. Ch. 65, 11 Am. Dec. 401; *Wallace v. Wilson*, 30 Mo. 335; *Frost v. Beckman*, 1 Johns. Ch. 288; *Halsa v. Halsa*, 8 Mo. 303; *Sillyman v. King*, 36 Iowa, 207; *Holdsworth v. Shannon*, 113 Mo. 61 L. R. A.

508, 21 S. W. 85; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 623.

J. C. Comstock was at most an assignee of an option, and as such could not be an innocent purchaser.

California Redwood Co. v. Little, 79 Fed. 854; *Jasper County v. Tavis*, 76 Mo. 13; *Boone, Real Prop.* note 8, p. 374; *Parnely v. Buckley*, 103 Ill. 115; *Broadwell v. Yantis*, 10 Mo. 398; *Griel v. Lomax*, 86 Ala. 132, 5 So. 325; *Moredock v. Rawlings*, 3 T. B. Mon. 73; *Bedal v. Stith*, 3 T. B. Mon. 290; *Tribble v. Davis*, 3 J. J. Marsh. 634; *Stafford v. Steele*, 7 J. J. Marsh. 342; *Vattier v. Hinde*, 7 Pet. 271, 8 L. ed. 682; *Dixon v. Caldwell*, 15 Ohio St. 412, 86 Am. Dec. 487; *Graves v. Spier*, 58 Barb. 349; 1 Perry, Tr. ¶ 211; *Lain v. Morton*, 23 Ky. L. Rep. 438, 63 S. W. 286; *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907.

Whether C. W. Comstock was conscious of moral turpitude in making this purchase is not material. His act was in violation of the legal rights of complainants, and made him guilty of legal fraud, and this alone is sufficient.

Thornton v. Irwin, 43 Mo. 153.

This is an action to enforce a constructive trust because the acts of C. W. Comstock are a violation of the good faith which he promised to Trice & Beamer in their contract of agency.

Lamb v. Evans [1893] 1 Ch. 218.

One assuming and agreeing to act as agent of another cannot dispute the title of such other.

6 Bacon, Abr. p. 573; *Dixon v. Hamond*, 2 Barn. & Ald. 310; *Robb v. Green* [1895] 2 Q. B. 315; *Ringo v. Binns*, 10 Pet. 269, 9 L. ed. 420; *Michoud v. Girod*, 4 How. 503, 11 L. ed. 1076; *Winn v. Dillon*, 27 Miss. 494.

If an agent acquires material or information in the course of his employment he will not be permitted, even after the termination of the agency, to use such material or information in any manner prejudicial to the interests of the principal, without the principal's consent.

10 Eng. Enc. Laws, p. 353; *Robb v. Green* [1895] 2 Q. B. 315; *Louis v. Smellie*, 73 L. T. N. S. 226; *Dennis v. McCagg*, 32 Ill. 429; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Van Epps v. Van Epps*, 9 Paige, 241; *Ex parte Bennett*, 10 Ves. Jr. 393; *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Murdoch v. Milner*, 84 Mo. 96; *Lockhart v. Rollins*, 2 Idaho, 503, 21 Pac. 413; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426; *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546, 71 N. W. 294; *Mechem, Agency*, § 454.

It was to complainants' interest that this land should not be sold except through their agency, and, while the owners had a right to sell it themselves, still the complainants had a right to the exclusive sale of it as against Comstock, their agent.

Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541; *Mechem, Agency*, ¶ 456; *Cameron v.*

Lewis, 56 Miss. 76; *Murdoch v. Milner*, 84 Mo. 96; *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Crosby v. Clark*, 132 Cal. 1, 63 Pac. 1022.

All that courts of equity require of complainants to avoid the application of the rule as to clean hands is that the contract before the court, and on which the right depends, must be fair.

Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020; *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39; *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 616; *New York & N. H. R. Co. v. Schuyler*, 38 Barb. 554; *Tripp v. Cook*, 26 Wend. 143; *Comstock v. Johnson*, 46 N. Y. 615; *Finch v. Finch*, 10 Ohio St. 507; *Mortland v. Mortland*, 151 Pa. 599, 25 Atl. 150; *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424; 2 Pom. Eq. Jur. ¶ 941; *Roselle v. Beekemeir*, 134 Mo. 381, 35 S. W. 1132.

Mr. John C. Tarsney, for appellees:

After diligent research we are unable to cite your honors to a single decided case applicable to the facts herein; yet this is not a surprising fact. It would be a surprising fact if another such case could be found. The complainants may well claim the honor of pioneers in an endeavor to establish, as a principle of equity jurisprudence, that a person may falsely and fraudulently represent and pretend to another that he is clothed with the powers and authority of an agent to sell a piece of property, engage that other to assist in such sale, induce him to expend his time and money therein, and, when the fraud is discovered and the fraudulent relation dissolved, if the other party purchases the property from the true owner, a court of equity may be invoked to take from him any advantages of his purchase, and give such advantages to the guilty instigator of the fraud.

Sanborn, Circuit Judge, delivered the opinion of the court:

For reasons of public policy, founded in a profound knowledge of the human intellect and of the motives that inspire the actions of men, the law peremptorily forbids everyone who, in a fiduciary relation, has acquired information concerning or interest in the business or property of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. This inexorable principle of the law is not based upon, nor conditioned by, the respective interests or powers of the parties to the relation, the times when that relation commences or terminates, or the injury or damage which the betrayal of the confidence given entails. It rests upon a broader foundation, upon that saga-
61 L. R. A.

cious public policy which, for the purpose of removing all temptation, removes all possibility that a trustee may derive profit from the subject-matter of his trust, so that one whose confidence has been betrayed may enforce the trust which arises under this rule of law although he has sustained no damage, although the confidential relation has terminated before the trust was betrayed, although he had no legal or equitable interest in the property, and although his correlate who acquired it had no joint interest in or discretionary power over it. The only indispensable elements of a good cause of action to enforce such a trust are the fiduciary relation and the use by one of the parties to it of the knowledge or the interest he acquired through it to prevent the other from accomplishing the purpose of the relation.

And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and *cestui que trust*, principal and agent, client and attorney, employer and employee, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his *cestui que trust*, that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created. 2 Sugden, Vendors, 8th Am. ed. 406-409; Mechem, Agency, pp. 455, 456; *Tisdale v. Tisdale*, 2 Sneed, 596, 608, 64 Am. Dec. 775; *Kingo v. Binns*, 10 Pet. 269, 280, 9 L. ed. 420, 425; *McKinley v. Williams*, 20 C. C. A. 312, 313, 36 U. S. App. 749, 74 Fed. 94, 95; *Lamb v. Evans* [1893] 1 Ch. 218, 226, 236; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 295, 22 S. W. 623; *Van Epps v. Van Epps*, 9 Paige, 237, 241; 1 Lewin, Tr. 246, *180; *Davis v. Hamlin*, 108 Ill. 39, 49, 48 Am. Rep. 541; *Winn v. Dillon*, 27 Miss. 494, 497; *People ex rel. Plugger v. Overysael Twp. Board*, 11 Mich. 222, 225; *Grumley v. Webb*, 44 Mo. 444, 454, 100 Am. Dec. 304; *Lockhart v. Rollins*, 2 Idaho, 503, 511, 21 Pac. 413; *Eoff v. Irvine*, 108 Mo. 378, 383, 18 S. W. 907; *Robb v. Green* [1895] 2 Q. B. 315, 317-320; *Louis v. Smellie*, 73 L. T. N. S. 226, 228; *Gardner v. Ogden*, 22 N. Y. 327, 343, 350, 78 Am. Dec. 192.

Why is not the case at bar governed by these rules of law? The defendant C. W. Comstock was the agent of the complainants to conduct to them in Barton county, Missouri, probable buyers of land, to the end that they might sell land in that county

to them, and gain a profit of the difference between the price at which the owners were willing to sell it and the price at which the complainants might be able to dispose of it. Comstock accepted this agency and acted under it. He conducted Mr. Shirk, his acquaintance and a possible customer, from his residence in Iowa to Barton county, Missouri, and accepted from Trice and Beamer his traveling expenses for his service under his contract of agency. By means of this agency he learned what he probably never would have known otherwise,—the location, quality, value, products, and probable income of the 1,925 acres of land in controversy. One of the objects of the agency which the complainants gave him was to enable them to sell this land. The subsequent purchase of it by Comstock prevented the accomplishment of this end. Could he lawfully take the information and advantages which Trice and Beamer conferred upon him through this agency to the end that they might make a sale of this land by means of his services under it, and then use this information and these advantages to make such a sale impossible, to deprive his principals of all the benefits which they hoped to derive from the payment of his expenses, and the exhibition of this land to the possible customer? Could he lawfully appropriate to himself the land and all the benefits derived and expected from the agency? The answers to these questions do not seem to be difficult or doubtful. The law imposed upon this agent, Comstock, the duty to use all the knowledge and all the benefits he derived from his agency to accomplish the purpose of his principals, and it implied an agreement on his part that he would faithfully discharge this duty. It forbade him to use them for his sole benefit or to prevent his principals from obtaining the object of the agency, and charged everything which he acquired by a violation of this inhibition with a constructive trust for their benefit. Why were not the lands in his hands charged with this trust for the use of the complainants?

It is contended that no trust arose because Trice and Beamer had no interest in or control over the lands. But no interest or control of the property to which the agency relates is essential to the raising of the trust. The fiduciary relation and a breach of the duty it imposes are sufficient in themselves. *Winn v. Dillon*, 27 Miss. 494, 497; *People ex rel. Plugger v. Overysel Twp. Board*, 11 Mich. 222, 225; *Grumley v. Webb*, 44 Mo. 444, 454, 100 Am. Dec. 304; *Lockhart v. Rollins*, 2 Idaho, 503, 511, 21 Pac. 413. If one employs and pays an agent to investigate the title or the character of land for the purpose of purchasing it, and the agent uses the knowledge he acquires in this way to forestall his principal and obtain a title to the property for himself, it is no answer to the suit of the former to recover the land from his agent that the employer never had any title or interest in it, or that he was not injured by

the action of the agent. In *Winn v. Dillon*,* 27 Miss. 494, 495, the complainant, Winn, employed Dillon for the agreed compensation of \$200 to search out and furnish to him the numbers or descriptions of state lands which he might enter under an act of the legislature of the state of Mississippi. Dillon furnished the descriptions pursuant to the contract. But before Winn had completed his entry of the lands Dillon entered them in his own name and for himself. Neither of these parties had any interest in, or control over, this property during the time that the contract of employment or agency was in force, but the court said: "Winn's object was to enter the lands; he had engaged the services of Dillon to that end, and this created the relation of private trust and confidence which disabled Dillon from doing any act or acquiring any interest in the property adverse to the interest of Winn;" and it declared that the title in the hands of Dillon was charged with a trust for the use and benefit of his employer, Winn. Concede that the complainants had no contract for the purchase of this land from its owners, Reid and Green, yet they knew that it could at any time be purchased for the price of \$20 per acre. Their scheme was to buy it at that price and sell it at a higher one. This was a legitimate business enterprise. The object of the agency of Comstock was to carry out this plan. His use of the knowledge he acquired through his agency to prevent his principals from accomplishing this purpose and to appropriate the benefits of the scheme to himself alone was as flagrant a breach of confidence and as fatal to his title to this property as it would have been if Trice and Beamer had held an unassailable agreement for the purchase of the land.

Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty of an attorney to be true to his client, or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term. *Eoff v. Irvine*, 108 Mo. 378, 383, 18 S. W. 907; *Robb v. Green* [1895] 2 Q. B. 315, 317-320; *Louis v. Smellie*, 73 L. T. N. S. 226, 228. In *Eoff v. Irvine*, after an attorney had examined an abstract of title for a client, and after the relation had ceased, he, by the use of the knowledge he had acquired in the examination, secured the title to the property for himself and his friends, but the court decreed that they held it in trust for his former client. In *Robb v. Green* a manager of a business copied the names of the customers from the order book of his master, the proprietor. After the manager's term of service had ended, he established a business in competition with that of his master, and proceeded to use the names of customers he had copied to divert business to himself, but the court decided that he

held this information in trust for his former master, and enjoined him from using it against him.

Another objection earnestly urged against the equity of the complainants is that Comstock had no discretionary power, no authority to sell the land; that his only agency was to solicit and conduct probable customers to his principals; and that, if he was disabled from purchasing this Buckwater tract, he was disabled from buying any land in Barton county. It does not follow that Comstock was forbidden to purchase any land in Barton county because he was disabled from buying the Buckwater tract. He was prohibited from using the information and advantages he had secured by means of his agency to prevent or hinder his principals from accomplishing the purpose of the agency. His disability extended to all land by the purchase of which through the information and benefits he had derived from the agency he would hinder or obstruct his principal's business of buying and selling lands in Missouri. But it extended no farther. He was at liberty to deal in any lands in Barton county concerning which he had learned nothing by the means of his agency. But he could not lawfully use any information or interest acquired thereby to destroy or to injure the business of his principals.

Nor was discretion or authority to sell these 1,925 acres of land requisite to disable this agent from buying and holding them adversely to his principals. Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principals to accomplish the purpose for which the agency was established. In *Gardner v. Ogden*, 22 N. Y. 327, 343, 350, 78 Am. Dec. 192, the clerk of the brokers of the plaintiffs was held to be disabled from buying the plaintiffs' property, although he never had any discretion or authority relative to the sale of it. In *Winn v. Dillon*, 27 Miss. 494, 497, Dillon was declared to be disabled from purchasing the lands he acquired, although the only authority he ever had was to search out and report their descriptions. In *Davis v. Hamlin*, 108 Ill. 39, 49, 48 Am. Rep. 541, an agent of a lessee to procure amusements for his theater, who never had any authority to deal with the leasehold estate, was held to be disabled from taking a renewal of the lease himself, and was adjudged to hold the leasehold interest which he had secured for the exclusive use and benefit of his principal.

The truth is that the principle of law which controls the determination of this case is not limited or conditioned by the interests, powers, or injuries of the parties to the fiduciary relations. It is as broad, general, and universal as the relations themselves, and it charges everything acquired by the use of knowledge secured by virtue

of these trust relations and in violation of the duty of fidelity imposed thereby with a constructive trust for the benefit of the party whose confidence is betrayed. It dominates and controls the relation of attorney and client, principal and agent, employer and trusted employee, as completely as the relation of trustee and *cestui que trust*. In *Greenlaw v. King*, 5 Jur. 19, Lord Chancellor Cottenham, speaking of this doctrine, says: "The rule was one of universal application, affecting all persons who came within its principle, which was that no party could be permitted to purchase an interest where he had a duty to perform which was inconsistent with the character of purchaser." In *Hamilton v. Wright*, 9 Clark & F. 111, 122, Lord Brougham declared that it is the duty of a trustee "to do nothing for the impairing or destruction of the trust, nor to place himself in a position inconsistent with the interests of the trust." And on page 124 he said: "Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust." The rule upon this subject was clearly and not too broadly stated in the American note to *Keach v. Sandford*, 1 White & T. Lead. Cas. in Eq. 4th Am. ed. p. 62, *58, in these words: "Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated." The facts of the case in hand brought it squarely within this rule, charged the title which the agent Comstock acquired with a constructive trust for the benefit of his principals, and furnished substantial ground for their application to a court of equity for appropriate relief.

It is contended, however, that the complainants are entitled to no remedy in equity because they have been guilty of iniquity. It is said that their plan of obtaining from owners options to purchase their lands at fixed prices, of then selling at an advance, and retaining the profits, and of obtaining agreements from owners that they might sell the lands at a price above that fixed in the contracts, and retain the balance for their compensation, was reprehensible, and that they conspired with Bowling to induce Reid and Green to sell their lands at a low price. There are two sufficient answers to these arguments. They are (1) that the record discloses nothing unfair or inequitable in the plans or acts of the complainants, and (2) that the acts to which the defendants object neither conditioned nor affected the equity which the complainants now seek to enforce. There was nothing

evil in itself, forbidden by law, or obnoxious to the strictest rules of fair dealing in the plan of business which the complainants had adopted. It contemplated no deceit of the owners of lands. In each case these owners were completely informed, either that the complainants proposed to buy their property at the prices which the owners fixed and to make a profit for themselves by selling it again at a higher price, or that they proposed to sell the lands at as high a price as they could obtain, to return to the owners the price which the latter fixed, and to retain the difference as their profit in the transaction. There is no suggestion of iniquity, injustice, or unfairness in such a method of dealing. *Larow v. Bozarth*, 68 Mo. App. 406.

Nor was there anything reprehensible in the endeavors of complainants to obtain from the owners of the lands here in controversy a contract for their purchase at the lowest possible price. They were not the agents of the owners. Bowling was their agent. The complainants are not responsible for his acts and transactions. They are not in issue in this case, and they will not be discussed. Bowling and the owners of the land whom he represented stood upon one side, and the complainants upon the other, in the negotiations for the sale of these lands to the latter. The complainants were prospective buyers. Reid and Green were sellers. The complainants were dealing with the vendors at arm's length. To them the lowest, to Reid and Green the highest, price, was the desideratum, and Trice and Beamer had the right to use all fair and reasonable means to buy the land from its owners at the lowest price which they were willing to receive for it. There is no evidence in this case that they made any false representations to the executors or to Bowling, or that they used any unfair means to obtain a contract for the purchase of the lands, while the fact that the agent, C. W. Comstock, was willing to take them, and Reid and Green sold them to him at the same price at which the complainants were expecting to buy them, is very persuasive evidence that no fraud was perpetrated upon the executors.

Moreover, if the charges which the defendants make against the complainants were true, they would constitute no defense to this suit. Their alleged offenses were not against the defendants, but against the former owners of this property. These owners have made no complaint and their rights and remedies are not here in question. The only issue here is whether or not the constructive trust which the betrayal of confidence by the agent Comstock has raised shall be enforced. General iniquitous conduct, reprehensible acts toward third parties, do not deprive a suitor of his right to justice in a court of equity. Wrongful conduct in the very act or matter which constitutes the complainant's ground of action, and that alone, will repel from a court of equity on the ground that "he who comes

into equity must do so with clean hands." This rule does not disqualify any complainant from obtaining relief who has not dealt unjustly in the very transactions concerning which he complains. *Shaver v. Heller & M. Co.* 48 C. C. A. 48, 61, 108 Fed. 821, 834; *Woodward v. Woodward*, 41 N. J. Eq. 224, 225, 4 Atl. 424; *Dering v. Winchelsea*, 1 Cox Ch. Cas. 318, 319; *Lewis's Appeal*, 67 Pa. 153, 166; *Bateman v. Fargason*, 2 Flipp. 660, 4 Fed. 32, 33; *Bispham, Eq.* 61; *Mahoney v. Bostwick*, 96 Cal. 53, 61, 30 Pac. 1020. The acts charged against the complainants, even if they had been committed, did not tend to perpetrate any wrong or inflict any injury upon the defendants, raised no equity in their favor, and constituted no defense to the enforcement of the trust which their violation of duty established.

One of the defenses to this suit was that the defendant James C. Comstock, who now holds the title to the lands in question, was a bona fide purchaser thereof for value without notice of the claim of the complainants. The court below found that this defense was not sustained by the evidence, and that James C. Comstock stood in the shoes of his brother, C. W. Comstock, the agent of the complainants. Counsel for the defendants have not argued or suggested in this court that there was any error in this conclusion. But, as the case must now be remanded for final decree, the evidence and the law upon this question have been carefully re-examined. James C. Comstock was a brother of C. W. Comstock. C. W. Comstock procured his option to purchase the land on September 15, 1899. He paid \$75 for it at that time. About October 16, 1899, he paid \$1,925 in part payment of the purchase price. On March 1, 1900, \$6,000 more was paid. The deed was taken to James C. Comstock, and the latter made his note and trust deed for \$30,000. C. W. Comstock managed the land, conducted all the correspondence and business, caused the leases to be taken to himself, acted in every way as the owner, and his brother, James C. Comstock, acted as his agent in the entire transaction. On January 4, 1900, James C. Comstock deposited with his brother, C. W. Comstock, \$10,000, and they say that out of this deposit the \$2,000 which C. W. Comstock had paid in September and October was repaid to him, and the \$6,000 was paid on March 1, 1900. The option to purchase the land was assigned to James C. Comstock about October 12, 1899. He never paid his brother \$1 for the assignment of this option or for the land, although the evidence is conclusive that the latter considered it of much greater value than the amount of the purchase price he had agreed to pay for it. In February, 1900, before the \$6,000 was paid, James C. Comstock was notified of the claim of Trice and Beamer. These facts compel the conclusion that James C. Comstock cannot defeat this suit on the ground that he is a bona fide purchaser without notice, because the evidence convinces that he is the mere agent and repre-

representative of his brother, holding the property for him, and because he received notice of the claim of the complainants before he had paid more than \$2,000 on account of the purchase of the property, and probably before he had paid anything. The actual payment of the money which constitutes the purchase price before the receipt of notice is indispensable to the maintenance of the claim that one is a bona fide purchaser without notice. *Jewett v. Palmer*, 7 Johns. Ch. 64, 67, 68, 11 Am. Dec. 401; *Hardingham v. Nicholls*, 3 Atk. 304; *Harrison v. Southcote*, 1 Atk. 538; *Story v. Windsor*, 2 Atk. 630; *Kiefer v. Rogers*, 19 Minn. 32, Gil. 14; *Wallace v. Wilson*, 30 Mo. 335.

The result is that the complainants are entitled to the relief which they sought by their bill. The evidence in this case has been carefully examined. It does not lead to the conclusion that the defendants or either of them intended to perpetrate any injustice or wrong upon the complainants, or to do any act which they deemed inconsistent with the rules of honor and fair dealing. But the fiduciary relation through which the agent, C. W. Comstock, procured his information and knowledge of the location, character, and value of this tract of land, his acceptance of the agency, his leading of the probable purchaser to the property, his receipt from his principals of the expenses of his trip, forbade him from purchasing this

land for himself, and thereby preventing his principals from effecting a sale of it, and charged it in his hands with a constructive trust in their favor.

The decree below is accordingly reversed, and the case is remanded to the Circuit Court, with directions to enter a decree to the effect that the defendants hold the title to the 1,925 acres of land described in the bill in trust for the sole use and benefit of the complainants; that upon the payment to the defendants or their attorneys of the amount of money which they have expended in purchasing the lands, with interest thereon at the legal rate, from the respective times of their payments, and upon the payment and surrender to James C. Comstock of his note for \$30,000, which he executed in part payment of the purchase price, or upon the execution and delivery to him of a bond, with sufficient sureties, approved by the judge and conditioned to pay the note of \$30,000, and to hold the defendant James C. Comstock harmless therefrom and from the trust deed or mortgage securing the same, the defendants shall convey the lands in dispute to the complainants; that in default of such conveyance the title shall be passed by decree; and that the defendants shall pay the costs of the suit.

Rehearing denied.

PENNSYLVANIA SUPREME COURT.

CITY OF PITTSBURG, *Appt.*,

v.

STERRETT SUBDISTRICT SCHOOL.

(204 Pa. 635.)

Property owned by a sub school district, and used exclusively for purposes of public education, is not subject to local assessment for a municipal improvement, where the statute does not expressly make it so, but provides for collection of such assessments by sale of the property.

(January 5, 1903.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 3, for Allegheny County in favor of defendant, in a proceeding to enforce payment of a street-paving assessment. *Affirmed*.

The facts are stated in the opinion.

Messrs. T. D. Carnahan and William W. Smith, for appellant:

An assessment for municipal improvements is not taxation in its general form, but is a special assessment upon property specially benefited.

NOTE.—As to liability to assessment for public improvements, of property of educational institution, see also, in this series, *San Diego v. Linda Vista Irrig. Dist.* (Cal.) 35 L. R. A. 33, and *note*.
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Sewickley M. E. Church's Appeal, 165 Pa. 475, 30 Atl. 1007; *New Castle City v. Stone Church Graveyard*, 172 Pa. 86, 33 Atl. 236; *Philadelphia v. Union Burial Ground Soc.* 178 Pa. 533, 36 L. R. A. 263, 36 Atl. 172.

If the lien is valid, then clearly we can enforce its collection.

Re Harding Street, 31 Pittsb. L. J. N. S. 147.

Messrs. Jesse T. Lazear, Thomas C. Lazear, and Charles P. Orr for appellee.

Mestrezat, J., delivered the opinion of the court:

There is but a single question in this case, and that is whether real estate purchased and held by the board of directors of sub school districts in the city of Pittsburgh is liable to assessment for grading, paving, and curbing a street on which said real estate abuts. The learned trial judge answered the question in the negative, and denied the right of the city to recover from a subdistrict the cost of the improvement.

By the act of February 12, 1869 (P. L. 150), the city of Pittsburgh was created an independent school district. A central board of education was established, having corporate capacity, with certain powers over, and duties relative to, the schools and sub-district schools of the city. The board is composed of one member elected by the board

of directors of each of the subdistricts. It is required, among other things, to maintain one high school and one or more separate schools for children of color, and authorized to take and hold real estate for these purposes; to assess, and, through the city treasurer, collect, sufficient taxes to establish and maintain the high school and schools for children of color, and for the payment of the teachers of the several subdistrict schools. Each ward is made a subdistrict, and two school directors are to be elected annually therein for a term of three years. The board of directors of a subdistrict is authorized, *inter alia*, to purchase and hold such real estate and personal property as may be necessary for the establishment and support of the schools within their respective districts, and to dispose of the same; to cause suitable lots of ground to be purchased or rented, and suitable buildings to be erected or rented for schoolhouses, and to supply the same with the proper conveniences and fuel, and are given general supervision over the schools; to levy a special tax, to be applied solely to the purchasing or paying for the ground, the building or erection of schoolhouses thereon, the repairing of said houses, and furniture, apparatus, and all necessary books and stationery, and fuel therefor, and janitor service; to appoint the teachers of the subdistrict schools, and to dismiss them at any time for cause; and to suspend or expel from the schools all persons found guilty of incorrigible conduct. The board is required to admit to the school of the subdistrict all persons between the ages of six and twenty-one years, residents of the subdistrict, except persons of color.

In 1891 the Sterrett subdistrict, the appellee, purchased a lot of ground within the subdistrict, and erected a school building thereon, which, since its erection, has been used exclusively for school purposes. This property abuts on Linden avenue, a public street of the city, which in 1893 was graded, paved, and curbed by the city. Viewers were appointed by the court of common pleas, who assessed the property of the subdistrict with \$1,336.65, as special benefits, which assessment was reported to, and duly confirmed by, the court. A municipal lien was filed by the city against the property under the act of May 10, 1891 (P. L. 75), and a scire facias thereon was issued to enforce payment of the claim against the premises. An affidavit of defense and plea were filed, and no further proceedings were taken on the scire facias. About five years thereafter the city issued a scire facias to revive and continue the lien, and on the trial thereof the court directed a verdict for the plaintiff, subject to the question "whether real estate, the property of the subdistrict schools in the city of Pittsburgh, is liable to assessment for municipal improvements." Subsequently, on motion of appellee's counsel, the court entered judgment for the defendant *non obstante veredicto*, on the ground that the real estate of the subdistrict was

not liable for a municipal claim for a street improvement, because the property was used exclusively for school purposes, and held further that this proceeding is an action *in rem*, and, as "it is not pretended that this land could be sold to satisfy this lien," judgment should not be entered on the verdict in favor of the plaintiff.

The provisions of the act of 1869, as referred to and quoted above, indicate sufficiently for the purposes of this case the powers and duties of the central board of education, and of the board of directors of the respective subdistricts. The system of education created by the act requires the united action of the central and subdistrict boards of directors to render it complete and effective. When organized and in operation, it is an efficient means of enforcing article 10, § 1, of the Constitution, which provides that "the general assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this commonwealth, above the age of six years, may be educated." While the city is the school district, yet the title to the real estate necessary for subdistrict school purposes is taken and held by the directors of the subdistricts. It is also true that the real estate in each subdistrict is purchased and paid for by the money of the subdistrict in which it is located. These facts, however, do not deprive it of the character of public property used for school purposes. It is one of the necessary and indispensable means which the state, through the city, uses in carrying out the system of public education commanded by the Constitution of the commonwealth. Each of the subdistricts is charged with the same duty in this respect, and that the act of 1869 did not impose upon the city the power and the duty of purchasing and holding the title to the real estate cannot affect its character as public property, nor deny to the subdistricts their right to exemption from taxation or municipal assessments to which the city, as a school district, would be entitled if the title was vested in it. In either case, regardless of where the title is lodged, the property is taken, held, and used "for the maintenance and support of a thorough and efficient system of public schools." The burden imposed on subdistricts by the purchase of real estate for school purposes is equalized among the subdistricts by similar service to be performed by each subdistrict. Substituting "subdistrict" for "municipality," and "district" for "state," the following language of Agnew, J., in *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255, is applicable here: "Nor is this mode of taxation inconsistent with our notions of the right of private property and of the equality of burdens, for each municipality, in its turn (sooner or later), by a tax on all of its inhabitants, pays only for what it makes and enjoys within its own limits; and thus in the course of time the burden is equalized upon all, as every portion of the state makes its own im-

provements and enjoys their peculiar benefits."

Regarding the real estate in question as the property of a school district,—“a quasi corporation for the sole purpose of administering the commonwealth's system of public education,”—is it subject to an assessment for benefits received by reason of the improvement of the street on which it abuts? The act of May 16, 1891, under which this lien was filed, provides that whenever there shall be any final assessment made on “any property or properties” to pay for the cost, expenses, and damages of any municipal improvements, the property so assessed shall be subject to a lien for the amount of such assessment. The act provides for the enforcement of the lien and the collection of the claim by sale of the real estate on a *levari facias* issued on the judgment obtained on a *scire facias*. It will be observed that the terms of the act do not limit its application to private, as distinguished from public, property. The words employed in the statute are “any property or properties,” and they are sufficiently comprehensive, if so intended by the legislature, to include all property, whether held for public use or owned by a private individual. But in construing this legislation, and in determining the intention of the legislature in its enactment, we must be guided by the well-established rule that “it is always to be assumed that the general language of statutes is made use of with reference to taxable subjects, and the property of municipalities is not in any proper sense taxable. It is therefore, by clear implication, excluded.” *Cooley*, Taxn. 131; *Erie County v. Erie*, 113 Pa. 360, 6 Atl. 136. In speaking of the presumption that public property is exempt from taxation, Judge Cooley (*Cooley*, Taxn. 130) says: “Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the legislature in adopting them.” Such is the case with property belonging to the state and its municipalities, and which is held by them for governmental purposes. All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demands of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact. In *Jones v. Tatham*, 20 Pa. 398, Lewis, J., delivering the opinion of the court, says: “Words of a statute applying to private rights do not affect those of the state.” 61 L. R. A.

This principle is well established, and is indispensable to the security of the public rights. The general business of the legislative power is to establish laws for individuals, not for the sovereign; and, when the rights of the commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied.” In *Directors of Poor v. School Directors*, 42 Pa. 21, Chief Justice Lowrie says: “The public is never subject to tax laws, and no portion of it can be without express statute. No exemption law is needed for any public property, held as such.” The late Chief Justice Green repeated this language with approval in his opinion in *Erie County v. Erie*, 113 Pa. 360, 6 Atl. 136. In *Endlich on the Interpretation of Statutes*, § 161, the author, citing authorities to support the text, says: “The Crown is not reached, except by express words or by necessary implication, in any case where it would be ousted of an existing prerogative or interest. It is presumed that the legislature does not intend to deprive the Crown of any prerogative, right, or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Where, therefore, the language of the statute is general, and, in its wide and natural sense, would divest or take away any prerogative or right, [titles or interests] from the Crown, it is construed so as to exclude that effect.”

It is contended, however, that an assessment for a local improvement is not taxation: in its general form, and hence is not subject to the rule that statutes imposing taxation do not apply to, or impose a tax upon, property held by the state or one of its municipalities, unless it is expressly so provided. In support of this position, the learned counsel for the appellant rely upon *Sewickley M. E. Church's Appeal*, 165 Pa. 475, 30 Atl. 1007, and two kindred cases decided by this court. The question in those cases, however, was, as the appellant's counsel concede, whether the constitutional exemption from taxation applies to municipal assessments. It was held that it did not apply to such assessments, and only relieves from the obligation to pay the ordinary taxes levied for general purposes. There can be but little doubt that such is now the settled rule in this state. It was admitted, however, by Chief Justice Sterrett, in *Church's Appeal*, that these assessments, resting for their final reason upon special local benefits, are referable to the taxing power, and are therefore not improperly recognized as a species of taxation. Such assessments have been recognized as an exercise of the taxing power in numerous other decisions of this court, and in the decisions of the courts of other states. *Hammitt v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *Olive Cemetery Co. v. Philadelphia*, 93 Pa. 129, 39 Am. Rep. 732; *Erie v. First Universalist Church*, 105 Pa. 278; *McKeesport v. Fidler*, 147 Pa. 532, 23 Atl. 799; *Board of Improvement v.*

Little Rock School Dist. 56 Ark. 354, 16 L. R. A. 418, 19 S. W. 969; *Worcester County v. Worcester*, 116 Mass. 193, 17 Am. Rep. 159. In *Olive Cemetery Co. v. Philadelphia*, 93 Pa. 129, 39 Am. Rep. 732, Sterrett, J., delivering the opinion, says: "It is conceded, however, that the authority to make and collect such assessments is delegated by the commonwealth. If it does not emanate from the inherent powers of the government to levy and collect taxes, it is difficult to understand whence it comes. The only warrant for delegating such authority must be either in the right of eminent domain or in the taxing power. It cannot be found in the former, and hence it must be in the latter." In *Eric v. First Universalist Church*, 105 Pa. 278, Gordon, J., approvingly repeats this language, and adds: "Scarcely less emphatic is the declaration of Mr. Justice Sharswood, in *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615, that this mode of municipal assessment for the cost of local improvements upon the properties benefited is a species of taxation." Judge Gordon also says that *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255, *Oratg v. Philadelphia*, 89 Pa. 265, and *Philadelphia v. Rule*, 93 Pa. 15, are ruled upon the assumption that such assessments are taxes. The same view is entertained in many other states, and it is there held that the general language of a statute authorizing assessments for local improvements does not apply to property held by the state, or a political subdivision thereof, and devoted strictly to public use. *Clinton v. Henry County*, 115 Mo. 557, 22 S. W. 494; *Board of Improvement v. Little Rock School Dist.* 56 Ark. 354, 16 L. R. A. 418, 19 S. W. 969. In the latter case, Hemingway, J., speaking for the supreme court of Arkansas, says: "If it be argued that the reasoning upon which the rule [under which public property is presumed to be exempt] is placed does not apply to special taxes for local improvements, because the levy would fall upon one public body for the benefit of a smaller one, or because the entire school district would pay the tax, while the small improvement district must bear the loss from the exemption, the answer is that the same is the case with regard to general taxes. Exemption of the statehouse and other state institutions relieves every taxable subject in the state from the burden of taxation, but it deprives the particular county or school district in which they are situate of the entire county or school tax; and so the exemption of county property from state taxes benefits the county only, and deprives the entire state of revenue; still, in all such cases, it is held that exemption is applied wherever liability is not expressed or necessarily implied. If the disparity of burden and benefit does not prevent the operation of the rule as to general taxes, we see no reason why it should as to special assessments."

These authorities conclusively show that statutes imposing assessments for local im-

provements are enacted in the exercise of the taxing power of the legislature. They, therefore, notwithstanding the generality of the enumeration of the property affected, do not apply or relate to property held or used for public purposes by the state or any of its political subdivisions. The reasons for this rule given in the authorities cited above are convincing, and amply sufficient to sustain it. The imposition of a tax or assessment by the authority of the state, represented by itself or any subordinate political division thereof, upon property held by another subordinate division, and used for public purposes, would, in effect, be a party demanding money and receiving payment from himself. An assessment pays for a public, though a local, improvement. It therefore relieves the public from the necessity of contributing to the cost or expense of the improvement. If public property purchased by funds raised by taxation is subjected to assessment for a local public improvement, it is the public paying the public, which clearly discloses the absurdity of the proposition. The fact that the benefit of the exemption would inure to the people of only a portion of the territory which produces the revenue from which the property is purchased cannot affect the right to exemption. As is shown in the authorities cited above, the same objection would be equally effective in preventing public property from being relieved from general taxation. It may also be observed that the other parts of the territory not benefited by the local improvement would in time derive like benefit from similar improvements, without the liability for assessment of their property.

The mode provided in the act of 1891 for enforcing the assessment also leads to the conclusion that the legislature did not intend that it should apply to the property of school districts. The statute provides that the collection of the claim shall be by "writ of scire facias, in accordance with the course of the common law," on which a judgment shall be entered for the debt, interest, and cost of the lien. A writ of *levari facias* shall issue on the judgment, and by virtue thereof the sheriff shall sell the property. As the proceeding is statutory, it is exclusive, and must be pursued in the enforcement of the claim. There is no personal liability against the owner which can be enforced by an ordinary action at law. Here the claim cannot be paid by the school board of the subdistrict, as it has no funds with which to make payment. As we have seen by reference to the act of 1869, the subdistrict school boards are authorized to levy a tax solely for the purpose of purchasing school sites, for the erection and repair of school buildings, for the purchase of school apparatus, and to pay for fuel and for janitor service. For no other purpose and to meet no other indebtedness can the board of a subdistrict levy or collect a tax. If, therefore, the claim of the plaintiff in this case is collected, it must be done by a sale of the

school property on a *levari facias* by the sheriff. As said by Williams, J., in *O'Donnell v. Cass Twp. School Dist.* 133 Pa. 162, 19 Atl. 358, this would take from it (sub-district) the schoolhouse, and defeat the very purposes for which the district was organized. For such reason it was held in that case that an execution could not issue on a judgment against a school district created by authority of the act of 1854 (P. L. 617). In *Patterson v. Pennsylvania Reform School*, 92 Pa. 229, it was held that the defendant was "a public corporate body, and cannot be proceeded against by *levari facias*." And in *Monaghan v. Philadelphia*, 28 Pa. 207, it is said: "It is very clear that none of the property of a municipal corporation, whether real or personal, necessary to the corporation for governmental purposes, could be seized and sold, even if the usual process for collecting a judgment could issue against such corporation." In *Schaffer v. Cadwallader*, 36 Pa. 126, Chief Justice Lowrie says: "It is essential to the existence of a lien (as of all other legal rights) that it be recognized by law, by being enforced or protected as such. This is a very plain principle, and it refuses to a judgment against a municipal corporation the character of a lien on its land, because such a judgment cannot be executed against the land."

In contemplation of the constitutional provision relative to our public schools, and statutory enactments to enforce it, the school districts or subdistricts of the state are the agents of the commonwealth in the administration of its system of public education. They are made quasi corporations for that purpose. *Ford v. Kendall School Dist.* 121 Pa. 543, 1 L. R. A. 607, 15 Atl. 812. They therefore hold the property as the agent of the state, and for the purpose of making its public school system effective. Taxation of any kind whatever imposed upon the property would interfere with and defeat the commonwealth in maintaining the system of education required by the Constitution. Such an intention should not be attributed to the legislature in the enactment of either special or general tax laws unless it is manifested by clear and explicit language.

We think it clear, therefore, on reason and authority, that the language used in the act of 1891 does not apply to property held by the state or any of its political subdivisions for public use. The statute, in imposing the burden, does not discriminate between private and public property, and does not expressly place it upon public property. The appellee's property is therefore presumptively exempted from the operation of the act, and the lien sought to be enforced here has no statutory authority, which is necessary to its validity, to support it.

The question raised here has been directly adjudicated in some of the states. In *Board of Improvement v. Little Rock School Dist.* 56 Ark. 354, 16 L. R. A. 418, 19 S. W. 969, the supreme court of Arkansas held that an

assessment of public school property for local improvements is not authorized by a statute which in general terms requires the assessment to be upon all real property situate in the district. Hemingway, J., delivering the opinion, holds that public property is exempt from special taxation, and, after citing numerous authorities to support his position, says: "It is argued that, even if public property is exempt, the exemption does not extend to the property of public school districts, inasmuch as they are not, strictly speaking, municipal corporations, and education is not a governmental function. The Constitution provides that the state shall ever maintain free public schools, and in performing this duty it exercises a function strictly public and governmental. It created school districts, and imposed upon them, in part, this duty, and in order to discharge it they own schoolhouses. They have no other duty than to perform for the state this public function, and only that they may do it, is the house held. The state may abolish them, take the property, and undertake, directly or through other agencies, this public function. The means of controlling the property would thereby be changed, but its use would be unchanged; and there is nothing in the policy of the law to exempt the property while held and controlled by the state which would deny the exemption while held by the state's agent, and used in the performance of its duties. *Green v. United States*, 9 Wall. 655, 19 L. ed. 806."

In *Hartford v. West Middle Dist.* 45 Conn. 462, 29 Am. Rep. 687, the supreme court of Connecticut holds that land occupied by a schoolhouse and used solely for school purposes cannot be assessed for the laying out of an adjoining street. In support of his conclusion, Granger, J., delivering the opinion, says: "How could the defendants, as a school district, be benefited by the laying out of the street? The assessment was undoubtedly made upon the idea that the intrinsic value of the property was increased, but, if that were so as a matter of fact, does it follow that it was increased in value as school-district property, bought and used solely for school purposes, and did the district, or could it, from the nature of things, derive any immediate, direct, or special benefit from the laying out of the street? We are unable to see how the district, as a corporation, could be so benefited, or that their property was rendered any more valuable for the purpose for which they used it, and for which they must continue to use it, if not for all time, at least for a very long period."

In the recent case of *Witter v. Mission School Dist.* 121 Cal. 350, 53 Pac. 905, the supreme court of California held that a lot belonging to a school district is not liable for an assessment for street improvements if used for school purposes. The court, conceding that there might be exemption from "taxation" where there would not necessarily be exemption from "assessments," put its decision on the ground "that the state is not

bound by general words in a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it."

We are aware that in some jurisdictions it is held that public property is subject to general as well as special taxation, where it is not excepted in the statute imposing the tax. We think, however, the contrary is the better

view, and that it is supported by reason and the great weight of authority.

In accordance with the views above expressed, we are of opinion that the real estate of the sub school districts of the city of Pittsburg is not subject to an assessment for the cost and expenses of local improvements.

The assignments of error are overruled, and the judgment is affirmed.

TENNESSEE SUPREME COURT.

LOUISVILLE & NASHVILLE TERMINAL COMPANY, *Appt.*,

v.

Belle B. JACOBS. .

(.....Tenn.....)

1. **The construction of a roundhouse for the housing of engines, and leasing it for that purpose, do not render the owner liable for a nuisance created by the manner in which it is used, if improper, and not ordinary, use of it is necessary to make it a nuisance.**
2. **In an action against the owner of a roundhouse operated so as to constitute a nuisance, evidence is admissible that it is not operated by the owner, but is leased to, and in possession of, a third person.**
3. **The title to engines cannot be proved by evidence of general reputation as to who owns them.**
4. **In assessing the damages for the maintenance of a nuisance in the neighborhood of a residence, the jury may look to such injury as occurs to the use of the property as a residence, taking into consideration the discomfort and annoyance which the owner has suffered from the nuisance.**
5. **Where, by charter, a terminal company is given discretion as to the location of its roundhouse, it cannot escape liability in case the house is located so as to constitute a nuisance to adjoining property by showing that the use made of the property is reasonable.**

(March 7, 1903.)

A PPEAL by defendant from a judgment of the Circuit Court for Davidson County in plaintiff's favor in an action brought to recover damages for the maintenance of a nuisance, to the injury of plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Messrs. Smith & Maddin, for appellant:

The terminal company was not sued as lessor for leasing the property for a purpose

that necessarily resulted in a nuisance. Under this declaration it could not be held liable unless it did the acts complained of.

Sappington v. Rutherford, 3 Hayw. (Tenn.) 271; *Cunningham v. Wood*, 4 Humph. 417; *Bedford v. Williams*, 5 Coldw. 207; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Furman v. North*, 4 Baxt. 296; *Erwin v. Davenport*, 9 Heisk. 49; *Rogers v. Breen*, 9 Heisk. 679; *Shaw v. Patterson*, 2 Tenn. Ch. 175; *Duluth Nat. Bank v. Knoxville F. Ins. Co.* 85 Tenn. 87, 1 S. W. 689; *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883; *Bradshaw v. Van Valkenburg*, 97 Tenn. 322, 37 S. W. 88; *Central Sav. Bank v. Carpenter*, 97 Tenn. 437, 37 S. W. 278; *Lock v. Franklin & H. Turnp. Co.* 100 Tenn. 163, 47 S. W. 133; *Gernt v. Cusack*, 106 Tenn. 141, 59 S. W. 335; *Louisville & N. R. Co. v. McGary*, 104 Ky. 509, 47 S. W. 440; *East Tennessee Coal Co. v. Daniel*, 100 Tenn. 66, 42 S. W. 1062.

It is a fundamental principle of law that proof without pleading will not sustain a judgment.

Bradshaw v. Van Valkenburg, 97 Tenn. 322, 37 S. W. 88; *Furman v. North*, 4 Baxt. 296; *Rogers v. Breen*, 9 Heisk. 679; *Lock v. Franklin & H. Turnp. Co.* 100 Tenn. 176, 47 S. W. 133; *East Tennessee Coal Co. v. Daniel*, 100 Tenn. 66, 42 S. W. 1062; *Gernt v. Cusack*, 106 Tenn. 150, 59 S. W. 335.

It is error to charge the jury to allow damages for property as to which there is not a word of proof, either as to its value, or as to the damage done.

Citizens' Street R. Co. v. Burke, 98 Tenn. 654, 40 S. W. 1085; *Mariner v. Smith*, 7 Baxt. 424.

Ownership of the engines operated at the roundhouse cannot be proved by "reputation."

Jones, Ev. § 300, p. 677; *Berry v. Osborne*, 15 Ga. 194; *Barrett v. Wheeler*, 71 Iowa, 662, 33 N. W. 230; *Burns v. Fredericks*, 37 Conn. 86; *Berniaud v. Beecher*, 76 Cal.

NOTE.—As to right to damages for injuries caused by smoke, cinders, and noxious gases from elevated railroad trains, see, in this series, *Sperb v. Metropolitan Elev. R. Co.* (N. Y.) 20 L. R. A. 752.

As to damages for noises, smells, etc., incidental to operation of turntable by railway, see *Louisville R. Co. v. Foster* (Ky.) 50 L. R. A. 813.

For smoke and nuisance generally, see *St. 61 L. R. A.*

Louis v. Edward Heltzeberg Packing & Provision Co. (Mo.) 39 L. R. A. 551, and *Moses v. United States* (App. D. C.) 50 L. R. A. 532.

For noise as nuisance, see *Powell v. Bentley & G. Furniture Co.* (W. Va.) 12 L. R. A. 53, and *Hill v. McBurney Oil & Fertilizer Co.* (Ga.) 52 L. R. A. 398.

As to liability of landlord to third person for nuisance on leased premises, see *note to Lee v. McLaughlin* (Me.) 26 L. R. A. 197.

394, 18 Pac. 598; *Johnson v. Turner* (Md.) 22 Atl. 1103; *Canfield v. Hard*, 58 Vt. 217, 2 Atl. 136; *Sexton v. Hollis*, 26 S. C. 231, 1 S. E. 893; *Mima Queen v. Hepburn*, 7 Cranch, 290, 3 L. ed. 348; *Jones v. Jennings*, 10 Humph. 428.

Damages for a nuisance caused in the operation of machinery, the cause of which is susceptible of removal, are measured by the damages to the use of the property.

Harmon v. Louisville, N. O. & T. R. Co. 87 Tenn. 614, 11 S. W. 703; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 4 L. R. A. 622, 11 S. W. 705; *Nashville v. Comar*, 88 Tenn. 415, 7 L. R. A. 465, 12 S. W. 1027; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 313; 3 *Sutherland, Damages*, 2d ed. §§ 1038, 1039, pp. 2274, 2275; *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Uline v. New York C. & H. R. Co.* 101 N. Y. 98, 53 Am. Rep. 123, note, 4 N. E. 536; *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474; *Blunt v. McCormick*, 3 Denio, 283; *Cumberland & O. Canal Corp. v. Hitchings*, 65 Me. 140.

The lessor is not liable for the acts of the lessee resulting in a nuisance, merely because the premises were leased to be used for the very purposes for which they were used.

Wood, Nuisances, 2d ed. pp. 951, 952; 1 *Taylor, Land. & T.* § 175, pp. 195, 196; *Rich v. Basterfield*, 4 C. B. 783; *Brown v. Bussell*, L. R. 3 Q. B. 251; *Calin v. Valentine*, 9 Paige, 575, 38 Am. Dec. 567; *Arrousmith v. Nashville & D. R. Co.* 57 Fed. 166; *Nugent v. Boston, C. & M. R. Co.* 80 Me. 62, 12 Atl. 797; *St. Louis, W. & W. R. Co. v. Curl*, 28 Kan. 622; *Ditchett v. Spuyten Duyvil & P. M. R. Co.* 67 N. Y. 425; *Miller v. New York, L. & W. R. Co.* 125 N. Y. 118, 26 N. E. 35; *Briscoe v. Southern Kansas R. Co.* 40 Fed. 274; *Virginia Midland R. Co. v. Washington*, 86 Va. 629, 7 L. R. A. 344, 10 S. E. 927; *Mahoney v. Atlantic & St. L. R. Co.* 63 Me. 69.

For the reasonable and careful exercise, without negligence, of the powers granted it by the state in its charter and by the provisions of the city ordinance, a railroad or terminal company is not liable to persons who may suffer inconvenience or damage incident to the smoke, soot, cinders, or noise created in the necessary operations of its engines, yards, and roundhouses, provided they are no more than necessary in the proper, reasonable, and careful exercise of these powers.

Iron Mountain R. Co. v. Bingham, 87 Tenn. 534, 4 L. R. A. 622, 11 S. W. 705; 2 *Elliott, Railroads*, § 718; *State v. Louisville, N. A. & C. R. Co.* 86 Ind. 114; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 29; *Dunsmore v. Central Iowa R. Co.* 72 Iowa, 182, 33 N. W. 456; *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, 52 N. J. L. 221, 20 Atl. 169; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472, 9 Atl. 871; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 13 Atl. 696; *Romer v. St. Paul City R. Co.* 75 Minn. 211, 77 N. W. 825; *Thomp-* 61 L. R. A.

son v. Pennsylvania R. Co. 51 N. J. L. 42, 15 Atl. 833; *Bordentown & S. A. Turnp. Road v. Camden & A. R. & Transp. Co.* 17 N. J. L. 314; *Carroll v. Wisconsin Central Co.* 40 Minn. 168, 41 N. W. 661; *Austin v. Augusta Terminal R. Co.* 108 Ga. 687, 47 L. R. A. 755, 34 S. E. 852; *Georgia R. & Bkg. Co. v. Maddox* (Ga.) 42 S. E. 316.

When a thing is authorized by law, the doing of it is not a nuisance unless it is done negligently, or the use is excessive.

2 *Elliott, Railroads*, § 718; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 523, 4 L. R. A. 622, 11 S. W. 705; *State v. Louisville, N. A. & C. R. Co.* 86 Ind. 114; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 29; *Dunsmore v. Central Iowa R. Co.* 72 Iowa, 182, 33 N. W. 456; *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, Affirmed in 52 N. J. L. 221, 20 Atl. 169; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472, 9 Atl. 871; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 13 Atl. 696, Affirmed in 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Romer v. St. Paul City R. Co.* 75 Minn. 211, 77 N. W. 825; *Bordentown & S. A. Turnp. Road v. Camden & A. R. & Transp. Co.* 17 N. J. L. 314; *Carroll v. Wisconsin Central Co.* 40 Minn. 168, 41 N. W. 661; *Georgia R. & Bkg. Co. v. Maddox* (Ga.) 42 S. E. 318.

McSsrs. Anderson & Grisham and A. G. Ewing, Jr., for appellee.

Beard, Ch. J., delivered the opinion of the court:

This action was instituted by the defendant in error, who owned and was in possession of a house and lot on Magazine street, in Nashville, to recover damage claimed to have been done to her property by the plaintiff in error by the alleged improper location of its roundhouse, and in its operation or management, in that the locomotives housed in it from day to day greatly annoyed her by their incessant noise and also cast off dense volumes of smoke and great quantities of gases, cinders, and soot, which were blown into and upon the premises of the defendant in error, inflicting serious injury upon her household furniture, destroying vegetation in her yard, and impregnating the atmosphere, so as to make her property practically uninhabitable. The trial resulted in a verdict and judgment for the plaintiff below, and the case is now before us on various assignments of error.

In order to a proper understanding of these assignments, it is necessary to state that, on the 21st of March, 1893, the Louisville & Nashville Terminal Company was granted a charter of incorporation by the state of Tennessee, by which it was authorized "to acquire and hold in this or any other state, at such place or places as shall be found by it expedient," all necessary real estate, "on which to construct, operate, and maintain passenger stations, . . . office buildings, sheds, and storage yards, . . . roundhouses and machine shops, . . . main and side tracks, . . . and other terminal railroad facilities, appurtenances,

and accommodations suitable" to enable the company to perform promptly the work of receiving, delivering, and transferring all passenger and freight traffic and otherwise discharging the duties and exercising the powers contemplated or given in the charter. Among the powers so granted was that to "lease to any railroad company or railroad companies its freight and passenger depot or station and its other terminal facilities at any place where the line or lines of said railroad company or companies may terminate or through which they may pass."

Acting within its charter, the plaintiff in error proceeded to acquire real estate in the city of Nashville, and to construct upon it a terminal station, including a roundhouse of large capacity for the storage and safe-keeping of locomotive engines, and afterwards, on the 15th of June, 1896, it executed a lease for the term of 999 years of all of its terminal property to the Louisville & Nashville Railroad Company and the Nashville, Chattanooga, & St. Louis Railway, reserving to itself an annual rent therefor, and at once turned over its entire holdings to the possession and use of the lessees. Since the time of said lease, so far as the record shows, the plaintiff in error has exercised no control over the roundhouse, or any other part of the terminal property. On the contrary, it affirmatively appears that the whole has been under the control of the two railroads, and their engines have occupied the roundhouse; and whatever nuisance may have been committed, so far as defendant in error is actively concerned, has been by them.

Without going into detail as to the evidence, it may be assumed that the verdict of the jury settled conclusively that by reason of the proximity of the roundhouse to the dwelling of the defendant in error she suffered great discomfort from the noise made in the incoming and outgoing of the engines of these railroad companies, and loss as well as inconvenience from the smoke, soot, cinders, and gases emitted by these engines. The fact is, the trial judge withdrew by his charge from the consideration of the jury every issue of fact save this: Was the operation of the roundhouse a nuisance? By their verdict the jury have answered that it was.

It was not insisted in the court below, nor is it here, that the roundhouse was *per se* a nuisance. Nor could such insistence, if made, be sustained. The contention, instead, was and is that, having erected this building for the very use to which it was applied, and such use having proved to be a nuisance, the Louisville & Nashville Terminal Company is liable for the resulting damage to the property of the defendant in error, notwithstanding the lease. In other words, the insistence is that the erection of this building for the very use to which it was subsequently applied makes the terminal company liable for the alleged subsequent wrong of the lessees upon the ground that its leasing was an implied warrant or con-

sent on its part to these lessees to appropriate it to such wrongful use. This was the view taken by the trial judge. As to this he said to the jury: "If the proof shows that such construction and leasing of the roundhouse of the defendant was for the very purpose for which it was operated, . . . and if the proof further shows that in its operation a nuisance was committed, and that plaintiff had thereby suffered hurt, worry, and discomfort, inconvenience, and damage, so as to injure the use of her property, then the defendant is liable." This view of the law is emphasized by being repeated at least in two other paragraphs of the charge. There is no doubt that, should a landowner erect or create a nuisance upon his land, he cannot rid himself of liability arising therefrom by a grant of the property to another. This was laid down as early as *Rosewell v. Prior*, 2 Salk. 459, 12 Mod. 639, where it is said that, "before his assignment over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting it over, and more especially here, where he grants over reserving rent, whereby he agrees with the grantee that the nuisance should continue and has a recompense, viz., the rent for the same." This rule has been applied in the case of the owner of a pier, who leased it in a dangerous condition. (*Swords v. Edgar*, 59 N. Y. 29, 17 Am. Rep. 295), and of a landowner who let out his premises to be used as a bawdy house, and of one who constructs upon his lot vaults, the necessary use of which creates a nuisance (*King v. Peddy*, 1 Ad. & El. 822; *Marshall v. Cohen*, 44 Ga. 489, 9 Am. Rep. 170), or of one who, by the negligence of his contractor, leaves a dangerous excavation near a highway (*Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603), or in a sidewalk in a city (*Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298). In such cases the liability of the landowner rests upon the ground that the very existence of the thing constitutes a nuisance, the responsibility for which cannot be shifted by a mere letting to or contracting with another.

But on principle it would seem to be otherwise where the structure or work, whatever it may be, was not of itself a nuisance, and where the letting was general in its character. In such case, if the use of such structure or work does not *ex necessitate* make a nuisance, but after the letting it is used by the tenant so as to create one, then the tenant alone should be liable. This limitation upon the general rule, which fixes liability upon the landlord for a nuisance on his premises, has been presented in many cases, but in none with more force than in the leading case of *Rich v. Basterfield*, 4 C. B. 783, which went far in overturning the authority of *King v. Peddy*, 1 Ad. & El. 822. This latter case held that if a landlord erect a building of which the occupation is likely to produce a nuisance, or if he let a building which requires particular care to prevent the occupation from becoming a nuisance,

and the nuisance occurs for want of such care on the part of the tenant, then the landlord is responsible. But in *Rich v. Basterfield*, 4 C. B. 783, the previous cases involving this question were reviewed, and the sound conclusion was announced that, if the landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the tenants' option so to use them or not, and the landlord receives the same rent whether they are so used or not, the landlord cannot be made responsible for the act of his tenant.

In the present case, while the roundhouse was erected near the house of the defendant in error for the housing of engines, yet it was not in itself a nuisance. Whether it became one depended alone upon the will of the lessees. It was not incumbent upon them to use it for storing their engines. In addition, the record tends to show that, even if the lessees saw proper to appropriate this building to that purpose, they might have moved their engines in and out of it by employing wood and hard coal, which would have reduced the injury to defendant in error, if any, to an inappreciable extent.

What has been said may be here repeated: If the roundhouse was a nuisance at the date of the lease, then the landlord, by his contract of leasing, could not have avoided liability. But, inasmuch as it was not then a nuisance, and only became one upon its use by the tenant, we think the liability of the landlord would depend upon the fact, to be passed on by the jury under proper instructions, whether the nuisance complained of arose necessarily from its ordinary use, or from its improper use by the tenants. In the first instance he would be liable, and in the second the tenant alone would be chargeable. 2 Wood, Nuisances, 3d ed. § 827. This author, in the same section of the valuable work just cited, says: "The rule may be stated as the result of the authorities to be that, in order to charge the landlord, the nuisance must necessarily result from the ordinary use of the premises by the tenant, or for the purpose for which they were let; and where the ill results flow from the improper or negligent use of the premises by the tenant, or, in other words, where the use of the premises may or not become a nuisance, according as the tenant exercises reasonable care or uses the premises negligently, the tenant alone is chargeable for damages arising therefrom." To the same effect is 1 Taylor, Land. & T. § 175. The trial judge failed in the clause above given, as well as in other portions of his charge, already referred to, to make this essential distinction, the effect of which was to say to the jury that the plaintiff in error was responsible for the nuisance which the record tended to show its tenants committed, whether such nuisance resulted from a proper or improper use of the roundhouse by these tenants.

In another view it is apparent this instruction was hurtful to plaintiff in error. 61 L. R. A.

As has already been stated, the trial judge greatly narrowed the scope of the jury's investigation. He said to them: "The question for you to determine is one of fact, namely, Was the operation of the roundhouse, as carried on, a nuisance? If not, the defendant is not liable, but if in its operation . . . the plaintiff has suffered hurt, annoyance, discomfort, inconvenience, and damage, . . . then the defendant is liable." Abounding, as the record did, in evidence that the defendant in error had suffered hurt, annoyance, etc., from the occupation and use of the roundhouse, under this instruction the jury could not do otherwise than return a verdict for the defendant in error, and this in spite of the fact that under a proper direction, as indicated above, they might have found that such operation was not the necessary result of the construction of the roundhouse, and that plaintiff in error in no way gave its consent to this method of use or occupation.

There are some other assignments of error which will be briefly disposed of.

First. The trial judge was in error in withdrawing from the jury so much of the testimony of E. C. Lewis as went to show that the plaintiff in error did not control or operate the roundhouse in question; and also in declining to let go to the jury the lease made by the terminal company to the Louisville & Nashville Railroad and to the Nashville, Chattanooga, & St. Louis Railway; for, as has already been shown, if the nuisance created by the railroad companies was not the necessary result of the construction of the roundhouse, and it was committed by these companies, it was essential to the proper defense of the plaintiff in error that the jury should understand the exact relationship of the terminal company to those companies. *Rich v. Basterfield*, 4 C. B. 783.

Second. It was also error in the trial judge to permit the witness Mrs. Jacobs, over the objection of the plaintiff in error, to state that the engines which, it is alleged, committed the nuisance complained of, by general reputation belong to the terminal company. Such testimony is incompetent to prove title. *Jones v. Jennings*, 10 Humph. 428; *Berniaud v. Beecher*, 76 Cal. 394, 18 Pac. 598.

Third. The trial judge improperly let to the jury certain testimony as to the effect of the alleged nuisance upon the value of the property or of the fee; but this testimony was practically excluded from the consideration of the jury by his charge when he told them that in the assessment of damages, should they find for the plaintiff, they might look, among other things, to such as occurred to the use of her property as her residence or home, etc., taking into consideration in such assessment the discomfort, annoyance, etc., which she may have suffered from smoke, etc. There was no error in this instruction. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

Fourth. It is assigned for error that the court below declined to give the following request: "That, if the proof shows that the defendant built the terminal roundhouse and yards for the purposes for which the proof shows they have since been operated, and that in the operation of them the defendant or its lessees employed the best and most skilful locomotive engineers, and had them instructed, by a person skilled in the operation of such engines, as to how to use them so as to produce as little smoke as possible, using such fuel as is ordinarily used for such purposes by the best railroads in the country, and that under the circumstances above set out, in operating said engines, damage resulted to the plaintiff from smoke or soot, etc., necessarily issuing from the engines, or noises necessarily resulting from the operation of its engines, then in that case neither the defendant nor its lessees would be liable in this action." It will be observed in the excerpts from the charter made in an early part of this opinion that no location is fixed for the property to be acquired for terminal purposes. The state thus left not only the selection of the property to be so used to the will of the corporation, but the fixing of the site of the roundhouse within the limits of the property. This being so, there is no warrant for the contention that a reasonable use of this roundhouse would protect the company, if otherwise liable, against a claim for compensation made by one whose property had been injured by such use. In such a case its charter would give it no right to enjoy its property at the expense of another's, and to it would be applied, as to an individual, the maxim, *Sic utere tuo ut alienum non ledas*. To a claim for exemption from liability rested on a charter right the answer may be properly made that the state has not authorized the wrong complained of, and in locating its roundhouse so that the injury necessarily resulted to the adjacent landowner it did so at its peril.

Even in England, though the general rule is that, when Parliament has authorized the construction of such a work at a particular place where its use would constitute a nuisance at common law, no compensation could be claimed in respect to injury to private rights, apart from a negligent use, unless provided for in the act, to avoid liability it is held that statutory sanction sufficient to justify the creation of a nuisance must be express, or must arise by necessary implication. *Hill v. Metropolitan Asylum Dist.* L. R. 4 Q. B. Div. 433, was an action brought by adjacent property owners to recover damages "in respect of and to obtain an injunction against the recurrence of what the plaintiffs alleged to be a nuisance affecting their rights by the erection and maintenance" of an asylum for the reception of smallpox patients. One of the defenses of the managers to the action was that the

erection and maintenance of the asylum was under the direction of the local government board, which derived its authority from an act of Parliament. To this defense Pollock, B., said: "There are no provisions in that act requiring them to build the very hospital, and on the very site, and to carry it on in the very manner in which it was carried on," and, this being so, "it cannot be supposed that the legislature armed them with an option so to perform their duty as to create or not create a nuisance affecting the right of others." This case went by appeal to the House of Lords, and is reported in L. R. 6 App. Cas. 193. There separate opinions were delivered by Lord Chancellor Selbourne, Lord Blackburn, and Lord Watson, concurring, however, in sustaining the rule announced by Pollock, B. In the course of the opinion of Lord Watson this strong language is used: "Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose." The case of *Truman v. London, B. & S. C. R. Co.* L. R. 25 Ch. Div. 423, is of like import.

But, over and beyond this, we think this corporation, in selecting a place for its roundhouse, acted in a private capacity, and is responsible for the injurious consequences which may result from its use. This is the view taken in *Boseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 167. It is there said: A railroad, in selecting a place for repair shops and engine house, acts altogether in its private capacity. Such location is a matter of indifference to the public, consequently, with respect to such act, the corporation stood on the footing of an individual, and was entitled to no superior rights of immunity. The authority to construct such works did not authorize it to place them wherever it might think proper in the city, without reference to the property rights of others. Grants of power to corporate bodies like these can give no license to use them in disregard of the rights of others, and with immunity for their invasion. To the like effect is the leading case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537.

Other errors are assigned, but we think that they may all be resolved into those which have been disposed of. For those already indicated, *the cause is reversed and remanded.*

NEW YORK COURT OF APPEALS.

Amelia L. SPIES, Exrx., etc., of Francis
Spies, Deceased, *Respt.*,
v.
NATIONAL CITY BANK, *Appt.*

(174 N. Y. 222.)

1. A contract of indorsement of a promissory note is governed by the law of the state where it is made, although the note itself is executed and payable in another state, unless the intention is to negotiate the instrument elsewhere.
2. What may be the law which is to be applied to a contract made in a foreign state is a question of fact, upon which the finding of the trial court, followed by a judgment based thereon, which is affirmed by the appellate division, is binding on the court of appeals.
3. The liability of the indorser of a note cannot be preserved by a reservation of the rights and claims against him by the holder, when he releases a judgment against the maker upon payment of less than the amount due.

(March 24, 1903.)

NOTE.—Conflict of laws as to negotiable paper.

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61 L. R. A.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment entered in the office of the clerk of New York County upon a report of the referee in favor of plaintiff in an action brought to recover the balance of the proceeds of certain bonds which plaintiff's testator had deposited with defendant, and which it had sold to satisfy an indebtedness due from said testator to the bank. *Affirmed.*

The facts are stated in the opinion.

Mr. John A. Garver, with Messrs. Shearman & Sterling, for appellant:

Every contract is governed by the law of the place where made, unless it is to be performed, or is intended to take effect, elsewhere.

Dyke v. Erie R. Co. 45 N. Y. 113, 6 Am. Rep. 43; *Tilden v. Blair*, 21 Wall. 241, 22 L. ed. 632.

Indorsement is an independent contract, governed by the law of the place where made, or where it takes effect.

4 Am. & Eng. Enc. Law, 2d ed. p. 477; Story, *Confl. L.* § 314; Dan. *Neg. Inst.* §§

I. Scope; explanation of terms.

This note is confined to questions relating to the determination of the character of instruments as negotiable or otherwise, and to the distinctive features of negotiable instruments as such. Questions that are common, alike, to negotiable and non-negotiable instruments, e. g., capacity of parties, validity of consideration, etc., are not considered. The question as to what law governs with respect to interest and usury is considered in note to *United States Sav. & Loan Co. v. Beckley* (Ala.) — L. R. A. —. In order correctly to apply the principles established by the cases cited in the subsequent subdivisions, it often becomes necessary to determine where a bill or note is deemed to have been drawn, made, or indorsed, and where it is deemed to be payable. These questions, however, except the question as to the place of payment so far as the drawer or indorser is concerned, depend upon principles that are equally applicable to other classes of contracts, and for that reason, with the exception already noted, cannot be adequately treated in this note. It may be said, however, by way of caution, that the place where, in a legal sense, a bill is drawn or a note is made is not the place where the drawer's or maker's name is written on the instrument, but, in general, the place where the instrument is first delivered so as to become a binding obligation upon him. Likewise, the place where, in a legal sense, the indorsement is made is not where the indorser's name is written on the instrument, but where the instrument, as so indorsed, is delivered so as to become effective against him.

II. General commercial principles as opposed to local law.

The Federal courts assert their right, in the absence of a local statute, to determine questions relating to this subject upon what they deem to be the general principles of commercial law, and do not consider themselves bound by the decisions of the courts of a state, the law of which, if statutory, would concededly govern.

867-899; *Aymar v. Sheldon*, 12 Wend. 439; 27 Am. Dec. 137; *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Rep. 289; *Cook v. Litchfield*, 9 N. Y. 279; *Musson v. Lake*, 4 How. 262, 278, 11 L. ed. 967, 974; *Trabue v. Short*, 18 La. Ann. 257.

The contract of the indorser is to pay the instrument, on certain conditions, at the place of indorsement, even though, by its terms, the instrument itself be payable elsewhere.

Story, Conf. L. § 314; *Weil v. Lange*, 6 Daly, 549; *Artisans' Bank v. Park Bank*, 41 Barb. 599; *Lee v. Selleck*, 32 Barb. 522; *Depau v. Humphreys*, 8 Mart. N. S. 1.

Even though the law of Louisiana were held to be controlling, it is only its statutory law which can be so. The Civil Code of Louisiana did not include the subject of negotiable instruments.

Thus, the question whether a pre-existing indebtedness constitutes a valuable consideration which entitles an indorsee to the character of a bona fide holder is to be determined by the United States Supreme Court according to its own judgment, and without reference to the decisions of the courts of the state where the transaction had its situs. *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61.

So, the nature of the liability of one who indorses a note before delivery to the payee is one of general commercial law, and will be determined by the Federal courts in accordance with their own judgment, and they are not necessarily bound by the decisions of the courts of the state in which the note was executed, indorsed, and payable. *First Nat. Bank v. Lock-Stitch Fence Co.* 24 Fed. 221.

In *Phipps v. Harding*, 30 L. R. A. 513, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468, the circuit court of appeals held that parties who placed their names on the back of a note in Wisconsin before the delivery to the payee were to be treated as joint makers of the note with the party who appears on the face thereof as maker, notwithstanding that it had been held otherwise by the state courts of Wisconsin. The decision is upon the ground that the question was one of general law, as to which the decisions of the state courts were not conclusive upon the Federal courts.

In *Farmers' Nat. Bank v. Sutton Mfg. Co.* 17 L. R. A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191, the circuit court of appeals held that the question of negotiability of a bill of exchange, though it was an Indiana contract, was one of general commercial law, except so far as the rights of the parties are affected by statute, and that, upon such questions, the Federal courts will exercise their own judgment, though, where the question is a new one with the Federal courts, it is their rule and their duty to give weight to the decisions of the courts of the state whose law they are administering.

And in *Van Vleet v. Sledge*, 45 Fed. 743, it was held that the question whether the liability of an indorser can be limited by parol evidence was a question of general commercial law, as to which the Federal courts are not bound by the decisions of the courts of the state where the indorsement was made.

So, in *Bank of Edgefield v. Farmers' Co-operative Mfg. Co.* 18 L. R. A. 201, 2 C. C. A. 637, 2 U. S. App. 282, 52 Fed. 98, it was held 61 L. R. A.

Upon questions of commercial law, and in the absence of statutory provisions, the New York courts will not follow the decisions of the courts of another state, even where the contract was made, or is to be performed, in that state, and is, consequently, governed by its laws.

Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; *Pine Grove v. Talcott*, 19 Wall. 666, 22 L. ed. 227; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Brooklyn City & N. R. Co. v. Nat. Bank*, 102 U. S. 29, 26 L. ed. 67; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 13 L. R. A. 241, 27 N. E. 849.

In New York the reservation of rights prevents the discharge of a surety or indorser.

Stewart v. Eden, 2 Cai. 121, 2 Am. Dec.

by the United States circuit court of appeals that, in an action in the Federal court, the general commercial law prevails with respect to the question whether the dishonor of the first to mature of several notes, given upon the same consideration, is notice to a subsequent indorsee for value before maturity of another note, of the equities existing between the original parties, when he had no notice of such dishonor; and that the court is not bound by the decisions of the supreme court of that state announcing a rule on the subject. In this case the note was made in Georgia, and indorsed to a citizen of North Carolina, who indorsed the same to a citizen of South Carolina. The action was brought by the last indorsee against the maker in a Federal court sitting in Georgia, and the question above stated was decided in the negative, although the Georgia statute, if applied, would have required an answer in the affirmative. The court said that the law of the place where a contract is made usually governs in the construction and enforcement thereof, and the validity and effect of all writings or contracts are determined by the law of the place where executed; but that the question presented in the case was not in regard to the construction of the contract or its validity, but rather with regard to the rule of commercial law which affects subsequent holders in the matter of notice of prior equities.

The foregoing citation of Federal cases on this point is not intended to be exhaustive, but merely illustrative. The right to determine these questions upon general principles of commercial law, without reference to the decisions of the courts of the place where the transaction had its situs, has, in a few instances involving bills or notes, been asserted by a state court relatively to transactions having their situs in other states.

Thus, in *Franklin v. Twogood*, 25 Iowa, 520, 96 Am. Dec. 73, the court said that, as a general principle, the character of an indorsement which will protect the indorsee from defenses available against the original holder is to be determined by the law of the place where the indorsement was made, but held that, when the question is not governed by a statute of that place, but depends upon the law merchant, the court of the forum is to determine for itself what the rule of the law merchant is on the subject, and is not necessarily concluded on that point by the decisions of the courts of the state where the indorsement was made, though those decisions, like the decisions of other jurisdictions, are to be consulted on the point.

The position taken in the foregoing case

222; *Morgan v. Smith*, 70 N. Y. 537; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *National Bank v. Bigler*, 98 N. Y. 51; *Palm-er v. Purdy*, 83 N. Y. 144.

A reservation of rights against parties secondarily liable may be made where the claim or judgment against the principal is assigned, as well as in the case of an actual discharge of the principal.

Hubbell v. Carpenter, 5 N. Y. 171; *Booth v. Farmers' & M. Nat. Bank*, 74 N. Y. 228.

The contract of indorsement was made in New York, and the rights and obligations of the parties to that contract are governed by the law of New York. The contract of subrogation was made in Louisiana. The rights and obligations of the parties to that contract are to be governed by the law of Louisiana, unless the contract was made to take effect in New York.

seems to be approved in *National Bank v. Green*, 33 Iowa, 146.

So, in *Roads v. Webb*, 91 Me. 406, 40 Atl. 128, the court, after holding that the law of Maine governed as to the negotiability of a note, said that, if it were not so, yet, where the general principles of commercial law are to be applied to a contract, the court of the forum will apply those principles according to its judgment, notwithstanding that it may have been held differently where the contract was made.

In *Faulkner v. Hart*, 82 N. Y. 418, 37 Am. Rep. 574, which involved the question as to the liability of a common carrier, the court remarked that it was long since held in New York that its courts could not break in upon the settled principles of our commercial law to accommodate them to those of any country (citing *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137). It is not apparent, however, how the case cited lends any support whatever to the statement. It is true that in that case the court applied the law of New York, rather than the law of France, to the question of the liability of the indorser of a bill of exchange drawn and payable in French territory; but the decision was expressly put upon the ground that the contract of indorsement was both made and performable in New York, and it is implied throughout the opinion that if it had been a question of the liability of the drawers the law of France would have been applied. In *Faulkner v. Hart*, however, the court treated the question as to the carrier's liability as one of general commercial law, and decided it in accordance with the rule as declared in New York, although the contrary rule was established by the courts of Massachusetts, the law of which, if statutory, would have been conceded governed.

In *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 13 L. R. A. 241, 27 N. E. 849, the court of appeals again decided that, while that court will follow the courts of another state in the construction of its statute law, it will follow its own precedents in the expounding of the general common law applicable to commercial transactions. The question in this case was as to the measure of the liability of a bank to which a draft is intrusted for collection; but the general principle declared is, of course, applicable to all questions relating to commercial paper which are not affected by statute.

As a rule, however, the state courts, at least in cases involving commercial paper, have proceeded upon the assumption that the rules of law prevailing in another state or country where the transaction had its situs were equally

In reserving its rights against the indorser, the bank intended that the reservation should take effect in New York.

Pinney v. Nelson, 183 U. S. 144, 148, 46 L. ed. 125, 22 Sup. Ct. Rep. 52.

It is always competent to prove the oral conditions or terms upon which a written instrument has been delivered.

Mattheus v. Sheehan, 69 N. Y. 585; *Marsh v. McNair*, 99 N. Y. 174, 1 N. E. 660; *Summers v. United States Ins. Annuity & T. Co.* 13 La. Ann. 504; *Herrick v. Carman*, 10 Johns. 224; *Grierson v. Mason*, 60 N. Y. 394; *Blewitt v. Boorum*, 142 N. Y. 357, 37 N. E. 119; *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32; *Jamestown Business College Asso. v. Allen*, 172 N. Y. 291, 64 N. E. 952; *Ensign v. Ensign*, 120 N. Y. 655, 24 N. E. 942.

Parol evidence is admissible to prove an independent agreement between the parties,

binding, whether embodied in the decisions of its courts or in its statutes; and the right of the courts of one state to disregard the decisions of the courts of another, and decide the questions upon general principles of commercial law, has been expressly repudiated in *Roe v. Jerome*, 18 Conn. 158, and *Limerick Nat. Bank v. Howard*, 71 N. H. 13, 51 Atl. 641. In the latter case the court, while conceding that it was competent for the United States Supreme Court to determine the law governing the interpretation of Vermont contracts without regard to the decisions applicable in that state, said it would be little less than usurpation for the court of New Hampshire to decide what, in its opinion, the commercial law of Vermont was.

It is apparent that this question is broader than the subject of the note, and cannot be exhaustively treated here, since it arises in many classes of cases that do not fall within the scope of the note. It is treated here only to the extent that it has arisen in cases dealing with the conflict of laws as to negotiable paper, and its exhaustive treatment is left for a subsequent note. The question, however, is one of practice. Theoretically, it does not affect the rules formulated in the succeeding questions for the determination of the question what law governs, since it relates, not to the determination of the governing law, but to the determination of the correct rule prescribed by the governing law on the point in question, and therefore logically arises only after the governing law has been ascertained. The practical effect of these rules, however, may be defeated in a particular case if the court, after determining that the law of another state governs, proceeds to determine what the law of the other state is on the particular matter in question by consulting the precedents furnished by the courts of the forum, rather than those furnished by the courts of the other state. When, therefore, the particular matter in question is not governed by statute, but depends upon principles of common law, it will be necessary, in applying the rules laid down in the subsequent subdivisions, to determine whether the court will be guided by its own precedents, or by the precedents of the courts of the other state which furnishes the governing law; and the position of the court upon this point may operate as a practical exception to or qualification of those rules so far as concerns matters depending upon the common law, and not upon statute.

III. Time of payment.

The time when a bill or note is payable clear-

when it is not in conflict with the terms of the written instrument.

Lewis v. Seabury, 74 N. Y. 409, 30 Am. Rep. 311; *Van Brunt v. Day*, 81 N. Y. 251; *Stowell v. Greenwich Ins. Co.* 163 N. Y. 298, 57 N. E. 480; *Kenyon v. Beryhel*, 13 La. 133; *Akin v. Drummond*, 2 La. Ann. 92; *Lewis v. Wilder*, 4 La. Ann. 574; *Packwood v. White*, 7 La. Ann. 31; *Flash v. American Glucose Co.* 38 La. Ann. 4.

It is entirely competent to create a trust of personal property by parol.

Hirsh v. Auer, 146 N. Y. 13, 40 N. E. 397.

Oral reservation may be proved.

Palmer v. Purdy, 83 N. Y. 144; *Bank of Montreal v. McFaul*, 17 Grant Ch. (U. C.) 234; *Wyke v. Rogers*, 1 De G. M. & G. 408; *First Nat. Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582; *Morse v. Huntington*, 40 Vt. 488.

ly relates to the matters of performance, and therefore falls within the second of the general principles laid down in *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245, *infra*, IV., *viz.*: Matters connected with the performance of a contract are regulated by the law prevailing at the place of performance. Thus, in that case, the question whether days of grace are to be allowed upon a bill or note was given as an illustration of the questions that fall within the second principle, and are governed by the law of the place of performance; and the same is expressly held in respect to the allowance of days of grace on notes, in the following cases: *Bank of Washington v. Triplett*, 1 Pet. 25, 7 L. ed. 37; *Dubuque F. & M. Ins. Co. v. Oster*, 74 Ill. App. 139 (*obiter*); *Thorp v. Craig*, 10 Iowa, 461; *Goddin v. Shipley*, 7 B. Mon. 575; *Vidal v. Thompson*, 11 Mart. (La.) 23; *Burnham v. Webster*, 19 Me. 232; *Cribbs v. Adams*, 13 Gray, 597; *Bank of Orange County v. Colby*, 12 N. H. 520; *Bowen v. Newell*, 13 N. Y. 280, 84 Am. Dec. 550; *Jewell v. Wright*, 30 N. Y. 264, 86 Am. Dec. 372; *Hatcher v. McMorine*, 15 N. C. (4 Dev. L.) 124; *Pawcatuck Nat. Bank v. Barber*, 22 R. I. 73, 46 Atl. 1095; *Bryant v. Edson*, 8 Vt. 325, 30 Am. Dec. 472; *Blodgett v. Durgin*, 32 Vt. 361; *Walsh v. Dart*, 12 Wis. 635; *Second Nat. Bank v. Smith* (Wis.) 94 N. W. 664.

This is true as to all parties to the notes, whether maker, drawer, acceptor, or indorser, though, as will be subsequently shown, for most purposes the contract of the drawer and indorser is to be determined by the law of the place where the bill was drawn, or where the bill or note was indorsed, irrespective of the place of payment. Indeed, most of the cases above cited which apply the law of the place of payment to the question involve the liability of drawers or indorsers.

When no place of payment is specified in a note, the law of the place where it is made, *i. e.*, where it is first delivered so as to become a binding obligation, governs in respect of the allowance of days of grace. *Burnham v. Webster*, 19 Me. 232; *Bryant v. Edson*, 8 Vt. 325, 30 Am. Dec. 472; *Blodgett v. Durgin*, 32 Vt. 361.

Irrespective of the residence of the parties. *Blodgett v. Durgin*, 32 Vt. 361.

Or of the place at which it is dated, if delivered elsewhere. *Ibid.*

IV. Mode of acceptance of bill.

There is some conflict between the laws of different jurisdictions in respect to the mode of accepting bills of exchange, and it therefore be-
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Mr. James Harold Warner, for respondent:

If the holder of a note does an act which destroys the remedy of an indorser against the maker, or, through inaction, produces the same result, the indorser is discharged.

Shutts v. Fingar, 100 N. Y. 543, 53 Am. Rep. 231, 3 N. E. 588; *Pitts v. Congdon*, 2 N. Y. 352, 51 Am. Dec. 299; *Brown v. Williams*, 4 Wend. 360.

A subrogation contract between the holder of a note and the maker, not containing, or accompanied by, a reservation in writing, and not made with the consent of the indorser, discharges the indorser.

In the face of a written agreement, an oral, collateral agreement between the same parties must, in order to be proved, relate to a distinctly different subject, and rest upon an independent consideration.

comes necessary to determine, in case of such a conflict, which law is to govern. In *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245, it was held by the United States Supreme Court that a parol agreement, made in Illinois, to accept a draft previously drawn upon the promisor at St. Louis, being valid by the law of Illinois, would support an action against the promisor as acceptor of the draft, notwithstanding that by the law of Missouri, where the draft was payable, such parol promise would be insufficient.

The court laid down the following general principles upon the subject of conflict of laws relating to contracts:

1. Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made.

2. Matters connected with its performance are regulated by the law prevailing at the place of performance.

3. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

The first two principles, as above stated, are not mutually exclusive, and an agreement to accept a bill, at least if executory, might fall within the literal terms of both, since the question of validity might arise by reason of a matter connected with performance. It is evident from the context, however, that the term "validity," as used in the statement of the first principle, is to be confined to the capacity of parties and formal requisites, as distinguished from matters of essential validity. The validity of the agreement, as affected by the fact that it was verbal and not in writing, would seem to fall within the first principle as so understood, and not within the second, and the opinion seems to favor that view. The decision, however, does not ultimately rest upon the ground that, as between the law of the place where a contract to accept is made and that of the place where it is to be performed, the former governs, since, in the view taken by the court, there was no question of conflict of laws. This was true because, according to the law of Illinois, the agreement to accept operated as a present acceptance of the bill which was already in existence. It was therefore an executed contract, and there was no place of performance as distinguished from the place where it was made. The court says: "The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois as perfectly as if . . . [the promisor]

Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46; *Stowell v. Greenwich Ins. Co.* 163 N. Y. 308, 57 N. E. 480; *Lewis v. Seabury*, 74 N. Y. 410, 30 Am. Rep. 311.

The law of Louisiana, governing the transaction between the bank and Hiller, becomes a fact in this case, because of determining the relation between Spies and Ong, and shows that the bank impaired the indorser's remedy against the maker, within the rule laid down by the courts of this state where the contract of indorsement is governed.

Parker, Ch. J., delivered the opinion of the court:

The appellate division having unanimously affirmed the judgment entered on the report of the referee, the legal effect thereof was to conclusively establish the findings of

had written an acceptance across its face and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri, but that was a different contract from that of acceptance."

In the subsequent case of *Hall v. Cordell*, 142 U. S. 116, 35 L. ed. 936, 12 Sup. Ct. Rep. 154, it was held that the validity of a parol agreement made in Missouri, to accept a bill of exchange to be drawn upon the promisor in Illinois, and the right of the payee of the bill to rely thereon, were to be determined by the law of Illinois by which such parol agreement was valid and was available to the payee, notwithstanding that by the law of Missouri such a verbal agreement would not be available to him, but only to the drawer or negotiator of the bill. The decision is upon the ground that the agreement to accept was to be entirely performed in Illinois, and that nothing in the case showed that the parties had in view, in respect to the execution of the contract, any other law than that of the place of performance, and that that law consequently must determine the rights of the parties. Upon a first impression, this decision would seem to be contradictory to that in the previous case, for, while in both cases the law of Illinois was applied, in the first case Illinois was the place where the agreement to accept was made, and Missouri the place of payment of the bill, while in the other case the facts were reversed, Missouri being the place where the agreement to accept was made, and Illinois the place where the bill was to be payable when drawn. There is, however, a distinction between the facts in the two cases which may perhaps reconcile them. In the first case, as already pointed out, the agreement with reference to acceptance was executed, and not merely executory,—that is, under the law of Illinois, the bill, which in that case was already in existence, was accepted as soon as the agreement to accept was made, so that there was no place of performance as distinguished from the place where the contract was made. In the other case, however, the agreement to accept could not be regarded as an executed agreement, and therefore there was a conflict presented as between the law of the place where it was made and that of the place where it was to be performed. It is difficult, however, to see why the agreement does not fall within the first of the principles laid down in the *Scudder Case*, since the Missouri statute seems to relate to the formal requisites of the contract (i. e. the ex-

fact made by the referee, which are as follows:

"In and prior to April, 1893, Francis Spies, the plaintiff's testator, was doing business in the city of New York in the name of Marcial & Co. At his request, in April, 1893, at New York City, the defendant discounted for him a note for \$4,786.62 made in New Orleans by R. M. Ong to the order of Marcial & Co., dated the 11th day of April, 1893, and payable in four months thereafter. Spies indorsed the note, in the name of Marcial & Co., to the defendant. At that time the defendant held certain railroad bonds which Spies had deposited with it as security for the indebtedness then due to it from him, and as security also for 'any other note or claim' the defendant might have against him. The defendant discounted the above-mentioned note, relying upon the said

executory contract to accept), rather than to the matter of its essential validity. There is another possible theory by which these decisions may be reconciled, though it is not suggested in either of the opinions. This theory, which is well established as applied to the question of usury, rests upon the presumption that the parties intend to contract with reference to a law that will uphold, rather than one that will invalidate, their contract. It will be observed that by the application of the law of Illinois the validity of the agreement to accept was upheld in both cases.

In *Exchange Bank v. Hubbard*, 10 C. C. A. 295, 26 U. S. App. 133, 62 Fed. 112, the circuit court of appeals of the second circuit held that the validity of a parol promise, made in South Carolina, to accept a bill of exchange to be drawn upon the promisor at New York, was governed by the law of South Carolina, and not by the law of New York. The New York statute, which was involved in this case, was like the Missouri statute involved in the preceding cases, and provided, in effect, that an agreement to accept, not in writing, can be enforced only by the person who draws or negotiates the bill. The court took the view that the case fell within the first of the principles stated in the *Scudder Case*. No mention was made in this opinion of the decision in *Hall v. Cordell*. The case came before the court again on subsequent appeal in *Hubbard v. Exchange Bank*, 18 C. C. A. 525, 38 U. S. App. 289, 72 Fed. 234, and the position taken on the first appeal was adhered to. In the second opinion, however, the court refers to the decision in *Hall v. Cordell*. After quoting that part of the opinion in the latter case which states there was nothing to show that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance, and that that law consequently must determine their rights, the court says that such statement of law is in accordance with the well-established principle previously stated in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, and quotes from the latter case as follows: "Contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view." The opinion then proceeds to state that the facts in the present case clearly show that the parties did not have in view, in respect to the execution of the contract, the law of the state of New York. This statement is, in part at least, an inference from the circum-

securities. The note was not paid when due, and was duly protested, and due notice was given to the plaintiff,—Spies, the indorser, having in the meantime died. In February, 1894, this defendant recovered judgment upon the note against Ong, the maker, in the civil district court for the parish of Orleans, in Louisiana, where Ong resided. A few months later the defendant sold and transferred the said judgment to Alfred Hiller for 50 per cent of its face value. An order of subrogation was entered in the action in which the said judgment had been recovered, which declared that Hiller 'be subrogated to all the plaintiff's rights, claims, and demands in and to the judgment therein against the defendant R. M. Ong.' In this transaction, all of which took place in Louisiana, Hiller represented Ong, and acted in his behalf and for his benefit, and Ong be-

came the owner of the judgment. When this defendant sold and assigned the said judgment to Hiller, it was with an express reservation of all of the defendant's rights and claims against the indorser of the note, to which reservation both Hiller and Ong assented. In or about January, 1899, the defendant sold the railroad bonds above referred to, and applied a part of the proceeds to the payment of the sum due to the defendant on the indebtedness for which the said bonds had been originally pledged by Spies. The balance of said proceeds, amounting to \$1,469.06, the defendant applied on account of his alleged claim against Spies as indorser of the Ong note.

"By the law both of Louisiana and New York, the effect of the said transaction between this defendant and Hiller and Ong was to release Ong from all liability upon

stances of the particular transaction. It appeared that the agreement to accept was made by a firm doing business in New York; that they had applied to a party in South Carolina to purchase cotton for them, and authorized him to state to a bank in South Carolina (the plaintiff) that the firm would remit currency immediately upon receiving bills of lading for the cotton, or would honor drafts promptly, as the bank preferred, if it would advance money to purchase the cotton, which understanding was confirmed by a telegram sent from New York which was shown to the bank, and in reliance upon which it furnished the money to purchase the cotton. The court argued that, if the bank had had any idea that it was contracting in view of the statutory law of New York where the drafts were to be accepted, and that it might be entangled by the law of the place of performance in regard to a verbal promise to accept drafts, it would have promptly accepted the promise to remit the currency; in other words, a promise of prompt cash payment. The fact that the drafts were cashed and the advances were made in South Carolina, which the firm knew would be the course of business, was regarded as supporting the inference that the parties intended to be governed by the law of South Carolina. The principle of this decision, and of the decision in *Hall v. Cordell*, if the latter decision is correctly interpreted by the former, makes the question whether the validity of the agreement to accept is governed by the law of the place where it is made, or by that of the place upon which the bill is drawn and where it is payable, dependent upon the intention of the parties, to be ascertained from the circumstances of the case, and, to a considerable extent, nullifies the principles laid down in the *Scudder Case*. Those principles, it is true, seem to have been formulated for the purpose of ascertaining the intention of the parties, and may, perhaps, yield to circumstances like those in *Hubbard v. Exchange Bank* showing a contrary intention; but there do not seem to have been any special circumstances in *Hall v. Cordell* which would take the case out of those principles. As already suggested, however, it may be that the question in that case was regarded as one relating to the performance of the contract, rather than to its formal validity, and therefore would fall within the second, rather than the first, of those principles.

With the exception of *Hall v. Cordell*, the weight of authority seems to favor the law of the place where the agreement to accept was made, rather than that of the place upon which the bill is to be drawn and where it is to be

payable, as the law determining the validity of the agreement to accept. In addition to the cases already referred to which support that view, are the following:

Where a letter of credit was issued in Boston by the local agent of London bankers, whereby the latter agreed to accept bills to be drawn upon them by third persons, the contract is to be governed, as to its obligation, construction, and character, by the law of Massachusetts, and not by the law of England. *Russell v. Wiggins*, 2 Story, 213, Fed. Cas. No. 12,165. The court said: "It is true that the contract is to accept bills drawn on the defendants in London, and, of course, the acceptance is there to be made. But that does not make it less obligatory upon the defendants to fulfil their promise to accept, although the acceptance, in order to be valid, must be according to the requirements of the English law." The action was for damages for failure to accept, and there was no count upon any accepted bill of exchange.

The statute of New York making a promise to accept a bill of exchange an actual acceptance, which will support an action as upon an accepted bill, governs a promise to accept made in New York, although it contemplates that the bills shall be drawn upon parties in England. *Scott v. Pilkington*, 15 Abb. Pr. 280.

In *Lonsdale v. Lafayette Bank*, 18 Ohio, 126. it was held that the law of Ohio, rather than of Louisiana, governed with respect to the question whether one who discounted, in Ohio, a bill of exchange drawn in that state upon parties in Louisiana, upon faith of a letter written by the latter in New Orleans addressed to the drawer in Cincinnati, authorizing him to draw bills and promising to honor them, can maintain, in his own name, an action for a breach of promise to accept in pursuance of such letter. The decision is not upon the ground that the *lex fori* governs, but upon the ground that, while the letter was dated at New Orleans and the acceptances were to be there, the contract was closed in Cincinnati, the bills were to be drawn and indorsed there, and the money on them to be obtained there. The doctrine of this case, on the point in question, was applied in *Anderson County Deposit Bank v. Turner-Looker Co.* 2 Ohio N. P. 73, with the result of making the question depend upon the law of Kentucky, the letter authorizing the drawing having been written from Ohio to the drawer in Kentucky, and the money having been obtained there upon the bill drawn in pursuance thereof, though the bill was to be accepted in Ohio.

In *Barney v. Newcomb*, 9 Cush. 47, it was

the note as maker. Such release operated to discharge the liability of Spies (or Marcial & Co.) the indorser. The liability of the indorser was not preserved or continued by the reservation by the defendant of its rights and claims against the indorser when it sold and assigned the judgment.

"The plaintiff is the duly qualified executor of the said Francis Spies, and, before the commencement of this action, demanded of defendant the said sum of \$1,469.06, which the defendant refused to pay."

While the note was a Louisiana contract, having been made in that state by a resident thereof, payable at a bank therein, the contract of indorsement was an independent contract, governed by the law of the state where it was made and took effect, for in the case of every negotiable instrument there are as many separate contracts as there are

indorsements, each being governed by the law of the place where made, unless the intention is to negotiate the instrument elsewhere. Story, Conf. L. § 314; Dan. Neg. Inst. §§ 867-899; *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137; *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Cook v. Litchfield*, 9 N. Y. 279, 290. The note was made payable to the order of Marcial & Co., under which name the plaintiff's testator did business in the city of New York, and it was by him duly indorsed to the defendant, at its banking house in New York, before maturity. The contract of indorsement was therefore a New York contract, and, the defendant having presented the note for payment when and where it was made payable, and, upon the refusal to pay, having caused the same to be duly protested for nonpayment and notice thereof to be given

held that the right of a party who discounted, in New York, a bill of exchange there, drawn upon a Massachusetts firm, upon faith of a letter from the latter authorizing the drawer to draw upon the firm against future consignments of goods, to maintain an action against the drawee for nonacceptance, was to be determined by the law of Massachusetts, and not by the law of New York. The decision is upon the ground that the letter of credit was drawn in Massachusetts, and the contract to accept and pay was to be performed there. In this case there was no conflict between the law of the place where the agreement to accept was made and that of the place where it was to be performed.

In *Worcester Bank v. Wells*, 8 Met. 107, it was held that the rule in New York by which an acceptance of a bill of exchange written on a paper other than a bill shall not bind the acceptor except in favor of a person to whom such acceptance shall have been shown, and who, on the faith thereof, shall have received the bill for a valuable consideration, applied to a contract of acceptance which was completed in New York, though the bill was drawn in Massachusetts, and the letter of acceptance was mailed in New York, directed to the drawer in Massachusetts. It is true in this case that the draft was payable in New York, but the decision seems clearly to be upon the ground that the agreement to accept was completed in New York, and not upon the ground that the draft was payable there. The court said that when the drawee agreed to the request of the drawer, and put the letter in the mail at New York, the contract was complete, thus showing that the court regarded the question where the contract was made as the important one.

So, in *Garretson v. North Atchison Bank*, 47 Fed. 867, in which it was held that the Missouri statute, requiring that the acceptance of a bill of exchange should be in writing, applied where a Missouri bank received a telegram from a person in Colorado asking if it would accept a certain check, to which it replied by a telegram in the affirmative,—the court seems to have regarded the question where the contract was deemed to have been made the vital one, though, having held that it was to be deemed made in Missouri, it said: "This contract, therefore, was completed in Missouri, and was to be performed here by the presentation at the banking house of defendant of a check for payment. The acceptor's liability being dependent upon his acceptance, it should necessarily follow that it is to be governed by the law of the place of acceptance."

In *Bissell v. Lewis*, 4 Mich. 450, the effect of § 1 L. R. A.

a letter of credit issued in New York by principals to their agent, authorizing the latter to draw drafts on the former to be made payable in New York, as an unconditional acceptance, sustaining an action against the principals as acceptors of a bill of exchange drawn in pursuance of the letters of credit, was to be determined by the law of New York, though the draft in question was drawn by the agent in Illinois upon the principal in New York. In this case New York was regarded as the place where the agreement to accept was made, and, as it was also the place where the drafts were to be payable, there was no conflict between the two; but the opinion seems to put the decision upon the ground that the *lex loci contractus* governed. The opinion in *Mason v. Dousay*, 35 Ill. 424, 85 Am. Dec. 308, however, seems to make the validity of a parol acceptance of a bill depend upon the law of the place upon which the bill is drawn and where it is payable, though in this case they were the same, and the result was therefore the same as if the law of the place where the acceptance was made had been formally applied.

A stipulation that the drawee shall accept a bill in a foreign country, the law of which requires that a valid acceptance shall be in writing, is a contract that the drawee shall accept the bill in writing though a written acceptance is not required by the law of the country where such stipulation is made. *Carnegie v. Morrison*, 2 Met. 381 (*obiter*).

V. Collateral effect of instrument.

The question sometimes arises whether the giving and accepting of a negotiable instrument operate as a payment and extension of an antecedent indebtedness. And as there is some conflict in the views of the courts of different jurisdictions on this point, it is sometimes necessary to determine which view shall prevail. Here, there is a choice between the law of the forum; the law of the negotiable instrument as a substantive contract (which, according to the weight of authority, is the law of the place of payment (*infra*, IX.d)); and the law of the antecedent contract.

The case of *Thomson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 53 N. W. 1137, is strictly authority only for eliminating the law of the forum as the governing law. It was there held that the question whether the giving and receiving of a debtor's note for an antecedent contract operates as a payment and extinction of the original debt is to be determined by the *lex loci contractus*. The note in this case was, in a legal sense, made and payable in Illinois, and

to the plaintiff, it thereupon became entitled to enforce payment, and still retains that right, unless it has done or omitted to do some act which, under the law of this state, has destroyed that right.

While the holder of a note may enforce collection from either the maker or indorser, or both, he must take care not to impair the remedy of the indorser against the maker, for, to the extent that he destroys the indorser's claim against the maker, he releases his claim against the indorser. *Shutt v. Fingar*, 100 N. Y. 539, 53 Am. Rep. 231, 3 N. E. 588; *Pitts v. Congdon*, 2 N. Y. 352, 51 Am. Dec. 299; *Brown v. Williams*, 4 Wend. 360.

In *Shutt's Case* it is said, in the course of a very full and careful discussion of the general subject, that an indorser who pays a note "is entitled to demand its possession

from the creditor, with the right of subrogation to all securities and remedies possessed by him against the prior parties thereon, unimpaired by any act or laches of such creditor."

In *Pitts' Case* it is held that he (the holder) "cannot discharge the party primarily liable and then sue the indorser, because the latter would in this way be deprived of his remedy over."

In *Brown's Case* the court said: "If . . . the holder releases the principal debtor, he ought not to recover against the indorsers, for, by releasing the debt, he discharged the principal from all liability upon the note to the indorsers as well as to himself."

The principle established by these cases is that, if the holder of a note so deals with the maker that he becomes discharged from all

the original indebtedness was for goods sold and delivered there, so that there was no conflict between the law of the two contracts, and the only conflict was between the law of the place where both contracts were made and the law of the forum, and the decision is upon the ground that the effect of the note as payment was a matter which pertained to the substantive right, and not to the remedy. That the court, however, had in mind the law of the note, rather than the law of the antecedent contract, as the governing law, is made clear by the fact that it explains the *lex loci contractus* as meaning the place of the seat of the contract, as distinguished from the place where it may casually have happened to have been signed, it appearing in this case that the note was casually signed in Missouri, but was delivered and was payable, in Illinois. In *Tarbox v. Childs*, 165 Mass. 408, 43 N. E. 124, however, the court took the view that the question as to the effect of a promissory note as payment of an antecedent debt was to be determined by the law of the antecedent contract, rather than by the law of the note. In this case the note was made and payable in Massachusetts, and the antecedent contract was made and payable in New York. The court held that, while the note would be interpreted and have effect according to the law of Massachusetts if the question had arisen in an action upon the note, its effect as a payment of the antecedent indebtedness was to be determined by the law of New York. *Vancleef v. Therasson*, 3 Pick. 12, seems to be authority only for eliminating the *lex fori* as the governing law of this question.

The question whether a check drawn in one state upon a bank in another operates as an assignment *pro tanto* of the drawer's deposit is to be determined by the law of the state where the bank is situated, rather than by the law of the state where the check is drawn. *National Bank v. Indiana Bkg. Co.* 114 Ill. 483, 2 N. E. 401; *Abt v. American Trust & Sav. Bank*, 159 Ill. 467, Affirming 57 Ill. App. 369; *Pabst Brewing Co. v. Reeves*, 42 Ill. App. 154.

In *Lindeman v. Rosenfield*, 67 Ind. 246, 33 Am. Rep. 79, and *Alford v. Baker*, 53 Ind. 279, it was held that the question whether a note made and payable at a bank in Kentucky was governed by the law merchant or the common law, for the purposes of the rule that, in the former case, the note extinguishes a pre-existing indebtedness, but in the latter does not in the absence of an express stipulation to that effect, was to be determined by the law of Kentucky.

The right of the payee of a bill of exchange, 61 L. R. A.

which was delivered and accepted in New York, to recover the original consideration as against the drawer, who has been released from liability on the bill by laches in demanding payment of the acceptors, is to be determined by the law of New York, and not by the law of the forum. *Gracie v. Sandford*, 9 Ark. 233.

In *Bartach v. Atwater*, 1 Conn. 400, it was held that the question whether a promissory note of a third person, payable at a future day, taken in New York for goods sold and delivered there, a receipt in full being given by the seller, would defeat an action against the purchaser on the original demand, the maker of the note having become bankrupt before it fell due,—was governed by the law of New York; but in this case New York was the *locus contractus* of both contracts, and the only possible conflict was as between the law of that state and the law of Connecticut as the *lex fori*.

VI. Character and liability of irregular indorser.

See also *First Nat. Bank v. Lock-Stitch Fence Co.* 24 Fed. 221, and *Phipps v. Harding*, 30 L. R. A. 513, 17 C. C. A. 203, 36 U. S. App. 148, 70 Fed. 468, *supra*, II.

It sometimes becomes a question whether one who indorses a note before its delivery to the payee is, in legal effect, a maker or indorser; and, since the courts of different jurisdictions take different views of that question, it may become necessary, in a given case, to choose between them. It would seem that the law of the place where the note is delivered so as to become binding upon the regular maker, if it is also payable there, must prevail over the law of the place where the irregular maker or indorser indorsed his name, since his contract is deemed to have been made at the place where the note was first delivered so as to become binding upon him, and, *ex hypothesi*, that is the place where it was delivered so as to become binding upon the regular maker. This view appears to have been taken in the three cases next cited:

The Massachusetts rule, that one who signs a note on its back before delivery to the payee is a promisor and the promise is binding upon him without demand or notice, governs the liability of one who, at the request of the maker, placed his name on such a note in New York, the note being afterwards returned to the maker and delivered by him to the payee in Massachusetts. *Lawrence v. Bassett*, 5 Allen, 140.

The rule in New York, whereby one who indorses a note before delivery to the payee stands as a first indorser, and is entitled to have demand made upon the maker and to have protest

liability thereon as against subsequent indorsers, then the indorsers cannot be compelled to pay it. Now, the plaintiff's claim throughout this litigation is that the defendant cannot enforce the contract of indorsement because it has destroyed the plaintiff's remedy against Ong, the maker of the note. Turning to the findings of fact, for the purpose of learning whether this contention be well founded, we find that the defendant recovered a judgment against the maker of the note, Ong, in the state of Louisiana, and later sold and assigned the judgment to one Hiller for 50 per cent of its face value, and caused or permitted an order to be entered in the action which declared that Hiller "be subrogated to all the plaintiff's [defendant here] rights, claims, and demands in and to the judgment therein against the defendant R. M. Ong." A reservation, not mentioned

in the assignment or order of subrogation, of the defendant's rights against the indorser, was also made by the defendant with the assent of both Hiller and Ong.

The next inquiry naturally is, Was the legal effect of this action to release Ong from all liability on the note to the indorser in the event that he should pay voluntarily, or otherwise, the 50 per cent of the note uncollected by the defendant? The answer must, of course, be furnished by the law of the state of Louisiana because Ong's contract, as maker of the note, was a Louisiana contract, and the contract of assignment, and such reservation as was attempted to be made, was made within, and is governed by, the law of that state. And the answer, for the purposes of this action, could only be obtained by the introduction of evidence showing what the law of Louisiana is, so far as

in the usual way, governs where the note was drawn and dated in Tennessee, executed by a corporation of West Virginia, and indorsed by an officer of such corporation, and forwarded to New York in payment for goods purchased in that state. *Carnegie Steel Co. v. Chattanooga Constr. Co.* (Tenn. Ch. App.) 38 S. W. 102. The decision is upon the ground that both the note and the indorsement became operative by delivery in New York, and that each was, therefore, a New York contract. The note was also payable in New York.

In *New York L. Ins. Co. v. McKellar*, 68 N. H. 326, 44 Atl. 516, a note was written in New Hampshire and signed by the maker and indorsed by two other parties in that state, and delivered to the payee in Massachusetts upon the surrender of a bond held against the obligors. By the law of New Hampshire parties who signed in blank upon the back of a note before its delivery to the payee are liable as original promisors, and are not indorsers entitled to notice; but the Massachusetts statute provides that such parties shall be entitled to notice of nonpayment the same as an indorser. It was held that the law of Massachusetts governed, and that the parties were therefore entitled to notice of nonpayment. In reply to the contention of the holder that the liability of an indorser is to be tested by the law of the place of indorsement, the court held that the indorsement must be deemed to have been made in Massachusetts, since the note was first delivered there, and that, moreover, by the law of Massachusetts the parties are not strictly indorsers, but in reality makers; and that the liability of the maker of a note executed in one state and payable in another is controlled by the law of the state in which the engagement is to be performed.

In *Wylle v. Cotter*, 170 Mass. 356, 49 N. E. 740, it was also held that the question whether one who put his name on the back of a note before delivery was a mere indorser or a joint maker or guarantor was to be determined by the law of New York, the note having been made, delivered, and payable there; and it was held, in accordance with the law of New York, that he was merely an indorser. It does not appear in this case, however, that the indorsement was written upon the note in Massachusetts, and it is probable that it was placed thereon in New York, though, in view of the decisions in the preceding cases, the fact in that respect would not be material.

In *Browning v. Merritt*, 61 Ind. 425, however, where a note payable in New York was executed in Indiana, and, before delivery to the payee, 61 L. R. A.

was indorsed by third persons, it was apparently assumed that the relation of such third parties to the note was governed by the rule in Indiana, whereby, when a note is indorsed concurrently with its execution, and, at or before its delivery to the payee, by persons other than the payee, the liability assumed by them, though presumptively that of indorsers only, may be shown by parol evidence to be the liability of joint makers or guarantors of the note, according to the intention of the parties and the facts of the case.

In *Greathead v. Walton*, 40 Conn. 226, also, the law of the state where the irregular indorsement was written was allowed to prevail over that of the place where the note was first negotiated, so as to become binding upon the regular maker. In this case the rule of law in Connecticut, by which one who indorses a note in blank before its delivery to the payee is liable to the latter, was held to govern a note which was made and payable in New York and indorsed in Connecticut by a third person, notwithstanding that the note was first negotiated so as to become binding upon the regular maker in New York. In this case, however, the payee, who was the plaintiff in the action, was an accommodation party, and lent his name to the note upon the express understanding with the regular maker that the person who afterwards indorsed the note in blank should sign the note as a joint maker so as to become liable to him (the payee). As a matter of fact, however, the irregular indorser signed upon the express understanding with the regular maker, of which the payee was not aware, that she should assume no liability to the payee. The court seems to have been of the opinion that the contract, as between the payee and such irregular indorser, must be regarded as having been made in Connecticut, but held, irrespective of that point, that the parties must be regarded as having entered into the contract with reference to the law of Connecticut by which such an indorser becomes liable to the payee. The court said, in this connection: "It is manifest that the defendant [the irregular indorser] supposed she would incur a liability to the plaintiff [the payee] by her indorsement, unless she made a stipulation to the contrary; which stipulation, though made, must, for reasons already given, be laid out of the case. It is equally manifest that the plaintiff put his name on this note relying on the security given him by the defendant's name. If the law of New York would not, under the circumstances, impose any liability on the defendant, we must take it for granted that the parties entered into this contract with ref-

it relates to that question, for what may be the foreign law upon a given subject presents a question of fact, not a question of law (*Genet v. Delaware & H. Canal Co.* 163 N. Y. 175, 177, 57 N. E. 297), and must be both proved and found like any other question of fact. It follows, necessarily, that, when found as a fact by a trial court or referee, the effect of a unanimous affirmance of a judgment based in part thereon is to compel this court to treat such finding precisely as it does any other finding of fact, namely, as importing absolute verity.

Again turning to the findings, we find it stated that by the law of Louisiana the effect of the said transaction between this defendant and Hiller and Ong was to relieve Ong from all liability upon the note as maker. The plaintiff's remedy as against the maker has therefore been swept away by

the affirmative action of this defendant, and hence, under the general rule of law that obtains in such case in this state, the defendant must be deemed to have lost the right that it once had to collect the note or any part of it from the plaintiff.

The learned counsel for the appellant insists that, even if it be true that the legal effect of the assignment of the judgment and the entry of the order of subrogation operated to discharge the maker from all liability on the note, nevertheless the effect of the holder's reservation of his rights against the indorser permits recovery from him on the note under the law of this state, which governs, as we have seen, the contract of indorsement. The legal effect of such a contention necessarily is that there exists in this state an exception to the general rule that a holder who so acts as to discharge a

erence to the law of Connecticut, under which, certainly, the liability was incurred."

It is difficult to determine from the cases whether the character of such an irregular indorser as maker or indorser is to be determined by the law of the place where the note is made, or that of the place where it is payable, if the same are in conflict. In *Lawrence v. Bassett*, 5 Allen, 140, *supra*, it was held that the *lex loci contractus* governed, but in this case there was no place of payment specified. In *Carnegie Steel Co. v. Chattanooga Constr. Co.* (Tenn. Ch. App.) 38 S. W. 102, *supra*, the decision was upon the ground that the contract became operative upon delivery in New York; but in this case the note was also payable in New York, so that there was no conflict between the law of the place where the contract was made and where it was payable. In *New York L. Ins. Co. v. McKellar*, 68 N. H. 326, 44 Atl. 510, *supra*, it will be observed that the court said that the liability of the maker of a note executed in one state and payable in another is controlled by the law of the state in which his engagement is to be performed. Probably the court meant by this that the character of an irregular indorser as maker or indorser was also to be determined by the law of the place of payment in case of such a conflict, although it may have meant merely that, when the person's character as maker had been determined, his liability was to be determined by the law of the place of payment. As a matter of fact, in this case the note, both as to the maker and irregular indorser, was delivered in Massachusetts, and was therefore deemed to have been made in that state, and was also payable there, so that there was no conflict between the law of the place where the contract was made and where it was payable. It is shown in *infra*, IX. d, that the law of the place where the note is payable prevails over that of the place where it is made, in case of a conflict respecting the liability of the maker; and probably the same rule is to be applied in determining whether an irregular indorser is, in legal effect, a maker or indorser, though the latter proposition is not a necessary corollary of the former.

Assuming that one who writes his name on the back of a promissory note for the purpose of giving the maker credit with the payee is himself a joint maker, the question whether he is entitled to notice of nonpayment the same as the indorser is to be determined by the law of the place where the note is payable, because the parties will be deemed to have had reference to the law of that state in construction of the obligation assumed. *Phipps v. Harding*, 30 L. R. 61 L. R. A.

A. 513, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468. The court said it would be otherwise with respect to the indorser of a note, for he is treated as in fact entering into a new obligation, undertaking that the maker will pay at the time and place stipulated, and that he (the indorser) will respond to his obligation at the place of the execution of his indorsement, if there delivered, in the event of dishonor and notice. While the decision seems to be upon the ground that the law of the place of payment governs with respect to the point in question, the note, though signed in another state, was first delivered in the state where it was payable.

VII. Character of holder.

See also *supra*, II.

It is shown in *infra*, IX., c, that the liability of the maker of a note, or the acceptor of a bill of exchange (the primary obligor) is to be determined by the law of his contract (which, according to the weight of authority, is the law of the place of payment [*infra*, IX. d]); and cannot be increased, diminished, or modified by the law of the contract of indorsement. It does not necessarily follow, however, that the character of a subsequent party as a bona fide holder is to be determined by the law of the contract of the maker or acceptor; for it may be that while that law, without reference to the law of the contract of indorsement, determines the liability of the maker or acceptor to a person who is ascertained to be a bona fide holder, yet the law of the contract of indorsement may determine who is a bona fide holder for the purposes of the former law. The cases seem to be very nearly equally divided upon this point; and it is difficult to determine on which side the weight of authority lies.

Thus, in *Webster v. Howe Mach. Co.* 54 Conn. 400, 8 Atl. 482, it was held that the question whether the payee of a draft drawn upon a New York corporation and accepted by its treasurer, payable at its office in New York, who applied the proceeds to an existing indebtedness of the drawer, is a bona fide holder entitled to protection against the defense that the acceptance by the treasurer was for the accommodation of the drawer merely, and in fraud of the corporation,—was to be determined by the law of New York, where the acceptance was made, and where the bill was payable, although the bill was drawn, and seems to have been discounted, in London.

In *Woodruff v. Hill*, 116 Mass. 310, it was held that the question whether one who took a

maker from all liability on a note releases all subsequent indorsers from liability thereon, and is to be found in a case where, at the time of releasing the maker, the holder expressly reserves all rights against the indorsers. If his contention be well founded, the exception would so operate as to destroy in large measure the value of the general rule, which is well grounded in reason as well as authority, for in many cases the holder could deprive the indorser of his remedy over against the maker, and still pursue the holder's remedy against the indorser, by a simple agreement with the maker that the holder's rights against the indorser should be reserved. He cites in support of his position the following cases in this court: *Morgan v. Smith*, 70 N. Y. 537; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Palmer v. Purdy*, 83 N. Y. 144.

note in payment of a pre-existing debt was entitled to protection against equities existing between the maker and the payee was to be governed by the law of Massachusetts, where the note was made and was payable, although the indorsement was made in New York. The decision is not upon the ground that Massachusetts is the *lex fort*, but that the note was made in Massachusetts, and that the contract of the maker with the payee, and with any indorsees thereof, was to be performed in Massachusetts.

The opinion in *Green v. Kennedy*, 6 Mo. App. 577, is not reported, there being a mere statement of the points decided; but one of those points was that a note executed and negotiated in another state, but payable in Missouri, is governed by the law of Missouri; and another was that the discharge of a pre-existing debt is sufficient to give one the character of a bona fide holder; from which it would appear that the law of the place of payment was regarded as settling the latter question. It does not appear, however, where the contract of indorsement was made.

So, in *Allen v. Bratton*, 47 Miss. 119, where the question was whether the suspension or satisfaction of a precedent debt was sufficient consideration to give the indorsee the position of a bona fide purchaser entitled to protection as against prior equities, the court held that, as the notes in question were executed and to be paid in Tennessee, they were to be governed by the law of that state. It does not appear where the notes were indorsed, but the decision is clearly upon the ground that the law of the maker's contract governs.

The question whether accepting a bill or note in payment of a precedent debt is a parting with value so as to make the holder a bona fide holder for value is to be determined by the law of New York, where the bill of exchange was payable in New York, although drawn, accepted, and delivered to the payee, in Indiana. *Bright v. Judson*, 47 Barb. 29.

The question whether a precedent debt is a sufficient consideration to give the indorsee of a negotiable warehouse receipt the character of a bona fide holder is to be determined by the law of the state where the warrant was issued and is payable, so far as it affects the right of the maker to avail himself, as against the transferee, of a defense which would have been available against the party to whom the warrant was issued. *First Nat. Bank v. Dean*, 28 Jones & S. 299, 16 N. Y. Supp. 107, Affirmed in 28 Jones & S. 306, 17 N. Y. Supp. 375. The court said that, as between the indorser and in-

In *Morgan v. Smith* no such question was involved. The defendants were cosureties upon a lease, and, after the lessees had taken possession under the lease, they entered into an agreement with the lessor that the latter should rent the premises for them at their risk, crediting to them any receipts for rent, with a condition that the agreement should not impair or alter the relations of the parties, the covenants of the lease, or the security for the rent. It was held that the agreement, even without the condition, was no more in effect than a consent that the lessees might underlet, and that, under the condition, the rights of the sureties were in no wise affected. The court concluded the opinion in these words: "The delivery and reception of the key was not a surrender or taking possession of the premises, but an intrusting to the plaintiff of the control of

dorsee, the question might depend upon the law of the place where the indorsement was made.

In *Emanuel v. White*, 34 Miss. 56, 69 Am. Dec. 385, the note was made in Mississippi and payable in Louisiana. It does not expressly appear where the contract of indorsement was made, but probably in Maryland, as both the payee and indorsee resided there. There were two questions in this case: One, whether it was incumbent upon the plaintiff to prove that he took the note before maturity for a valuable consideration; and the other, whether one who takes a note for an antecedent debt is a bona fide holder. With reference to the first question, the court said that the note, being payable in Louisiana, was, of course, governed by the rules of commercial law which prevail in that state, and therefore applied the rule of that state by which the holder of negotiable paper is presumed to be a bona fide holder for valuable consideration until something is shown in disparagement of his title. The second question was not expressly decided by the application of the law of Louisiana, and in fact a Mississippi decision is cited in support of the decision that the discharge of an antecedent debt is sufficient to make one a bona fide holder; but if, in the view of the court, the first question was to be determined by the law of the place of payment, it would seem, *a fortiori*, the second question ought to be.

The question whether one who takes a promissory note as security for, or in payment of, an existing debt is entitled to protection against equities existing between the original parties is to be determined by the law of the state where he acquires the note. *Woodsen v. Owens* (Miss.) 12 So. 207.

And so it was held in *Brook v. Vannest*, 58 N. J. L. 162, 33 Atl. 382, that the question whether one who takes a negotiable note before maturity, as a security for a precedent debt, is a bona fide holder, is to be determined by the law of the place where the transfer was made, although the note was payable in another state.

And *King v. Doolittle*, 1 Head, 88, also held that the question whether the transfer of negotiable paper in payment of, or security for, a pre-existing debt is a transfer in due course of trade, so as to protect the paper in the hands of the transferee against the equities to which it is subject as between the original parties, was to be determined by the law of the place where the contract of indorsement was made. As a matter of fact, in this case, however, both note and indorsement were made in Pennsylvania.

them for the purpose of letting them in behalf of the lessees, they all the while remaining tenants and liable for the rent according to the terms of the lease. We do not think that this point can be sustained."

Calvo v. Davies was an action to enforce a mortgage upon premises subsequently sold to a grantee, who in his deed assumed its payment, and later entered into an agreement with the mortgagee to extend the time of payment, without the consent of his grantor. Held, that the effect of the agreement was to discharge the grantor and mortgagor from liability for the mortgage debt.

In *Palmer v. Purdy*, of the four tenants, all liable for rent to the plaintiff, two left the firm, after having made an agreement with the other two that they should assume the payment of rent thereafter to accrue, but the fact of this agreement was not fairly communicated to the landlord, so this court held that he was not called upon to treat the outgoing members as sureties, but could legally deal with them all as principal debtors. So the defense that, by the acceptance of the notes of the two members continuing in possession of the premises, the landlord

had extended the time of payment of the rent was brushed aside, and then the court added further that, even if it accorded to them the rights of sureties, the plaintiff's acceptance of the notes, upon an express reservation of his rights and remedies as against them, prevented it from operating as an absolute, and made it only a "qualified and conditional, suspension of the right of action. . . . It is to be treated, in effect, as if it was made in express terms subject to the consent of the surety, and the surety is not thereby discharged."

That rule has never been applied to an indorser on a promissory note by this court, and never can be, when, as in this case, there is to be found in the facts and circumstances surrounding the transaction no opportunity to treat the release of the maker as having been made subject to the consent of the indorser.

The judgment should be affirmed, with costs.

Gray, O'Brien, Bartlett, Haight, Vann, and Cullen, JJ., concur.

So, in *Holt v. McCann* (Tex. Civ. App.) 42 S. W. 310, it was held that the New York rule, that one who takes a negotiable note in payment of an antecedent indebtedness is not entitled to protection as a bona fide holder, governed an indorsement and transfer of a note made in New York. It does not appear where the note was made or payable, but the decision is upon the ground that the law of the place of the contract of indorsement governs.

In *Culver v. Benedict*, 13 Gray, 7, the question whether a pre-existing debt was a sufficient consideration to give a purchaser of negotiable instruments the character of a bona fide holder was determined by the law of Massachusetts upon the ground that the transfer was made there; but in this case the question arose between the original owner of negotiable bonds and one who purchased them from a third person, with whom they were deposited, but who transferred them in violation of his trust under such circumstances as to entitle the transferee to protection if he was a bona fide holder for value. The only conflict passed upon by the court was that between Massachusetts, as the place where the transfer was actually made, and New York, where the original agreement for the transfer was made.

The law of Massachusetts, by which a party who takes a negotiable instrument in payment of a pre-existing debt is regarded as entitled to the same protection as any other taker for a valuable consideration, must govern in a trial in this commonwealth. *Ives v. Farmers' Bank*, 2 Allen, 236. It would seem from this statement that the court regarded the question as one to be determined by the *lex fori*. The note in this case was made and payable in New York and was indorsed in Connecticut, and the court, after making the statement above referred to, stated that the same rule prevailed in Connecticut, where the note was negotiated, and that that was, also, the latest rule adopted in New York; so that, in the view of the court, there was really no conflict of laws on the subject.

In *Russell v. Buck*, 14 Vt. 147, the New York rule that one who takes a note in payment, or as security, for a precedent debt, is not entitled to protection as a bona fide holder, was applied: but in this case the note was made

and was payable in New York, and was also indorsed there.

The question thus far discussed, bearing upon the bona fide character of parties, clearly relates to the substantive contract as distinguished from the remedy; and, with the exception of *Ives v. Farmers' Bank*, 2 Allen, 236, the courts seem to have regarded the choice of laws as restricted to the law of the substantive contract of the original obligor, or that of the contract of transfer or indorsement. When, however, the question is as to the presumptions to be indulged with reference to the bona fides of the transaction, the claims of the law of the forum must be considered.

In *Limerick Nat. Bank v. Howard*, 71 N. H. 13, 51 Atl. 641, however, the court held that the rule of law in Vermont, to the effect that an indorsee in blank of a promissory note is put upon inquiry if he has knowledge of facts and circumstances that would lead a careful and prudent man to suspect that the paper was invalid as between the antecedent parties, governed in an action, in New Hampshire, upon a note made, payable, and indorsed in Vermont, notwithstanding that by the law of New Hampshire mere suspicion of facts which would be a defense to a note in the hands of payee is not notice of, and does not put the indorsee upon inquiry as to, such facts. The conflict here was merely between the law of the place of the contract and the law of the forum, and the decision was made to turn upon the question whether the matter pertained to the substantive contract or to the remedy, it being held that it pertained to the substantive contract. The court said: "While it is not inaccurate to say that upon the plaintiff's evidence and the evidence offered by the defendants, the question is whether a finding that the plaintiff was not a bona fide holder could be supported,—that is, whether all the evidence is sufficient for that purpose,—that method of stating the question is liable to be misleading, and to suggest, in the first instance, that nothing is involved but matters relating solely to the remedy. If the expression 'bona fide holder' had the same legal meaning in New Hampshire and Vermont, it is not unlikely that this case might present nothing but a question of the sufficiency of evi-

dence which the law of the forum would ordinarily determine." The court then proceeds to show that the term "bona fide holder" has a different meaning by the law of Vermont than it has by the law of New Hampshire, and that, as the parties contracted with reference to the former law, they in effect embodied that law in their contract.

As already shown, the Mississippi supreme court, in *Emanuel v. White*, 34 Miss. 56, 69 Am. Dec. 385, made a similar decision.

VIII. *Negotiability in general; bill or note fraudulently transferred.*

The question, what law determines the character of an instrument as negotiable or otherwise, is, of course, an important one; but its importance lies in the fact that certain properties or qualities are dependent upon the character of the instrument in this respect. Except for the purpose of ascertaining whether a given instrument has one or more of the peculiar properties or qualities that attach to negotiable paper, the question of its negotiability is of no practical consequence. These properties and qualities vary widely in their nature and their effect upon the rights of the parties. One of them, for instance, relates to the substantive liability of the acceptor of a bill or the maker of a note (the primary obligors); another relates to the substantive liability of the drawer of a bill or indorser of a bill or note (secondary obligors); another relates to the conditions precedent to the liability of the secondary obligors; and still others relate to the remedies available to the parties. It is conceivable that the courts might take the position that, while the instrument will be subjected, successively, to different laws accordingly as one or the other of these various matters is in question, yet, for the purposes of all these different laws, the character of the instrument as negotiable or otherwise is to be determined by a uniform unvarying law. For instance, assuming that the question whether the assignee or indorsee may maintain an action in his own name is governed by the law of the forum, the courts might, and in some instances (*infra*, XI.) have, adopted the view that when, by the law of the forum, his right in that respect depends upon the question whether the instrument is negotiable or not, its character in that respect is to be determined by the substantive law of the contract, and not by the law of the forum. The cases, however, by no means agree that the question as to the negotiability of a particular instrument is always to be determined by the same law, without reference to the particular properties or qualities that are involved in the case. For this reason, the question, what law governs in respect to negotiability, cannot be satisfactorily treated in a general and abstract manner, and without reference to the particular property or quality dependent upon the character of the instrument in that respect. The question, therefore, as affecting each of the distinctive properties or qualities attaching to negotiable paper, is discussed under the subdivision covering that property or quality. An exception, however, is made so far as the question of negotiability concerns the respective rights of one who has been fraudulently deprived of an instrument and one who has obtained the same from or through a person who had no authority to transfer it. In this respect the question as to negotiability is not subsidiary to any other question discussed in the note, and for that reason is separately discussed in this subdivision.

While it is difficult to reconcile all the statements made by the courts upon this subject. It will be seen, by the cases hereinafter cited, that 61 L. R. A.

the weight of authority is that the negotiability of an instrument for the purposes last referred to depends, not upon the substantive law of the original contract, but upon the law of the place where the transfer to the present holder took place.

In *Gorgier v. Mievillie*, 3 Barn. & C. 45, 4 Dowl. & R. 641, 2 L. J. K. B. 206, the court held that a bond, by which the King of Prussia declared himself and successors bound to every person who should, for the time being, be the holder of the bond, was analogous to a bill of exchange indorsed in blank, and that one who receives such bond in pledge from an agent who pledged it in violation of his trust to the principal was entitled to hold it as against the principal. The decision as to the negotiable character of the bond was based upon proof at the trial that bonds of such description were sold in the market as negotiable paper.

In *Lang v. Smyth*, 7 Bing. 284, 5 Moore & P. 78, 9 L. J. C. P. 91, it was held that the question as to the negotiability of bonds issued by the Neapolitan government was properly submitted to the jury in an action between the owner of such bonds and one who purchased them in England from the latter's agent, who transferred them in violation of his trust. Chief Justice Tindal said, in reply to the contention that the question of negotiability was one for the court, that the bonds were not English instruments recognized by the law of England, but Neapolitan, and the court was not allowed to form an opinion upon them unless supplied with evidence as to the law of the country whence they came. He distinguished *Gorgier v. Mievillie*, 3 Barn. & C. 45, 4 Dowl. & R. 641, 2 L. J. K. B. 206, upon the ground that in that case evidence was given that, by the usage of merchants "in this country," those bonds passed from hand to hand, which usage could scarcely have existed unless they were negotiable by delivery in Prussia; so that evidence as to the law of Prussia was rendered unnecessary. He further remarks, however: "And the question is, not so much what is the usage in the country whence the instrument comes, as in the country where it is passed." This last remark seems to combat the inference that would naturally be drawn from what went before, that the question of negotiability, even as affecting the sufficiency of the transfer, was to be determined by the law of the country whose government issued the bonds.

In *Goodwin v. Roberts*, L. R. 1 App. Cas. 476, 45 L. J. Exch. N. S. 748, 35 L. T. N. S. 179, 24 Week. Rep. 987, it was held that the scrip of a foreign government, issued by it on negotiating a loan (which scrip promised to give the bearer, after the payment of all instalments, a bond for the amount paid, with interest), was held to be negotiable, and to pass by mere delivery to a bona fide holder for value. The question in this case was whether a purchaser of such scrip, who left it in the hands of his broker, could maintain trover for it, or for the value thereof, against one who, in good faith, acquired the scrip under a transfer by the broker in violation of his trust. It was held that the plaintiff could not recover. The decision that the scrip was negotiable seems to have been based upon a statement in the special case to the effect that such scrip had for many years been regarded and dealt with upon the European stock exchanges as negotiable. Lord Selborne referred to the fact that the special case was silent as to the laws of Russia and of Austria (by which governments the scrip in question was issued) with respect to the character and negotiability of such instruments, and

quoted with approval the statement of Lord Chief Justice Tindal in *Lang v. Smyth*, 7 Bing. 284, 5 Moore & P. 78, 9 L. J. C. P. 91, to the effect that proof of such a usage as that referred to was sufficient to justify the inference that such instruments are negotiable in the states by which they were issued so as to render evidence of the laws of those states unnecessary; and the further statement of the Lord Chief Justice to the effect that "the question [when the effect, not of the instrument transferred, but of the transfer of that instrument in England, is the thing in controversy] is not so much what is the usage in the country whence the instrument comes, as in the country where it is passed."

In *Picker v. London & County Banking Co. L. R. 18 Q. B. Div. 515*, 56 L. J. Q. B. N. S. 299, 35 Week. Rep. 469, the court of appeal distinctly announced the doctrine that the negotiability of an instrument is to be determined by the law of England or the custom of English merchants, and not by the law of any foreign country. It was accordingly held in this case that the owner of Prussian bonds, which, for the purposes of the decision, were assumed to be negotiable according to the law of Prussia, which were stolen from him, could recover them from an English bank which received them in good faith without being aware of anything wrong in relation to them.

In *Williams v. Colonial Bank*, L. R. 38 Ch. Div. 388, 57 L. J. Ch. N. S. 826, 59 L. T. N. S. 643, 36 Week. Rep. 625, Affirmed in L. R. 15 App. Cas. 267, 60 L. J. Ch. N. S. 136, 63 L. T. N. S. 27, 39 Week. Rep. 17, the executors of an English holder of shares in an American railroad, in order that the shares might be registered in their names, signed blank transfers with powers of attorney indorsed on the share certificates, and gave them to their brokers in London; the latter fraudulently deposited them with a London bank as security for advances made to themselves, and afterwards became bankrupt; in a controversy between the executors and the bank over the right to the shares, it was held that the law of England governed, and, accordingly, that the executors were entitled to the shares as against the bank. Upon the proof in the case as to the American law on the subject, the certificates so indorsed were not negotiable. The bank relied upon the doctrine of estoppel, and the evidence tended to show that such contention, under the circumstances, was well based according to the American law. Cotton, L. J., said: "Now the question here whether . . . [the brokers] gave the banks a good title to the certificates depends on transactions in England, and must be decided by the law of England, and not by the law of America. The law of America, in my opinion, is properly referred to for the purpose of deciding what would be the effect of a valid, effectual transfer of the certificates on the title to shares in an American company, but whether . . . [the brokers] transferred to the banks a good title to the certificates depends on transactions in England, and in no way depends on the law of America. So, also, the question whether the plaintiffs have been estopped by any act of theirs from questioning the title of the transferees of . . . [the brokers] must be a question of English law." It is not clear from this opinion whether the negotiability of the instruments as affecting the validity of the bank's title would have been governed by the law of England or by the law of America if the two had differed on this point. Lindley, L. J., however, discusses the question upon the hypothesis that the certificates, as indorsed by the executors, were negotiable instruments accord-

ing to the American law, and held that, even on that assumption, their negotiability, so far as it affected the bank's title, would be governed by the law of England. Rowen, L. J., took the same position, saying that it was immaterial whether the instruments were negotiable according to American law, since they were not negotiable according to the law of England. Lindley, L. J., further said: "Moreover, it may be that the consequences of having acquired a title to the certificate may depend upon American law, but the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all."

All the lords who expressed opinions substantially agreed in the statement of Lord Herschell that the question what is necessary or effectual to transfer the shares in a New York corporation, or to perfect the title to them, where there is, or must be held to have been, an intention to transfer them, is answered with reference to the law of New York, although the transactions relied upon took place in England between persons domiciled in England; but that the law of New York, as proved in the case, made the foundation of the title of the bona fide purchaser for value of certificates of stock delivered to him in fraud of the rights of the owner dependent upon the principle of estoppel. The view seems to have been entertained that upon the question of estoppel the law of England governed, though in some of the opinions the court seems to have taken the view that the law of England on the subject of estoppel was the same as the law of New York as proved in the case.

In *Wylie v. Speyer* (1881) 62 How. Pr. 107, however, where coupons detached from railroad bonds had been stolen in Massachusetts, and sold, after maturity, in a foreign country, to a bona fide purchaser, it was held that the law of New York, according to which a purchaser after maturity, under such circumstances, acquires no title as against the person from whom the coupons were stolen, rather than the contrary rule prevailing in the foreign country, governed the rights of the parties in an action in New York between the original owner and the purchaser. The decision seems to be upon the ground that, inasmuch as New York was the forum and the property in question was there at the time of the suit, the court would apply the law of New York to the rights of the parties.

IX. *Liability of, and defenses available to, maker or acceptor.*

a. *In general.*

Since there are at least four different places, any one of which might conceivably furnish the law governing the liability of the maker or acceptor, namely, (1) the law of the forum; (2) the law of the place where the bill or note was indorsed or transferred; (3) the law of the place where the bill or note was drawn or made; (4) the law of the place where the bill or note is payable,—it is apparent that it will seldom happen that any one case can be cited as an authoritative decision in favor of the law of any one of those places as against the laws of all the others, since, in most cases at least, two or more of those places will coincide, and the facts will not call for a choice as between them. Therefore, it is necessary, in order to reach the ultimate law that prevails over all other possible laws, to proceed by a process of elimination, recognizing each case as full and positive authority only for the elimination of the particular law or laws it expressly discards, and negative authority for the elimination of any law it may impliedly discard by failing

to apply it, with, perhaps, an incidental indication in favor of one or another of the coincident laws from the fact that it designates the law that governs by reference to the particular element of the note or bill that furnishes that law. For instance, the law of a place where a note is made and payable may be the same; and a decision that applies the law of that place, rather than that of another place where the note was indorsed, is an authoritative decision only so far as it eliminates the latter law; and yet, by designating the law of the place of payment as the governing law, it lends some support to the proposition that, in case of a conflict between the law of the place where the note was made and that of the place where it is payable, the latter governs. Care should be taken, however, not to attach too much importance to such indications, as the courts frequently select the particular designation of the law as a mere matter of convenience, and without any intention to discriminate between the coincident laws, or any purpose beyond the elimination of the law of a third place. The process above indicated has been adopted in the citations of the cases in subdivisions IX. b, c, and d, *infra*. The cases cited in subdivision IX. b, are full authority only upon the point as to elimination upon the question of the primary obligor's liability of the law of the forum. Those cited in subd. IX. c, are full authority only upon the point as to the elimination, upon this question, of the law of the place of indorsement; those cited in subdivision IX. d, are full authority only upon the point whether, as between the law of the place where the bill is drawn or the note made and that of the place where the same is payable, the former or latter governs. It is apparent, however, that the cases cited in IX. c, are indirect authority for the elimination of the law of the forum; and that the cases cited in IX. d, are indirect authority for the elimination of both the law of the forum and the law of the contract of indorsement, so far as the liability of the primary obligors is concerned. It is also apparent that, if the law of the forum is eliminated by subdivision IX. b, and the law of the place of indorsement by subdivision IX. c, the law chosen by the weight of authority of the cases cited in subdivision IX. d, is the ultimate law that prevails over all the others upon the point in question.

b. *As between the law of the substantive contract and the law of the remedy.*

The cases hold with practical unanimity that the liability of, and the defenses available to, the maker or acceptor, whether dependent upon the negotiable character of the instrument or not, are governed by the law of the substantive contract, using that term in the sense above explained, rather than by the law of the forum. This is assumed in subdivisions IX. c, and d, *infra*, and is expressly held in the following cases, in which the court expressly eliminated the law of the forum as the governing law: *Roe v. Jerome*, 18 Conn. 138; *Stacy v. Baker*, 2 Ill. 417; *Yeatman v. Cullen*, 5 Blackf. 240; *Smith v. Blatchford*, 2 Ind. 184, 52 Am. Dec. 504; *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775; *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; *Bliss v. Houghton*, 13 N. H. 128; *Bliss v. Houghton*, 16 N. H. 90; *Smithwick v. Anderson*, 2 Swan, 575; *Harrison v. Edwards*, 12 Vt. 648, 36 Am. Dec. 364.

The Kentucky court of appeals, in *Davis v. Morton*, 5 Bush, 160, 96 Am. Dec. 345, held that, notwithstanding that a note was negotiable by the law of Tennessee, where it was made and payable (and which was assumed to be the law of the substantive contract), the maker might

nevertheless, in an action thereon against him in Kentucky by a bona fide indorsee, avail himself of a set-off existing against the payee before notice of assignment. The decision was upon the ground that the note was not in the form required by the law of Kentucky to put it upon the footing of a bill of exchange, and that the statute of Kentucky, providing that an action by an assignee of a thing in action, other than a bill of exchange or a promissory note placed upon the footing of such a bill, shall be without prejudice to any discount, set-off, or defense,—pertained to the remedy, and not to the substantive contract, and therefore applied, although the substantive contract was governed by the law of Tennessee. This decision, however, was expressly overruled by the case of *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775, so far as it made the negotiability of the instrument depend upon the law of the forum rather than the law of the substantive contract. In the latter case it was held that a note, being by the law of Ohio (which was held to be the law of the substantive contract) placed upon the footing of a bill of exchange, so that by that law an innocent indorsee was protected against equities existing against the payee, was not subject, in an action thereon in Kentucky, to a set-off in favor of the maker against the payee, although, according to the law of Kentucky (*law fort*), the note was not on the footing of a bill of exchange. The court conceded as a general proposition that set-offs are creatures of law of the forum, and may be pleaded to a contract if allowed by the law of the forum, though not allowed as a defense by the law of the place where the contract was to be executed. It held, however, that the character of the instrument as negotiable or otherwise, for the purposes of the Kentucky statutes relating to the defenses and set-offs available to the maker against the indorsee, was to be determined by the law of the substantive contract, and not by the law of the forum.

The opinion in *Second Nat. Bank v. Hemingray*, 31 Ohio St. 168, referring to the decision in *Davis v. Morton*, 5 Bush, 160, 96 Am. Dec. 345, said: "Now, while I am quite willing to admit that this decision of the Kentucky court is bad law in so far as it denies to Tennessee the right to fix the negotiable character of its own paper, I think it ought to be regarded as good authority to show that, by the true construction of the Kentucky statute, it can have no extraterritorial effect in matters of set-off." The Ohio case involved the right of the maker of a note in Kentucky to avail himself of the Kentucky statute above referred to, in an action in Ohio by the indorsee. The court, while holding that the negotiable or non-negotiable character of an instrument is to be determined by the law of the place where it is made, distinguished between the question of negotiability and the question of offset, and held, in view of the Kentucky decision referred to, that the Kentucky statute with reference to set-off related to the remedy, and had no extraterritorial effect. The right of the maker to avail himself, as against the indorsee, of a set-off existing against the original payee, was therefore denied. *McIlvaine, J.*, dissented, taking the view that the Kentucky statute inhered in the notes for the purpose of determining the character and equity of the contract. He said: "After the quality and nature of the contract are ascertained by the statute of Kentucky, of course the laws of Ohio in relation to offset should control the rights of the parties in the courts of this state. And if the notes are not negotiable, they were subject, under our laws, to the defense of offset as to all claims acquired by the

maker before notice of the assignment, and pleaded by way of such defense."

The supreme judicial court of Massachusetts, in *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753, seems to take the same position with reference to the Kentucky statute as that taken in the dissenting opinion in the preceding case. It was held in this case that the Kentucky statute applied in an action in Massachusetts upon a note made and payable in Kentucky which was negotiable in form, but was not placed upon the footing of a bill of exchange according to the law of Kentucky.

Roots v. Merriweather, 8 Bush, 397, assumed that the question as to the right of the maker of a note to avail himself of the defense of failure of consideration as against an indorsee would be governed by the law of the place governing the substantive contract if that law were ascertained; but, there being no proof of that law, the question was determined by the law of the forum.

In *Warren v. Copelin*, 4 Met. 594, it was held that the maker of a note which, by the law of Connecticut where it was made and payable and indorsed, was not negotiable, could defend an action thereon in Massachusetts by the indorsee, upon the ground that, prior to the indorsement, and before he had notice thereof, he was garnished by a creditor of the original payee, it being the law of Connecticut that the rights of the garnishing creditor, under such circumstances, are superior to those of the assignee, though the rule in Massachusetts is otherwise. See also *Lodge v. Phelps*, 1 Johns. Cas. 139, 2 Cal. Cas. 321, *infra*, XI.

c. As between the law of the original contract and the law of the contract of indorsement.

While, as will be shown in a subsequent subdivision, the indorsement of a note or bill constitutes a separate and distinct contract, which, so far as concerns the liability of the indorser to subsequent parties, is governed by the law of the place of indorsement, yet it is established, practically without contradiction, that the liability of, and defenses available to, the maker of a note or acceptor of a bill of exchange are to be determined by the law that originally governed his contract (without reference now to whether that is the law of the place where the contract was made, or that of the place of payment), and cannot be increased, diminished, or impaired by an indorsement which, so far as the liability of the indorser is concerned, is governed by another law. This does not necessarily mean, however, that the sufficiency of the indorsement to enable the indorsee to enforce the liability that the maker or acceptor has assumed is to be tested by the law of the latter's contract, rather than that of the contract of indorsement (as to this point, see *infra*, XI.); but merely that the law of the maker's or acceptor's contract determines the extent and the conditions of his liability to an indorsee, assuming that the right of the latter to enforce the former's liability, such as it is, has been ascertained.

Where a note is given under a law which declares that the equities shall remain open between the original parties in the hands of a bona fide assignee, no negotiation, or change of place, can cut off this right of the maker. It is the law of the contract, and may be set up wherever suit shall be brought. *Dundas v. Bowler*, 3 McLean, 397, Fed. Cas. No. 4,141.

While it was held in *Crouch v. Hall*, 15 Ill. 263, that the liability of the indorser of a note was to be determined by the law of the state where the indorsement was made, it was held that the liability of the maker to the indorsee 61 L. R. A.

was governed by the law of the place where the note was made. The question was as to the right of the maker to avail himself of a want of consideration as a defense against an indorsee after maturity.

The defenses which the maker of a note may make against an assignee are to be determined by the law of the state where the note is made, and not by the law of the place where the note was assigned. It was held that this rule was to be applied whether the note showed upon its face where it was made, or the fact in that respect appeared from extrinsic evidence. *Evans v. Anderson*, 76 Ill. 558.

The court, in *Yeatman v. Cullen*, 5 Blackf. 240, also said, in effect, that the law of the place where the contract was made would prevail over that of the place of indorsement as to the defenses available to the maker against the indorsee, if there was a conflict; though, as a matter of fact, in this case the note was made and indorsed in the same state.

The indorsement of a note is a new and substantial contract, and, betwixt the indorser and indorsee, is subject to the laws of the state where it is made; but such indorsement cannot change the original liability of the promisor. *Dow v. Rowell*, 12 N. H. 49. This was an action by an indorsee against the maker. It was assumed that the law of Vermont, where the note was made, governed the right of the maker to avail himself of a payment made to the payee, notwithstanding that the indorsement was made in New Hampshire, though it was held that the law of both states was the same.

A note payable generally makes the maker liable only according to the law of the country where it was executed, even though it may have been indorsed in another country, and the rights of the maker and indorser would thus be governed by different laws; yet the right of the maker to set up equitable defenses to the note will be governed and regulated by the law of the place where the note was made. *Orcutt v. Hough*, 54 N. H. 472.

Where a negotiable promissory note is made in and according to the law of one state, and is there payable, though indorsed in another state, the liability of the maker to the indorsee is determined by the law of the state where made and to be performed. *Lockwood v. Lindsey*, 6 App. D. C. 396.

In *Ory v. Winter*, 4 Mart. N. S. 277, it was held that the law of Mississippi, by which the maker of a note may set up any equitable defense against a bona fide indorsee which he could offer against the payee, applied to a note made in that state, although the indorsement was made in Louisiana.

The law of the place of performance governs as to the negotiability of warehouse receipts. *Farmer v. Etheridge*, 24 Ky. L. Rep. 649, 69 S. W. 701. The question of negotiability in this case affected the liability of a Kentucky warehouseman to persons to whom the warehouse receipts were transferred in Tennessee. It was held that the law of Kentucky, as the *lex loci solutionis*, governed.

Barrett v. Walker, 14 La. 303, and *Hermann v. Hootsell*, 18 La. 419, seem to be to the same effect, though it does not expressly appear in these cases that the notes were indorsed outside of Mississippi.

In *Murray v. Gibson*, 2 La. Ann. 311, it was held that the law of Mississippi governed as to the defenses available to the maker against the assignee of a note which was made in Mississippi, though the plaintiff acquired possession of the note and his interest therein by seizure and sale under attachment sued out against the payee, apparently in Louisiana.

In *Newton v. Gray*, 10 La. Ann. 67, it was

assumed that the law of Arkansas, by which the maker of a note may avail himself, as against the assignee, of any defense existing against the payee prior to the assignment, governed a note executed in Arkansas, although indorsed in Louisiana.

An indorsee of a negotiable promissory note takes it subject to all the infirmities that attach to it by the law of the place where it was made and payable, notwithstanding that the indorsement was made in another state. *Herdic v. Roessler*, 109 N. Y. 127, 16 N. E. 198.

When a promissory note is made in one state and is payable there, and is afterwards indorsed in another state, a statute of the former state, letting in equitable defenses in favor of the maker and against innocent indorsees in due course of trade, governs, notwithstanding the indorsement in the other state, where a different rule prevails. *Brady v. McGehee*, 1 Shannon Cas. 154, *Thomp. Tenn. Cas.* 220.

The question whether the maker of a note is liable to an attaching creditor of the payee, or to an indorsee of the latter, he not having notice of the transfer until after the attachment, is to be determined by the law of the place where the note was made and payable, and not by the law of the place where the transfer was made. *Emerson v. Patridge*, 27 Vt. 8, 62 Am. Dec. 617; *Worden v. Nourse*, 36 Vt. 758.

In *Palmer v. Minar*, 8 Hun, 342, however, it was held that the fact that a purchaser of a promissory note made in Pennsylvania knew that it was given for a patent right, but did not know of the statute of Pennsylvania requiring such notes to bear upon their face the words "Given for a patent right," or of a statute of that state making it a misdemeanor to take, sell, or transfer a note given for a patent right not containing such words, did not invalidate a note in his hands where the transfer to him was not made in Pennsylvania,—especially where it does not appear that he knew that the note was delivered to the payee in Pennsylvania.

While the question involved in the cases cited in the last subdivision did not relate to a choice between the law of the original contract and of the contract of indorsement; and while in some of those cases it appears that the same place furnished both laws, and in others the fact in that respect does not appear,—yet none of those cases lend any authority for the position that the law of the contract of indorsement prevails over that of the original contract of the obligor in respect to the latter's liability to the indorsees. So, while, in many of the cases cited in the next subdivision, the same place furnished the law of both contracts, and in others the fact in that respect does not appear, none of these cases can be regarded as resting upon the ground that the law of the place of indorsement governs in respect to this matter; upon the other hand, many of them are negative authority for the elimination of the law of the place of indorsement.

d. *As between the law of the place where the contract is made, and that of the place where it is payable.*

It having been shown in subdivision IX., b, *supra*, that, as between the law of the substantive contract and the law of the forum, the former governs in respect to the liability of, and the defenses available to, the maker of a note or acceptor of a bill, and in subdivision IX., c, *supra*, that the law of the substantive contract, for the purposes of such rule, is the law of the original contract of the maker or acceptor, rather than the law of the contract of the drawer or indorser (the law of the forum, and the law of the drawer's or indorser's contract

having been thus eliminated), it remains to be considered, in this subdivision, what place furnishes the law of the original contract of the maker or acceptor. It is apparent, from the principles laid down in the preceding subdivisions, that the law chosen in answer to this question will prevail over the law of the forum, and over the law of the place where the bill was drawn or the bill or note indorsed, so far as the liability of the primary obligor is concerned. This question naturally calls for a choice between the law of the place where the note was made or the bill drawn, and that of the place where it is payable; and, occasionally (when the bill is not accepted at the place where it is payable), between the law of the place of acceptance and that of the place of payment. It is to be remembered, however, that a bill of exchange is ordinarily payable at the place upon which it is drawn, and since, in the usual course of business, it will be accepted there, if anywhere, the place where the acceptor's contract is made and the place where it is payable are generally the same. It may happen, however, that a bill will be accepted at a place other than that upon which it is drawn; but, even in that case, if it is accepted generally without designating any other place of payment, it will be regarded as payable at the place upon which it is drawn. *Cox v. National Bank*, 100 U. S. 704, 25 L. ed. 739; *Frierson v. Galbraith*, 12 Lea, 129.

When no place of payment is mentioned in a note, it is, presumptively, so far as this subject is concerned, to be treated as payable at the place where it was made; and, therefore, in the absence of the designation of a place of payment, the law of the place where the note was, in a legal sense, made, governs, since in such case there is no conflict. *Stickney v. Jordan*, 58 Me. 106, 4 Am. Rep. 251; *New York Security & T. Co. v. Davis*, 96 Md. 81, 53 Atl. 669; *Dow v. Rowell*, 12 N. H. 49; *Orcutt v. Hough*, 54 N. H. 472; *Bronte v. Leslie*, 30 Ill. App. 288; *Clark v. Searlight*, 135 Pa. 173, 19 Atl. 941; *Gage v. McSweeney*, 74 Vt. 370, 52 Atl. 969; *Wilson v. Lazier*, 11 Gratt. 482; *Strawberry Point Bank v. Lee*, 117 Mich. 122, 75 N. W. 444; *Barrett v. Dodge*, 16 R. I. 740, 19 Atl. 530.

While there is some conflict among the cases, the decided weight of authority favors the law of the place where the note or bill is payable, rather than that of the place where the same was made or drawn (or accepted, if the place of acceptance and payment are different), as the governing law so far as the essential liability of, and the defenses available to, the maker or acceptor are concerned (excluding mere formal requisites, capacity of parties, etc.).

The United States Supreme Court, in *Brabton v. Gibson*, 9 How. 263, 13 L. ed. 131, held that notes given in Pennsylvania, but made payable and indorsed in Mississippi, are governed by the law of the latter state. The court said that the law of the place where the contract is to be performed, and not that of the place where it was executed, applied. The point in this case was as to the defenses available to the maker against the indorsee of the note. It was held, in accordance with the principle above stated, that the law of Mississippi, allowing the maker to avail himself of certain defenses against the indorsee, would have applied if the defense asserted had been within the terms of the statute. The court further said: "The indorsement of the words, *Ne varietur* [upon the notes], could have no effect upon the notes which were payable in Mississippi and which were indorsed to the plaintiff in that state. Nor could they have affected the negotiable character of the notes had they been assigned in the usual course of business in Louisiana [cit-

ing a Louisiana case). There seems to be a plain inference, from the foregoing language, that the law of the place of payment,—at least if coincident with that of the place of indorsement,—prevails over the law of the place where the note was made.

So, in *Calhoun County v. Galbraith*, 99 U. S. 214, 25 L. ed. 410, involving the liability of a county on bonds issued by it, it was held that the law of New York, by which bonds made payable to a designated company or bearer may be assigned in blank after which they pass by delivery from hand to hand and have all the properties of commercial paper, governs bonds executed and delivered in Mississippi but payable in New York.

In *Sturdivant v. Memphis Nat. Bank*, 9 C. C. A. 236, 23 U. S. App. 300, 60 Fed. 730, it was held that a statute of Mississippi, by which equities available between the original parties to a note or bill of exchange are equally available against an indorsee, did not govern a note made and delivered in Mississippi but payable in Tennessee. The decision is upon the ground that the law of the place where a contract is made and entered into, as a general proposition, determines its validity, but that the law of the place of performance governs the contract in the matter of performance. The particular defense relied upon in this case was a partial failure of consideration, and that was treated as pertaining to the performance, rather than the validity of the contract. The court had previously held in this case that, the parties having stipulated for a rate of interest which was allowable by the law of Mississippi (*lex loci contractus*), but not by the law of Tennessee (*lex loci solutionis*), the question as to usury was to be determined by the law of Mississippi. In reply to the argument that it was inconsistent to apply the law of Tennessee to the principal and the law of Mississippi to the interest, the court said: "In this case we consider that the laws of the state of Tennessee with regard to usury, while applying to a contract made in Tennessee to be executed in Tennessee, do not apply in the case of a contract made in another state, in accordance with the laws thereof, to be executed in the state of Tennessee; but the law of the state of Tennessee, applicable, is that any contract made in another state valid according to the laws of that state, to be performed in the state of Tennessee, shall be executed in Tennessee, in respect to interest, according to the stipulation of the parties. So that, as we view the case, the whole matter of performance, both as to principal and interest, is determined in accordance with the laws of the state of Tennessee. It may well be that the usury law of Tennessee, as well as the anticommercial statute of the state of Mississippi, is a domestic statute to be applied to domestic cases, and that in both states the general law in regard to commercial paper governs interstate transactions."

In *Holmes v. Bank of Ft. Gaines*, 120 Ala. 493, 24 So. 959, the negotiability of a note was determined by the law of the state where it was payable, and, in the absence of proof to the contrary, it was presumed that the common law on the subject prevailed there. It is stated in the opinion, however, that it did not appear in any of the pleadings where the note was executed and delivered by its maker to the payee. The question of negotiability bore upon the defenses available against an indorsee.

In *Pryor v. Wright*, 14 Ark. 189, it was held that, assuming that by the law of Louisiana the maker of a note is discharged by default of presentment and demand at the place of payment named therein, such law would govern the liability of the maker of a note payable in

Louisiana. It does not appear where the note was made, but the decision is clearly upon the ground that the law of the place of payment governs the question of the responsibility of the maker.

The question whether a note is commercial paper, as affecting the availability of defenses by the maker against an indorsee, is to be determined by the law of the state where the note is payable, the presumption being that the parties make their contract with reference to the law of the place where it is to be performed. *Fordyce v. Nelson*, 91 Ind. 447. In this case the note seems both to have been made and to have been payable in Missouri; but the decision applying the law of that state is upon the ground that the note was payable there.

The character of a promissory note as an inland bill of exchange is to be determined by the law of the state where it is made payable,—especially if it purports to be dated in that state, although actually made in another state. *Godwin v. Shipley*, 7 B. Mon. 578.

A note is to be governed, as to its validity, nature, obligation, and interpretation, by the law of the place where it is made payable. *Tyler v. Trabue*, 8 B. Mon. 306. In this case the law of Pennsylvania, according to which the payment of the note to the payee after its maturity would be sufficient to defeat an action upon the note by an indorsee, was applied, the note being payable in Pennsylvania.

The question as to whether fraud or failure of consideration is available to the acceptors, as against an indorsee, of a bill of exchange drawn in Louisiana but payable in Kentucky and directed to the drawees at Kentucky, is to be determined by the law of Kentucky. *Kelly v. Smith*, 1 Met. (Ky.) 313. In this case it was presumed that the bill was accepted in Kentucky, but the court held that, even if it had been accepted in another state, it would still be governed by the law of Kentucky, that being the place of payment.

The law of a place where a note is payable fixes its character as a bill of exchange or otherwise, and the universal law of comity requires its character, as so fixed, to be recognized in other jurisdictions as between the original parties. *Carlisle v. Chambers*, 4 Bush, 268, 96 Am. Dec. 304. The note, in this case, was made and payable in Ohio, but the decision is upon the ground that the law of the place of payment governs.

In *Roots v. Merriweather*, 8 Bush, 397, it seems to have been assumed that the law of Illinois, if properly pleaded and proved, would have determined the right of the maker of a promissory note, made in Ohio and payable in Illinois, to avail himself of the defense of failure of consideration as against the indorsee, though, in the absence of proper pleading and proof, the question was determined by the law of Kentucky (*lex fori*).

In *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775, *supra*, IX., b. the principal question discussed was, what law governed as between the law of the substantive contract and the law of the forum; but the case is clear authority for the proposition that, as between the law of the place where the note was made and that of the place where it was payable, the latter governs in respect of its negotiable character as affecting the liability of the maker, since in that case it was held that the question was to be determined by the law of Ohio, where the note was payable, notwithstanding that it was made in Kentucky.

In *Fiske v. Foster*, 10 Met. 597, the court refused to apply a statute of Maine, providing that the holder of a protested bill drawn in that state may recover damages from the acceptor,

of a bill drawn in Maine upon a party in Massachusetts, and accepted and payable in the latter state. The ground of the decision is not given. It would be clearly in accord with the weight of authority if put upon the ground that Massachusetts furnished the law of the acceptor's contract because it was made and payable there. It may, however, have been upon the ground that Massachusetts was the forum, for the courts of this state have held, contrary to the weight of authority, that the liability for damages or interest *ex mora* is to be determined by the *lex fori* (see note to *Gray v. Western U. Teleg. Co.* [Tenn.] 56 L. R. A. 301).

The law of the place where a note or bill of exchange is made and delivered controls with respect to its negotiability. In the absence of the designation of any other place of payment. And, if any other place of payment is designated, the law of that place controls. *Strawberry Point Bank v. Lee*, 117 Mich. 122, 75 N. W. 444. The question of negotiability in this case affected the defenses available against the indorsees.

The fact that the residence of the payee in Iowa is inserted after his name in a note made and delivered in Michigan does not overcome the presumption that the note is payable in Michigan, so as to make the question of its negotiability depend upon the law of Iowa, rather than that of Michigan. *Ibid.*

In *Clark v. Porter*, 90 Mo. App. 143, it was held that the negotiable quality of a note was to be determined by the law of Arkansas, where it was payable: but in this case the note was made in Indian territory, where, for judicial purposes, the law of Arkansas prevailed, and the court does not decide whether, in case of a conflict between the two, the law of the place where a note is made or payable governs with respect to its negotiability. The question of negotiability in this case affected the defenses available to the maker as against the indorsees.

The place of payment as to the drawee is his place of residence, or the place to which the bill is addressed to him, unless a particular place of payment is stated in the bill. *Frazier v. Warfield*, 9 Smedes & M. 220. In this case the bill was addressed to the drawee at Lexington, no other place of payment being designated. It was held that the place of payment, so far as the drawee was concerned, was Kentucky, and their liability was to be determined by that law, and they could not avail themselves of a defense which was permissible under the Mississippi statute but not under the statutes of Kentucky, notwithstanding that they were residents of Mississippi.

In *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37, the question was involved as to the negotiability of a note secured by a mortgage upon real property in Nebraska, payable in Massachusetts. The court devoted considerable attention to the question whether the contract was made in Nebraska, or in Iowa, and held that it was made in Nebraska. In reply to the objection that the note being payable in Massachusetts, the question whether it was an Iowa or a Nebraska contract was wholly immaterial, because its character, as regards negotiability, must be determined by the law of the state where, by its terms, it is to be performed, the court said that it was not necessary to determine whether the rule contended for has any application to mortgage securities, since, in the absence of the evidence of the law of Massachusetts on the subject, it would be presumed it is the same as the law of Nebraska.

In *Warren v. Lynch*, 5 Johns. 230, it was held that the question whether an instrument for the payment of money, executed in Virginia but payable in New York, bearing a scrawl and 61 L. R. A.

the letters L. S. at the end of the maker's name, was an instrument under seal or a promissory note, was to be determined by the law of New York, the character of the instrument in this respect being material as affecting the right of the maker to avail himself of defenses against a bona fide holder for value. *Kent, Ch. J.*, who delivered the opinion, said: "The note was given in Virginia and by the laws of that state it was a sealed instrument or deed. But it was made payable in New York, and, according to a well-settled rule, is to be tested and governed by the laws of this state."

So, it was stated in *Everett v. Vendryes*, 19 N. Y. 436, though the point was *obiter*, that the contract of the acceptor of a bill of exchange is governed by the law of the place to which it is addressed and at which it is consequently payable, though drawn at another place.

If no particular place of payment is specified in a note, or if, in other words, it is payable generally, the law of the place where it is made determines, not only its construction, but also the obligations and duties it imposes on the makers, and therefore the maker may avail himself of any equitable defenses given to him by the law of the place where the note is made. *Barrett v. Dodge*, 16 R. I. 740, 19 Atl. 530.

In *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439, the question was as to the effect upon the negotiability of a note of a stipulation therein for the payment of attorneys' fees. The note was dated and payable in Iowa, and was delivered there, though signed in South Dakota. The court intimated its opinion that the law of Iowa ought to govern, but did not decide the question, since it held that the result would be the same whether the law of Iowa or that of South Dakota governed. It was urged in this case that as to the remedy, to wit, the right to interpose a defense, depending upon the negotiability or non-negotiability of the note, the law of the forum must control.

The negotiability of a note made in one state and payable in another is to be determined by the law of the latter state. *Freeman's Bank v. Ruckman*, 16 Gratt. 126. The action in this case was against the maker of the note. The place of payment and the forum were the same, and the court did not apparently mean to decide as between the *lex loci solutionis* and *lex fori*, but merely between the *lex loci contractus* and *lex loci solutionis*, holding that the question of negotiability went to the nature and effect, and not merely to the form, of the contract.

In *Curtis v. Hutchinson*, 4 Ohio Dec. 19, which held that the law of New York governed as to the negotiability of a bond, the bond, though executed in Ohio was delivered, and was payable in New York.

In *Howenstein v. Barnes*, 5 Dill. 482, Fed. Cas. No. 6,786, a note providing for the payment of attorneys' fees was made and delivered in Kansas, but was payable in Missouri. The supreme court of Kansas had decided that such notes were negotiable instruments, but the supreme court of Missouri had decided otherwise. The court said that if it were necessary to choose between the rules as announced by the different courts, it would choose the rule adopted in the state where the note was made, rather than that where it was payable; but the decision was in favor of the negotiability of the note upon the ground that the claim was a general one of commercial law, and that the court was not bound by the decision of either state upon such a question, but could determine the question as an independent one. It said: "The parties are presumed to have contracted with reference to the law as it really is; and it really is the same in both states, for it is a part

of the common law of the land, and this court must base its decision on that law."

In *Ludlow v. Bingham*, 4 Dall. 47, 1 L. ed. 736, the court seems to have been of the opinion that the law of the place where the contract was made governs with respect to its negotiability. It was there held that a negotiable note, expressed in commercial form, drawn in Philadelphia, dated there and made payable at the bank of the United States, but delivered in New York, was governed by the law of the latter place with respect to the question, what equities between the original parties were available against an indorsee. The whole inquiry in this case is directed to the question whether the note must be deemed to have been made in New York or in Pennsylvania, it apparently having been assumed that the law of the place where the note was, in a legal sense, made, would govern, irrespective of the place of payment.

And the United States circuit court of appeals, sixth circuit, expressly held, in *Farmers' Nat. Bank v. Sutton Mfg. Co.* 17 L. R. A. 595, 8 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191, involving the liability of an accommodation acceptor to a bona fide holder, that the question whether a stipulation to pay attorneys' fees in a bill of exchange, drawn in Indiana, accepted in Michigan, was to be discounted in Indiana and paid in Michigan, destroyed its negotiability, was to be determined by the law of Indiana. The decision rests upon the supposed authority of *Tilden v. Blair*, 21 Wall. 241, 22 L. ed. 632. It is not apparent, however, how the latter case is authority for the position that the law of the place where a bill is drawn and discounted, rather than that of the place where it is payable, governs with respect to its negotiability. It undoubtedly supports the decision of the circuit court of appeals in so far as the latter regards Indiana as the place where the acceptor's contract was made, it having been discounted there. The question in *Tilden v. Blair*, however, was not as to the negotiability of the bill, but as to whether it was void because it was discounted at an excessive rate of interest. According to the law of New York, where it was payable, it would be void; but according to the law of Illinois, where the acceptor's contract was deemed to have been made, it was not void, and a bona fide purchaser without notice could recover the full amount of the acceptance with interest from the time it fell due. This case, therefore, seems to fall within the principle that has been often applied to the question of usury,—that the parties will be deemed to have contracted with reference to a law that will uphold, rather than one that will avoid, their contract. It will be observed that this principle does not apply to the question of negotiability, since that question merely goes to the nature and effect of the contract, and not to its validity or invalidity, and there is no presumption that the parties intended to make a negotiable, rather than a non-negotiable, instrument. It may be further said that the circuit court of appeals held that, except so far as the rights of the parties were affected by statute, the question of negotiability was one of general commercial law, as to which the Federal courts were not bound by the decision of the state court.

See also cases cited in *supra*, V., upon the point whether the effect of a check as an assignment is to be determined by the law of the place where drawn, or where payable.

It will be observed that some of the cases cited in *infra*, XI., hold that the negotiability of an instrument is to be determined by the law of the forum; but in these cases the question of negotiability was important as affecting the remedy, and therefore they do not conflict with 61 L. R. A.

the decisions in this subdivision which apply the law of the place of payment to the question of negotiability. So, the cases cited in the various subdivisions of X., *infra*, that apply the law of the place where the bill was drawn, or the bill or note indorsed, to the question of negotiability, are distinguishable from the cases cited in this subdivision, applying the law of the place of payment, because in the former cases the question of negotiability was important as affecting the liability of the drawer or indorser.

X. Liability of, and defenses available to, drawer or indorser.

a. The nature of the drawer's or indorser's contract.

As to sufficiency of indorsement to transfer title and enable indorsee to maintain action in his own name, see *infra*, XI.

While, as is subsequently shown in this subdivision, the overwhelming weight of authority establishes the principle that the contract of the drawer of a bill, and of the indorser of a bill or note, is a separate contract which has a situs of its own independent of that of the contract of the maker or acceptor (the primary obligor), still, in the nature of the case, it is necessary to look to the note or bill for some of the terms of the contract of the drawer or indorser. Thus, for instance, the allowance of days of grace, as affecting the drawer or indorser is, as already shown (*supra*, III.), governed by the law of the place where the note or bill is payable. In this connection it may be, and in some cases has been, plausibly argued that, while the contract of the drawer or indorser is, to some extent, independent of that of the maker or acceptor, yet the place of performance of both contracts is the same, namely, the place of payment named in the bill or note, or, if none is named, the place upon which the bill is drawn, or at which the note is made. If the place of payment of the contract of the primary obligor could be thus imported as a term of the contract of the drawer or indorser, there would be, with reference to such contract, a conflict between the law of the place where it was made and that of the place where it is payable, similar to that which exists in respect of the contract of the drawer or maker. As already shown (*supra*, IX. d), such conflict with reference to the maker's or acceptor's contract is solved by the choice of the law of the place of payment as the governing law in respect to matters of substance, as distinguished from matters of form. Applying, by analogy, the same rule to the contract of the drawer or indorser, we would, upon the hypothesis assumed, have the law of the place of payment as the governing law of that contract in respect to matters of substance; and as, upon this hypothesis, the place of performance of both contracts is the same, we should reach practically the same result, so far as matters of substance are concerned, as if the liability of the drawer and indorser were directly subject to the law of the contract of the maker or acceptor. But it is held by the great weight of authority, not only that the contract of the drawer and indorser is a separate and independent contract, but also that such contract is to pay, in the event of the default of the primary obligor, not at the place of payment named expressly or impliedly in the bill or note, but at the place where, in a legal sense, the contract of the drawer or indorser was made. *Horne v. Rouquette*, L. R. 3 Q. B. Div. 514, 39 L. T. N. S. 219, 26 Week. Rep. 894 (indorser); *Allen v. Kemble*, 6 Moore P. C. C. 314, 13 Jur. 287 (drawer and in-

dorser); *McClintick v. Cummins*, 3 McLean, 158, Fed. Cas. No. 8,699 (indorser); *Davis v. Clemson*, 6 McLean, 622, Fed. Cas. No. 3,630 (drawer and indorser); *Crawford v. Branch Bank*, 6 Ala. 12, 41 Am. Dec. 33 (drawer); *Miller v. McIntyre*, 9 Ala. 638 (indorser); *McDougald v. Rutherford*, 30 Ala. 253 (indorser); *Greathead v. Walton*, 40 Conn. 236 (indorser); *Warner v. Citizens' Bank*, 6 S. D. 152, 60 N. W. 746; *Cox v. Adams*, 2 Ga. 158 (indorser); *Levy v. Cohen*, 4 Ga. 1 (indorser); *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79 (indorser; *obiter* as to drawer); *Rose v. Thames Bank*, 15 Ind. 292 (indorser); *National Bank v. Green*, 33 Iowa, 140 (indorser); *Briggs v. Latham*, 36 Kan. 255, 59 Am. Rep. 546, 13 Pac. 393 (indorser); *Short v. Trabue*, 4 Met. (Ky.) 301 (indorser); *Depau v. Humphreys*, 8 Mart. N. S. 1; *Trabue v. Short*, 18 La. Ann. 257 (indorser); *Powers v. Lynch*, 3 Mass. 77 (indorser); *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103 (indorser); *Wood v. Gibbs*, 35 Miss. 559 (drawer); *Freesse v. Brownell*, 35 N. J. L. 285, 10 Am. Rep. 239 (drawer and indorser); *Artisans' Bank v. Park Bank*, 41 Barb. 599 (indorser); *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137 (indorser); *Well v. Lange*, 6 Daly, 549 (indorser); *Hatcher v. McMorine*, 15 N. C. (4 Dev. L.) 122 (indorser); *Green v. Bond*, 5 Sneed, 330 (drawer and indorser); *Nichols v. Porter*, 2 W. Va. 13, 94 Am. Dec. 500 (indorser).

The application of the foregoing principle to the various questions arising in respect to the liability of the indorser and drawer is shown in the following subdivisions, which include some cases omitted from the foregoing list because they do not embody a formal statement of the rule. The New York court of appeals, in *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518, while apparently conceding the correctness of the doctrine above stated as applied to the contract of the indorser of a bill or note, repudiates it as applied to the drawer of a bill or check. In this case a check was drawn and delivered in Louisiana upon a bank in New York. The action was by the payee, a nonresident, against the drawer, a Louisiana corporation, and the precise question was whether the cause of action arose within New York for the purposes of § 427 of the Code of Civil Procedure, permitting a nonresident to maintain an action against a foreign corporation "where the cause of action shall have arisen within the state." The court discussed the character of the drawer's contract at length, and expressly held that the drawer's contract is to pay, in the event of nonacceptance or nonpayment by the drawee, at the place upon which the bill or check is drawn and where it is contemplated that the drawee shall pay it, and not at the place where it was drawn. This case seems to be opposed to the clear weight of authority. The court, *inter alia*, cites and relies upon *Everett v. Vendryes*, 19 N. Y. 436, *infra*, XI.; *Lee v. Selleck*, 33 N. Y. 615, and *Horne v. Rouquette*, L. R. 3 Q. B. Div. 514, 39 L. T. N. S. 219, 26 Week. Rep. 894,— *infra*, X. c. 4. The circumstances which impair the weight of these cases as authority upon the point in question are mentioned in connection with the citation of these cases. There are other cases, notably *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205, *infra*, X. b, that seem to take the view that the *locus solutionis* of the drawer's or indorser's contract is, for all purposes, the place of payment of the bill or note. There are other cases, notably *Wooley v. Lyon*, 117 Ill. 244, *infra*, X. c. 3 (b), which, while sometimes cited in support of that view do not really support it, though for the reasons stated in X. c. *infra*, they apply the law of the place of payment to

some of the conditions precedent of the drawer's or indorser's liability.

b. Substantive Liability.

As to character of indorsee as bona fide holder, see *supra*, VII.

It necessarily follows, from the principles stated in the last subdivision, that the substantive liability of the drawer or indorser, as distinguished from the conditions precedent to that liability, is to be determined by the law of the place where the bill is drawn, or the bill or note indorsed, as the case may be.

Thus, the indorsement of a note subjects the indorser to the obligations imposed by the law where the indorsement was made. *Brabston v. Gibson*, 9 How. 263, 13 L. ed. 131. This was *obiter*, as the case only involved the liability of the maker to the indorsee, and besides, in this case the note, though made in Louisiana, was payable in Mississippi and indorsed there, so that there was no conflict between the place of payment and the place of indorsement.

In *National Bank v. Green*, 33 Iowa, 140, *supra*, X. a, it seems to have been assumed that the question whether the indorsee of a note is entitled to recover the full amount of the note from the indorser, or only the amount paid, ought to be determined by the law of the place where the indorsement was made; but, inasmuch as the question was one of commercial law, the courts of the forum would not be bound by the decisions of the courts of the state where the indorsement was made upon the question as one of commercial law.

See also *Van Vleet v. Sledge*, 45 Fed. 743, *supra*, II.

In *Brown v. Bunn*, 16 Ind. 406, it was assumed that the question whether an action would lie against the indorsers of a note not payable to order or bearer at a bank was to be determined by the law of the state where the indorsement was made; but in this case the question was determined by the law of Indiana, because the law of Illinois, where the indorsement was made, was not proved.

The question whether an executor, who accounts in part for the estate by assigning to a trustee certain cash notes, is liable upon his assignment, is to be determined by the law of Kentucky, where the assignment was made and was to be performed, rather than by the law of Tennessee, where the assignor resided. *Cross v. Petree*, 10 B. Mon. 413.

So, the law of the place where a bill is indorsed, by which a demand made after protest upon the drawer for payment extinguishes all remedy against the indorser, applies notwithstanding that the bill is payable in another country. *Powers v. Lynch*, 3 Mass. 77, *supra*, X. a.

The right to show that the obligation growing out of an indorsement of a promissory note is not absolute, but depends upon a collateral oral agreement, relates to the nature and validity of the contract, and not to the remedy, and is governed by the *lex loci contractus*. *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 13 L. E. A. 52. By the *lex loci contractus* the court clearly meant the law of the place of the contract of indorsement, though, in this case, the note was made and payable, and the indorsement was also made, in Vermont, so that the only conflict was between the law of Vermont (*lex loci contractus*) and the law of Massachusetts (*lex fori*).

In *Hodges v. Shuler*, 24 Barb. 68, the question of the negotiability of an instrument as affecting the indorser's liability was determined by the law of Massachusetts, where the instru-

ment was executed and was payable, and where the indorsement was made. Strictly speaking, this case is, of course, only authority for eliminating the law of the forum as the governing law.

The law of Kentucky, by which a remote assignor of a note is not primarily liable to the holder, governs where a note executed in Kentucky and payable at the office of the payees in Louisiana is indorsed and assigned by the latter in Kentucky. *Short v. Trabue*, 4 Met. (Ky.) 301; *Trabue v. Short*, 5 Coldw. 293, *supra*, X. a. The decisions in both these cases are upon the ground that the law of the place where the contract was indorsed governs; and in the latter case the court expressly conceded that the law of Louisiana would govern the contract of the makers.

Making and indorsing or signing a note are separate and distinct contracts, each governed by the law of the place of the contract. *Nichols v. Porter*, 2 W. Va. 13, 94 Am. Dec. 500, *supra*, X. a. It was held in this case that one who assigned a note in West Virginia, which was not negotiable by the law of the latter state, was not liable as an indorser, though it was negotiable at the place where it was made.

In *Allen v. Kemple*, 6 Moore P. C. C. 314, 13 Jur. 287, *supra*, X. a. the actual question was whether, in an action by the assignees in bankruptcy of the holder of a bill of exchange, against the drawer and a previous indorser, brought in the country where the bill was drawn and indorsed, the law of that country by which a surety may avail himself of a set-off in favor of the principal against the creditor, or the law of the place where the bill is payable denying such right, governed. It was held, in accordance with the principle above stated, that the law of the place where the bill was drawn and indorsed governed on this point, so that the drawer and indorser were allowed to avail themselves of the set-off existing in favor of the acceptor against the bankrupt holder. By reason of these facts it was said, in *Rouquette v. Overmann*, L. R. 10 Q. B. 525, 44 L. J. Q. B. N. S. 221, 33 L. T. N. S. 820, that the question in the former action was not, in substance, one as to the law governing bills of exchange at all, but that the question would have been precisely the same if the action had been brought in the other country upon a guaranty given by the defendants in respect to goods supplied to a party in England.

In *Wood v. Gibbs*, 35 Miss. 559, *supra*, X. a. the court, upon the principle stated in the preceding subdivision, held that, a bill having been drawn in Mississippi upon parties in Indiana, the drawer might avail himself of the Mississippi statute allowing him to set up failure of consideration, even as against a bona fide holder for value without notice. The court, referring to the decision in *Fellows v. Harris*, 12 Smedes & M. 462, said that that decision did not depend for its correctness upon the question whether the bill, relatively to the drawer, was payable in Louisiana, but was correct under the Mississippi statute in relation to negotiable instruments, and that the remark at the conclusion of the opinion that the bill must be regarded as one drawn in Mississippi, but payable in Louisiana, should not have the force of a decision upon the question that such a bill, as between the drawer and payee, was a bill payable in Louisiana, and governed as to its nature, obligation, and effect by the laws of that state.

Coffman v. Bank of Kentucky, 41 Miss. 212, 90 Am. Dec. 371, however, holds the exact contrary of the decision in *Wood v. Gibbs*, 35 Miss. 559. The only difference between the facts in the two cases was that in the latter

case the bill had been accepted by the drawee, whereas in the former case it had not been accepted. In both cases, however, the action was against the drawer, the bill being drawn in Mississippi, addressed to parties in Louisiana, and it was held in the *Coffman* case that the drawer could not avail himself of the Mississippi statute permitting a drawer to set up the defense of failure, or illegality of consideration, or payment against a bona fide holder without notice. One of the cases cited in support of this decision is *Fellows v. Harris*, 12 Smedes & M. 462, which is explained in the opinion in *Wood v. Gibbs*. No reference is made to *Wood v. Gibbs* in the opinion in *Coffman v. Bank of Kentucky*.

Harrison v. Pike, 48 Miss. 46, states, in general terms, that, if a bill is drawn upon a party in another state or in a foreign country, or the note is made payable there, neither is, as a general rule, affected by "our" statute, but is governed by the law of the place where performance is to be made; citing, *inter alia*, *Fellows v. Harris*, 12 Smedes & M. 462; *Coffman v. Bank of Kentucky*, 41 Miss. 212, 90 Am. Dec. 371. In this case, however, the action was by the holder of a note made in Mississippi but payable in Louisiana, against one who made it to his own order, and indorsed and transferred the same; and it was held that the Mississippi statute, referred to in the preceding cases, did not apply. In this case, it will be observed that it was a question of the liability of a primary obligor (the maker), and not of a secondary or contingent obligor, such as the drawer of a bill. As applied to the actual facts in this case, the decision is in accord with the principle stated in *supra*, VII. d. and merely chooses the law of the place where the note is payable, rather than that of the place where it is made, as the law governing the maker's liability.

The individual liability of the members of an unincorporated joint stock company formed in Canada upon a bill of exchange drawn by the company must be determined by the law of Canada though the bill of exchange was payable in New York. The court said that though it may be true that the bill itself should be governed by the law of the place where it was made payable, yet the liability of the individual members of the association must be determined by reference to the law of the place where the association was formed and where the place of business was located. *Cutler v. Thomas*, 25 Vt. 73. It would seem that the same result would have been reached in this case if the law governing the bill of exchange had been applied, since the bill seems to have been drawn in Canada, and Canada would therefore be the place of performance relatively to the drawers.

Dunn v. Welsh, 62 Ga. 241, also seems opposed to the weight of authority. It was there held that bills of exchange, being payable in New York, were New York contracts, and that the law of that state, by which the legal liability of a blank indorser cannot be explained or altered by parol evidence, governed, although the action was brought in Georgia. It does not appear, in this case, where the note was made or indorsed, but, as already indicated, the court seems to have been of the opinion that the law of the place of payment governed.

As shown in the note to *United Sav. & Loan Co. v. Beckley*, — L. R. A. —, the principle that the law of the place where the bill was drawn, or where the note or bill was indorsed, governs the law of the place where the bill was drawn, applied to questions of usury. So, by the application of this principle the rule has been established that the damages or interest *ex mora*, for which the drawer or indorser is liable in the event of the dishonor of the bill or note

by the primary obligor, are to be determined by the law of the place where the bill was, in a legal sense, drawn, or the bill or note was indorsed, irrespective of the place of payment. *Cooper v. Waldegrave*, 2 Beav. 282 (*obiter*); *Gibbs v. Fremont*, 20 Eng. L. & Eq. Rep. 555, 9 Exch. 25, 22 L. J. Exch. N. S. 302, 17 Jur. 820 (*obiter*); *Slacum v. Pomey*, 6 Cranch, 221, 3 L. ed. 205 (drawer); *Bank of United States v. United States*, 2 How. 711, 11 L. ed. 439 (drawer); *Ex parte Heidelback*, 2 Low. Dec. 526, Fed. Cas. No. 6,322 (drawer); *Cullum v. Casey*, 9 Port. (Ala.) 131, 33 Am. Dec. 304 (drawer); *Crawford v. Branch Bank*, 6 Ala. 12, 41 Am. Dec. 33, 574 (drawer); *Price v. Page*, 24 Mo. 65 (drawer); *Page v. Page*, 24 Mo. 595 (drawer); *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137 (*obiter*; indorser); *Cowperthwaite v. Sheffield*, 1 Sandf. 416 (indorser); *Case v. Heffner*, 10 Ohio, 180 (indorser); *Green v. Bond*, 5 Sneed, 330 (drawer and indorser); *Bailey v. Heald*, 17 Tex. 103 (drawer and indorser, Overruling *Able v. McMurray*, 10 Tex. 350).

In the foregoing cases it is assumed, or expressly held, that the law of the place of indorsement governs the liability of the indorser for damages or interest *ex mora*, irrespective, not only of the place of payment, but also of the place where the bill is drawn. In *Schermerhorn v. Pelham*, 1 N. C. 510 (Conference, 462), it was held that damages and interest on a bill of exchange are, as against an indorser, to be assessed according to the law of the place where the bill was drawn, and not where it was indorsed. The decision is upon the ground that the indorser places himself in the situation of the original drawer, and subjects himself to the same duties which the latter was bound to perform; but this position is contrary to the prevailing view, which regards the contract of drawing and each contract of indorsing as separate and distinct contracts, which are performable at places where they were respectively made.

The rule thus established by the cases above cited is opposed by the decision in *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205. In that case (Redfield, J., writing the opinion) it was held that the rate of interest by way of damages, for which the indorser of a note was liable, was to be determined by the law of the place where the note was payable, and not by the law of the place where it was indorsed. In this case the note was made in Canada, was indorsed in Vermont, and was payable in New York. It was held that both the maker and indorser were liable for interest after maturity at the New York rate. Judge Redfield, having laid down the proposition that the rate of interest, as against the maker, is to be determined by the rate at the place where the interest is payable, held that the indorser was subject to the same liability, taking the position that his contract was to pay the note at the place of payment named therein. The decision therefore rests upon a proposition that is against the overwhelming weight of authority. See *supra*, X. a.

And *Vinson v. Platt*, 21 Ga. 135, while not discussing the question, held, in an action involving the liability of both drawer and acceptor, that the law of the place where the bill was payable governed, rather than that of the place where it was drawn.

So, also, in *Mullen v. Morris*, 2 Pa. St. 85, and *Clark v. Searight*, 135 Pa. 173, 19 Atl. 941, it was held, though the last case is *obiter* as to the point, that an indorser is liable for interest on a protested bill of exchange according to the law of the place on which it is drawn; and the court, in *Bank of Illinois v. Brady*, 3 61 L. R. A.

McLean, 268, Fed. Cas. No. 888, while holding that the necessity of prosecuting the drawer of a bill as a condition of holding the indorser was to be determined by the law of the place of indorsement, said that the law of the place where the bill is payable fixes the rate of interest which the holder may recover against all who are parties to it.

It will be observed that the cases above cited that apply the law of the place where the bill was drawn or the bill or note indorsed, treat not of the question of the amount of the contractual liability of the drawer or indorser, but of his liability for damages or interest *ex mora*. The distinction here suggested is clearly brought out in *Ex parte Heidelback*, 2 Low. Dec. 526, Fed. Cas. No. 6,322. The court there said that, while the contracts of the various parties to a bill of exchange are distinct, and the drawer is bound, generally speaking, according to the law of the place where the bill is drawn, which is in most cases the same as that in which it is to be paid by him, if he pays it, still he is to a certain extent involved in the same law with the acceptor because, upon due protest, demand, and notice, he is bound to make good to the holder what the acceptor ought to pay at the place where he was to pay, which makes it necessary to ascertain what that amount was by the law of that place; but what the drawer should pay as interest *ex mora*, or as damages, does not depend upon the law of the place where the acceptor was to pay if that is different from the place where the drawer's contract is to be performed. It has been held in some cases that damages or interest, *ex mora*, for breach of a contract pertain to the remedy, and are therefore to be determined by the law of the forum. According to these cases, of course, the same law (*lex fori*) would govern, whether it was a question of the liability of the primary, or of the secondary, obligor; but these cases are opposed to the great weight of authority, which regards the question of damages and interest *ex mora* as a part of the substantive contract, and as subject to the law of the substantive contract, rather than the law of the forum. See *note to Gray v. Western U. Tele. Co.* (Tenn.) 56 L. R. A. 301.

c. Conditions precedent to Liability of the drawer or indorser.

1. In general.

The doctrine that the ultimate liability of the drawer or indorser, as distinguished from the conditions precedent to that liability, is to be determined by the law of the place where the bill was drawn, or the bill or note indorsed, is, as already shown (*supra*, X. b), a necessary corollary of the principle that the drawer's or indorser's contract is performable at the place where it is made, rather than at the place where the bill or note is payable. When, however, it is a question of conditions precedent, complications arise, since, from the nature of the case, most, at least, of those conditions must be performed at the place of payment of the primary obligor's contract. Thus, for instance, as already shown (*supra*, III.) the maturity of a bill or note, even as affecting the liability of the drawer or indorser, is to be determined by the law of the place where it is payable, irrespective of the place where it is drawn or indorsed; and, since the usual rule is that the demand upon the maker or acceptor, as a condition of holding the drawer or indorser, must be made on the day of the maturity of the bill or note, it necessarily follows that the time in which the demand is to be made is to be determined by the law of the place of payment.

of the primary obligor's contract. Irrespective of the place where the bill was drawn or the bill or note indorsed (see authorities cited *infra*, X. c. 2, (b)). This illustration shows the impossibility of applying the latter law to all the elements that enter into the performance of conditions precedent to the liability of the drawer or indorser.

The Louisiana supreme court, in the course of its argument in the celebrated case of *De-pau v. Humphreys*, 8 Mart. N. S. 1, said, by way of illustration: "The validity and, to some purpose, the construction, of the contract of the drawer and of each indorser must be governed by the law of the place of drawing and indorsing; but, as each of these, in effect, undertakes that the drawee shall accept and pay the bill, according to its tenor, in ascertaining the obligations of the drawer and several indorsers, recourse is necessarily had to the law of the place in which the bill is payable, to discover whether the holder has exercised due diligence, and what will be a fulfilment on the part of the drawee of the undertaking of the drawer and indorser, in respect to the acts to be done by him; if it appears that the undertakings of the drawer and indorser have not been fulfilled by the drawee, a resort must be had to the laws of the places of drawing and indorsing to determine what notice the holder must give of the dishonor of the bill, and the amount of the damages to be paid by the drawer and several indorsers." The various phases of this question are discussed in the following subdivisions.

2. Demand and protest.

(a) Necessity of.

It is established by the great weight of authority that the necessity of demand and protest as a condition of holding the drawer or indorser is determined by the law of the place where the bill was drawn or the bill or note was indorsed, as the case may be. *Givens v. Western Bank*, 2 Ala. 397 (indorser); *McDougald v. Rutherford*, 30 Ala. 253 (indorser); *Holbrook v. Vibbard*, 3 Ill. 465; *Barber v. Bell*, 77 Ill. 490 (indorser); *Thorp v. Craig*, 10 Iowa, 461 (drawer); *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244 (indorser); *Briggs v. Latham*, 36 Kan. 255, 59 Am. Rep. 546, 13 Pac. 393 (indorser); *Young v. Harris*, 14 B. Mon. 556, 61 Am. Dec. 170 (indorser); *Piner v. Clary*, 17 B. Mon. 661 (indorser); *Artisans' Bank v. Park Bank*, 41 Barb. 599 (indorser); *Holt v. Salmon*, Rice L. 91 (indorser).

So, the law of France, by which a bill of exchange payable a certain number of days after sight must, even if it has been presented and protested for nonacceptance, be presented for payment after the expiration of the sight, does not apply as between the indorser and indorsee of a bill drawn in a French West India island on a mercantile house in Bordeaux, but indorsed in the city of New York. *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137. The decision is upon the ground that the indorsement is a new and independent contract, and is to be governed by the law of the place where it is made. It was also held, in this case, that the drawer's liability is to be determined by the law of the place where the bill is drawn, though in this case the law of the place where the bill was drawn and where it was payable were the same. The court recognized that this conclusion might operate harshly upon the indorsers, since, by reason of the noncompliance with the law of France, they might not be enabled to have recourse over all the drawers. It said, however, that the indorser can always protect himself by

special indorsement, requiring the holder to take the steps necessary to charge the drawer according to the law by which the latter's liability is governed.

In *Raymond v. Holmes*, 11 Tex. 55, the court expressed a preference for the rule, which it said prevailed in England, that the law of the place drawn upon should control and fix the liability of the drawer or indorser, rather than the law of the place where the bill is drawn or indorsed; but it quoted the following from *Story on Conflict of Laws* as stating the American rule: "By the common law the protest is to be made at the time, in the manner, and by the persons prescribed in the place where the bill is payable. But as to the necessity of making a demand and protest, and the circumstances under which notice may be required or dispensed with, these are incidents of the original contract which are governed by the laws of the place where the bill was drawn. They constitute implied conditions upon which the liability of the drawer is to attach, according to the *lex loci contractus*; and, if the bill is negotiated, a like responsibility attaches upon each successive indorsement, according to the law of the place of his indorsement." In accordance with the American rule, however, the court held that the statute of Texas, dispensing with notice of protest, when the suit is brought to the first term of court after the accrual of the liability, applied to the liability of the drawer and indorser of a bill of exchange drawn and indorsed in Texas upon parties in Louisiana, although, by the law of Louisiana, such notice would be necessary to hold the drawer and indorser.

In some of the foregoing cases the place where the bill was drawn or the bill or note indorsed coincided with the place of payment, but the decisions are clearly put upon the ground that the law of the place where the bill is drawn or the bill or note indorsed governs, irrespective of the place of payment.

In *Briggs v. Latham*, 36 Kan. 255, 59 Am. Rep. 546, 13 Pac. 393, the law of Missouri, where the note was delivered by the indorser, was held to govern in this respect, notwithstanding that the indorsement was written in Illinois, and that both the indorser and indorsee were residents of the latter state. It was urged in this case that, since all the parties to the indorsement were citizens of Illinois, they must be presumed to have contracted with reference to the laws of that state with which they were familiar, and not according to the laws of Missouri where they happened to be. The court, however, repudiated such contention as applied to the case in hand, distinguishing it from *Vanzant v. Arnold*, 31 Ga. 210, upon the ground that in the case at bar the parties were not transiently in Missouri, and did not go there for the sole purpose of making a contract, and that part of their time was spent in Missouri, and they had a place of business there. It is implied, however, that the general rule might be overcome by circumstances clearly indicating a contrary intent. In *Holt v. Salmon*, Rice L. 91, *supra*, also, the law of Georgia dispensing with demand and notice as a condition of holding the indorser, but requiring the holder to sue the maker within three months after notice to do so, applied to an indorsement made in Georgia, notwithstanding that the indorsees knew that the indorsers resided in South Carolina.

In *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244; *Young v. Harris*, 14 B. Mon. 556, 61 Am. Dec. 170; and *Piner v. Clary*, 17 B. Mon. 661, *supra*, — it was held that the character of an instrument, as negotiable or otherwise, for the purpose of apply-

ing the law of the place where it was drawn or indorsed in respect to the necessity of protest and demand, was also to be determined by that law, rather than by the law of the place where it was payable.

(b) *Time and manner of.*

While, as shown in the preceding subdivisions, the necessity of demand and protest is to be determined by the law of the place where the bill was drawn or the bill or note indorsed, as the case may be, the weight of authority establishes the rule that the time, manner, and sufficiency of the demand and protest are to be determined by the law of the place where the bill or note is payable, since the acts in question must, in the nature of the case, be performed there rather than at the place where the bill was drawn or the bill or note indorsed.

Thus, on the questions of timely and sufficient presentation and protest, the law of the place where a foreign bill of exchange is payable governs, and not the law of the place where it is drawn. *Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418. The action was by the payee against the drawers.

The doctrine of this case is sustained by the following cases: *Wiseman v. Chiappella*, 23 How. 368, 16 L. ed. 466; *Neederer v. Barber*, Fed. Cas. No. 10,079; *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275; *Wooley v. Lyon*, 117 Ill. 244, 57 Am. Rep. 867, 6 N. E. 885; *Allen v. Harrah*, 30 Iowa, 363; *McClane v. Fitch*, 4 B. Mon. 599; *Ellis v. Commercial Bank*, 7 How. (Miss.) 294, 40 Am. Dec. 63; *Chew v. Read*, 11 Smedes & M. 182; *Commercial Bank v. Barksdale*, 36 Mo. 503; *Bank of Rochester v. Gray*, 2 Hill, 227; *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137; *Sylvester v. Crohan*, 138 N. Y. 494, 34 N. E. 273; *Carter v. Union Bank*, 7 Humph. 549, 46 Am. Dec. 89.

It was held in *Musson v. Lake*, 4 How. 262, 11 L. ed. 967, however, that the necessity of exhibiting the bill when a demand of payment is made upon the drawee of a foreign bill of exchange as a condition of holding an indorser liable is to be determined by the law of the place where the indorsement is made, rather than by the law of the place where the bill is payable. According to the principle above stated, which seems to be supported by the cases above cited, it would seem that the necessity of exhibiting the bill would be determined by the law of the place of payment, since that affects the sufficiency of the demand within the rule announced in *Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418, *supra*.

The case of *Warner v. Citizens' Bank*, 6 S. D. 152, 60 N. W. 746, is also opposed to the rule above stated. In this case it was held that a statute of Dakota enlarging, beyond the period fixed by the law merchant, the time for the presentation of a bill of exchange payable at sight or on demand, without interest, in order to hold the drawer or indorser, governed a draft or check drawn upon a bank in Illinois but transferred by the payee in South Dakota. The court here assumed to apply the general principle that, as between the drawer and indorsee of a bill, the former's contract is governed by the law of the place where the bill was drawn. As already shown, it does not necessarily follow from this principle that that law is to be applied to every element entering into the performance of the conditions precedent to the drawer's liability.

3. *Notice.*

(a) *Necessity of.*

N. H. 326, 44 Atl. 516, and *Phipps v. Harding*, 30 L. R. A. 513, 70 Fed. 468, 17 C. C. A. 203, 34 U. S. App. 148, —, *supra*, VI.

The necessity of giving notice of dishonor of a bill or note by the primary obligor in order to hold the drawer or indorser is to be determined by the law of the place where the bill is, in a legal sense, drawn or the bill or note is indorsed, irrespective of the law of the place where it was made or is payable. *Givens v. Western Bank*, 2 Ala. 397; *Holbrook v. Vibbard*, 3 Ill. 465; *Belford v. Bangs*, 15 Ill. App. 76; *Gay v. Itainey*, 89 Ill. 221, 31 Am. Rep. 76; *Stubbs v. Colt*, 24 Blatchf. 314, 30 Fed. 417; *Thorp v. Craig*, 10 Iowa, 461; *Briggs v. Latham*, 36 Kan. 255, 59 Am. Rep. 546, 13 Pac. 393; *Young v. Harris*, 14 B. Mon. 556, 61 Am. Dec. 170; *Artisans' Bank v. Park Bank*, 41 Barb. 599; *Commercial Nat. Bank v. Simpson*, 90 N. C. 467; *Hatcher v. McMorine*, 15 N. C. (4 Dev. L.) 122; *Holt v. Salmon*, Rice L. 91; *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874.

Allen v. Merchants' Bank, 23 Wend. 215, 34 Am. Dec. 289, was an action by the indorsees of a draft drawn and indorsed in New York upon a house in Pennsylvania, against a bank to which it was intrusted for collection, upon the ground that by failure to give the indorser notice of nonacceptance, as required by the law of New York, the recourse to him was lost. There was a difference of opinion among the members of the court upon the question whether the bank was liable for the default of its agent in this respect, but it seems to have been assumed that the necessity of the notice, in order to hold the indorser, was governed by the law of New York, where the indorsement was made.

In *Barger v. Farnham* (Mich.) 90 N. W. 281, the court said that the negotiability of the note in suit, which was apparently executed in Pennsylvania, but was payable in West Virginia, was to be determined by the law of West Virginia, and, not being payable at a bank, it was not, by the law of that state, negotiable. The question of negotiability in this case affected the rights of persons whose names appear on the note as indorsers to notice of nonpayment. The court, however, did not rest its decision upon the law of West Virginia, but, with respect to two of the parties who indorsed their names on the back of the note before its delivery to the payee, it was held that, under the circumstances of the case, they were makers, and therefore, irrespective of the law of West Virginia, were not entitled to notice; and with respect to the payee, who also indorsed the note in Pennsylvania, it was held that, if the contract of indorsement were to be governed by the law of Pennsylvania, which, presumably, would treat the note as negotiable, he was entitled to notice of dishonor; and if, on the other hand, the paper was governed by the law of West Virginia, and therefore to be treated as non-negotiable paper, his signature was of no further force than as evidence of an assignment through which the plaintiff acquired title, and in either view he was not liable to the indorsee. The court, however, stated that it did not intend to intimate that the negotiability of the note relatively to the indorser was to be determined by the law of Pennsylvania.

The necessity of demanding payment of the maker and giving notice to the indorser of nonpayment, as a condition of holding the latter, is governed by the law of the place where the note was made, is payable, and was indorsed. *Rond v. Bragg*, 17 Ill. 69. This case is merely authority for eliminating the *lex fori*.

See also *New York L. Ins. Co. v. McKellar*, 68 61 L. R. A.

(b) *Time and mode of.*

While, as shown in the last subdivision, the authorities substantially agree that the necessity of giving notice of dishonor is to be determined by the law of the place where the bill was, in a legal sense, drawn, or the bill or note was indorsed, there is considerable conflict of authority upon the question what law is to determine the time and sufficiency of the notice. This conflict of authority, so far as the time of notice is concerned, is restricted to the time within which the notice must be given after the bill or note is mature according to the law of the place of payment. As already shown (*supra*, III.), the maturity, for all purposes, is to be determined by the law of the place of payment, and of course the time of notice cannot begin to run until the maturity of the bill or note. The weight of authority in America, at least of the earlier cases, is that the time (in the sense above explained) and sufficiency of the notice are governed by the law that determines its necessity; that is, by the law of the place where the bill was drawn if it is a question of the drawer's liability, or by the law of the place of indorsement if it is the indorser's liability.

Thus, the court, in *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137, said that the notice must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made.

Cook v. Litchfield, 9 N. Y. 279, expressly held that the sufficiency of notice of nonpayment of a note in order to hold the indorser was to be determined by the law of New York, although the note was dated, signed, and indorsed in Michigan, it appearing that the indorsement was for the accommodation of the maker, and that the note was first negotiated in New York. The note in this case was also payable in New York, but the decision, as already stated, is upon the ground that New York was the place where the contract of indorsement was, in a legal sense, made.

So, the law of the place where a bill is drawn, and not of the place where the drawee resides, or the bill is presentable, governs as to the mode and time of the notice of nonacceptance and nonpayment to be given in order to charge the drawer. *Carroll v. Upton*, 2 Sandf. 171.

In *Belford v. Bangs*, 15 Ill. App. 76, it was held that the indorsement of a note creates a new and distinct contract, and is governed by the law of the place where it is made. The question in this case was as to the necessity and sufficiency of notice of nonpayment to the indorser. The note was dated in Michigan, and was also payable there, and it was presumed from those facts, in the absence of proof to the contrary, that it was indorsed there, so that the law of Michigan was held to govern; but this was upon the ground that Michigan was the presumed place of the indorsement, not upon the ground that the note was made and payable there. But see *Wooley v. Lyon*, 117 Ill. 244, 57 Am. Rep. 867, 6 N. E. 882, *infra*.

In *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244, the court said it was ruled, in *Thorp v. Craig*, 10 Iowa, 461, that the law of the place of contract of indorsement must govern the liability of the indorser, and that it was held in that case that a party who indorsed commercial paper in Iowa, payable in New York, must be notified of its dishonor, according to our law, in order to be held liable thereon. The court then said that the rule there announced may be considered as the settled rule in Iowa.

The time of making protest of a dishonored bill of exchange is to be regulated by the law of the place where it (the protest) is made; but 61 L. R. A.

the time of giving notice of the nonpayment is to be regulated by the law of the place where the drawer and indorsers respectively resided at the time the bill was drawn or indorsed. *Piner v. Clary*, 17 B. Mon. 661.

The law of the place where a note is made payable determines the mode and time of the presentment and of the proceedings upon nonpayment; but the notice to the indorser must be according to the law of the place where the indorsement was made. *Snow v. Perkins*, 2 Mich. 238. In this case the note was made and payable in New York, but was indorsed in Michigan, and the notice to the indorser was to the effect that the note had been protested for nonpayment. It had been previously held in Michigan, in case of a note payable in that state, that a notice of protest was not sufficient as a notice of nonpayment, the protest of a note not being authorized by the law of Michigan; but it was held in this case that, since the protest was authorized by the law of New York, where the note was payable, the notice of protest was a sufficient notice of nonpayment.

Second Nat. Bank v. Smith (Wis.) 94 N. W. 664, held that the law of the place where the note was actually executed, negotiated, and made payable governed as to the manner of giving notice, without intimating which law would govern in case of a conflict. As to the kind and sufficiency of the evidence necessary to prove notice, it held that the *lex fori* governed.

The Illinois supreme court, in *Wooley v. Lyon*, 117 Ill. 244, 57 Am. Rep. 867, 6 N. E. 882, however, took the position that the law of the place where the note is payable governs, not only as to the time and mode of its presentment for payment and manner of protest, but also as to the time and mode of giving notice, as conditions of holding the indorser. The court conceded that there was a conflict of authority on the point, but it regarded the position taken by it as resting upon the better reasoning, and disapproved of *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137, *supra*, and other cases holding that the notice should be according to the law of the place of indorsement.

So, in *Brown v. Jones*, 125 Ind. 375, 25 N. E. 452, the Indiana supreme court held that the time within which notice of protest must be mailed to one who drew a bill to his own order in Indiana, and indorsed it to a bank in that state after it had been accepted by the drawee in Illinois, it being payable in the latter state, was to be determined by the law of Illinois. The decision is expressly put upon the ground that Illinois was the law of the place of payment. The court said that the paper was payable in Illinois, and, hence, was controlled by the statutes of Illinois relating to commercial paper. Among the cases it cites in support of this statement, is *Shanklin v. Cooper*, 8 Blackf. 41, which was expressly overruled by the case of *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 78. It is not entirely clear in this case whether the objection to the time within which the notice was mailed was based upon the ground that the notice was delayed until after the expiration of the days of grace allowed by the law of Illinois, or was not given within the proper time after the expiration of such days of grace. If the objection was based on the former ground, the decision on the facts is not necessarily inconsistent with the cases which apply the rule of the place where the bill was drawn, since that rule is undoubtedly understood as applying only to the time within which the notice must be given after the maturity of the bill or note as tested by the law of the place of payment, since, as already shown (*supra*, III.), it is generally conceded that the

law of the place of payment governs in respect of the allowance of days of grace, even as against the drawer or indorser.

Todd v. Neal, 49 Ala. 266, laid down the principle that the law regulating demand, protest, and notice of nonpayment is the law of the place where the bill is payable, unless the parties have agreed on some other. The question in respect of notice was whether sending the notice through the mails of the confederate states was sufficient. The bill in this case was drawn in Alabama and made payable in Louisiana. It does not appear whether the note was indorsed in the former or latter state, and it seems to have been assumed that the law of both states on the subject was the same. This case, therefore, seems to be only indirect authority for the proposition that the law of the place of payment prevails over the law of the place of indorsement in respect to the sufficiency of the notice.

In Allen v. Harrah, 30 Iowa, 363, the court said that protest and notice of nonpayment of a note should be according to the law of the place of payment, because it is there that the note is refused payment. In this case, however, the question was simply as to the sufficiency of a demand upon one of two joint makers in order to hold the indorser. This question, as already shown (*supra*, X. c. 2, (b)), is concededly governed by the law of the place of payment. There does not seem to have been any question as to the sufficiency of the notice, and, besides, it does not appear that there was any conflict between the law of the place where the note was payable and where it was indorsed.

The rule in England has sometimes been supposed to be the same as that announced in Wooley v. Lyon, 117 Ill. 244, 57 Am. Rep. 867, 6 N. E. 882, *supra*, and some of the earlier cases do support such rule; but the later cases in England seem to support the rule supported by the earlier American cases, to the effect that the law of the place where the bill is drawn, or the bill or note is indorsed, governs as to the time, mode, and sufficiency of the notice of dishonor.

In Rothschild v. Currie, 1 Q. B. 43, 4 Perry & D. 737, it was held that notice of dishonor of a bill of exchange drawn and indorsed in England upon, and accepted by, a French house, if given within the time allowed by the law of France, was sufficient to hold the payee and indorser, notwithstanding that both he and the indorsee were citizens of England. The court, in this case, seems to have entertained no doubt as between the law of the place where the bill was drawn and indorsed, and the law of the place where it was payable, and the only question discussed is whether the matter of notice of dishonor was part and parcel of the contract, or only an incident to the remedy, the view being taken that it was a part of the contract itself, and was therefore governed by the law of France.

In Hirschfeld v. Smith, L. R. 1 C. P. 350, 35 L. J. C. P. N. S. 177, 12 Jur. N. S. 523, 1 Harr. & R. 284, a bill was drawn in England payable to the drawer's order, directed to and accepted by, the drawee in France, payable in the latter country, and was indorsed by the drawee in blank and delivered to the defendant in England, by him indorsed in blank and delivered to the plaintiff in England, and indorsed by the latter to a person in France. The bill was duly presented in France and dishonored, and the holder took the steps required by the law of France to entitle him to recover from the other parties; that is, he had the bill protested and a copy of the protest transmitted to the French consul in London, and by the consul the protest was, in due

course, according to the French practice, made known to the defendant without delay. It was held that the defendant was bound. The decision was put upon two grounds. The first ground, which rests upon the authority of Rothschild v. Currie, 1 Q. B. 43, 4 Perry & D. 737, is that the law of France, where the bill was payable, governed, notwithstanding that the defendant's indorsement was made in England. The other ground is that, if the first ground is not sound, and if the contract of an indorser in England of a bill accepted, payable in France, is to be governed by the law of England, and the holder is not entitled to sue such an indorser in England, unless he has given due notice of dishonor according to the law of England,—then, under the circumstances, the notice of dishonor, given according to the law of France, ought to be deemed reasonable notice according to the law of England, and to be sufficient in England to bind the indorser. The court says: "It is reasonable to hold that the foreign holder should have time to make good his right of recourse against all the parties to the bill in what country they may be. Here the holder was a Frenchman, in France. The indorsement to him was by the plaintiff, a Frenchman, in France. The indorsement to the plaintiff was by the defendant, an Englishman, in England; and the indorsement to that Englishman by Lion, the payee, may have been in any country. The inconvenience would be great if the holder was bound to know the place of each indorsement and the law of that place relating to notice of dishonor, and to give notice accordingly, on pain, in case of mistake, of losing his remedy; whereas, there would be great convenience to the holder if notice, valid according to the law of the place, should be held to be reasonable notice for each of the countries of each of the parties, unless an exceptional case should give occasion for an exception."

The court, in Rouquette v. Overmann, L. R. 10 Q. B. 525, 44 L. J. Q. B. N. S. 221, 33 L. T. N. S. 420, uses language favoring the first of the grounds stated in the preceding case; but the question in this case was not as to the time within which notice must be given after the maturity of the bill tested by the law of the place of payment, but the question was merely whether the drawer and indorser, in England, of a bill drawn upon and accepted by a resident of Paris, could escape liability because the bill was not presented, or protest made, or notice of dishonor given, until after the expiration of the extended time for the payment and protesting of current bills of exchange granted by an edict of the French Emperor in consequence of the invasion of the country by the German army. The court, in holding the drawer and indorser liable notwithstanding the delay, took the position that the enlargement of the time was analogous to the allowance of days of grace, which is conceded to be determined by the law of the place where the bill is payable (*supra*, III.). This case is therefore distinguishable upon the ground suggested in connection with the case of Brown v. Jones, 125 Ind. 375, 25 N. E. 432.

The court of appeal in Horne v. Rouquette, L. R. 3 Q. B. Div. 514, 39 L. T. N. S. 219, 26 Week. Rep. 894, clearly takes the position that the law of the place where the bill is drawn or indorsed governs the time within which the notice of dishonor must be given in order to hold the drawer or indorser, though it introduces an important qualification, or, at least, explanation, in the application of that rule. In this case it was held that the payee of a bill drawn in England upon parties in Spain and payable in the latter country, who indorsed the same in England, was liable to his immediate

indorsee, upon the dishonor of the bill by the failure of the drawee to accept, notwithstanding that such indorsee did not send him notice of nonacceptance until twelve days or more after dishonor, it appearing that such immediate indorsee indorsed the bill to a third person in Spain, by the law of which notice of nonacceptance was unnecessary, and that he sent the notice of nonacceptance to his indorser as soon as he received it from his indorsee. The decision is not upon the ground that the bill was payable in Spain, and it is expressly stated that that fact is immaterial. It is upon the ground that, while the first indorsement, being made in England, was governed by the law of England with respect to necessity of notice, and that if there had been no further indorsement, or a further indorsement in England, the delay would have been fatal, yet the first indorsement must be regarded as having been made with a view to a possible reindorsement in a country whose law did not require immediate notice in order to hold the indorser, and that, therefore, the condition of the first indorser's liability was sufficiently complied with by the giving of notice as soon as it was received by his indorsee. It will be observed that this decision rests substantially upon the second ground suggested in *Hirschfeld v. Smith*, L. R. 1 C. P. 350, 35 L. J. C. P. N. S. 177, 12 Jur. N. S. 523, 1 Harr. & R. 284, *supra*. Cotton, L. J., said, in *Horne v. Rouquette*, L. R. 3 Q. B. Div. 514, 39 L. T. N. S. 219, 26 Week. Rep. 894, *supra*, that, while he was unable to agree with the reasons given by Lord Denman in deciding *Rothschild v. Currie*, 1 Q. B. 49, 4 Perry & D. 737, *supra*, the decision in that case might be supported on other grounds, namely, that due notice is such as may be reasonably required under the circumstances of the case, and that the notice was, under the circumstances, given in a reasonable time. This qualification or explanation of the rule to some extent, at least, obviates a serious objection that has been made to the application of the rule, based upon the idea that, as there may be a number of indorsements made in different places, an intermediate indorser may, in consequence of delay in receiving notice, be unable to give his indorser notice within the time required by the law of the place where such indorsement was made, and yet be liable over to his indorsee because the notice was received within the time allowed by the law of the place where the indorsement to the latter was made. The qualification or explanation above suggested would not, of course, meet the objection unless the rules established at the place of indorsement, governing the time within which notice must be given, allow a certain leeway under exceptional circumstances. Of course, if those rules establish a hard and fast period which cannot be enlarged under any circumstances, the objection could not be obviated in this manner. But when there is a provision like that in § 184 of the negotiable instrument law of New York, excusing delay in giving notice when caused by circumstances beyond the control of the holder, it would seem that the objection referred to can be satisfactorily met by holding that the failure of an intermediate indorser to receive timely notice from his indorsee under such circumstances is sufficient to excuse his delay in giving notice to his indorser. Whether this qualification or explanation meets the further objection to the rule, that it requires the last holder, in order to charge all the prior parties, to comply, in respect to giving notice, with the requirements of the law of every state in which the contract of the prior party may have been made, is not so clear, since it may be that his delay in giving notice beyond the period required by the law

where any previous indorsement was made, could not be excused upon the ground that a longer period was allowed by the law of the place of the last indorsement, since he would have immediate knowledge of the dishonor of the bill or note. Still, even the last holder may, perhaps, hold the drawer, or a previous indorser, by virtue of his right to hold the immediate indorsers and the latter's right to hold the prior indorser.

The question whether a notice by the surety on a note to proceed against the principal must be in writing in order to effect the surety's release if not complied with goes to the question of the surety's obligation, and is not merely a matter of remedy, and, therefore, is to be determined by the law of the place where the note is made and is payable, rather than by the law of the place where the action is brought. *Tenant v. Tenant*, 110 Pa. 478, 1 Atl. 532.

4. Necessity of suing primary obligor as condition of holding drawer or indorser.

It is established by the great weight of authority that the necessity of suing the acceptor of a bill, or maker of a note, as a condition of holding the drawer or indorser, is to be determined by the law of the place where the bill was drawn or the bill or note was indorsed, as the case may be. *Mott v. Wright*, 4 Biss. 53, Fed. Cas. No. 9,883; *Bank of Illinois v. Brady*, 3 McLean, 268, Fed. Cas. No. 888; *Dundas v. Bowler*, 3 McLean, 397, Fed. Cas. No. 4,141; *Dunn v. Adams*, 1 Ala. 527, 35 Am. Dec. 42; *Miller v. McIntyre*, 9 Ala. 638; *Cox v. Adams*, 2 Ga. 158; *Levy v. Cohen*, 4 Ga. 1; *Stanford v. Pruet*, 27 Ga. 243, 73 Am. Dec. 734; *Studebaker Bros. Mfg. Co. v. Hinsey*, 88 Ill. App. 234; *Humphreys v. Collier, Breese (Ill.)* 231; *Crouch v. Hall*, 15 Ill. 263; *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; *Mendenhall v. Gately*, 16 Ind. 149; *Rose v. Park Bank*, 20 Ind. 94, 83 Am. Dec. 306; *Bernard v. Barry*, 1 G. Greene, 388; *National Bank v. Green*, 33 Iowa, 140; *Young v. Harris*, 14 B. Mon. 556, 61 Am. Dec. 170; *Carlisle v. Chambers*, 6 Bush, 268, 96 Am. Dec. 304 (see *infra*); *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Conahan v. Smith*, 2 Disney (Ohio) 9; *Holt v. Salmon*, Rice L. 91; *Trabue v. Short*, 5 Coldw. 293.

Well v. Sturgis, 23 Ky. L. Rep. 644, 63 S. W. 602, is merely authority for eliminating the *lex fori* as the note was executed, payable and assigned in Illinois, whose law was held to govern.

It is true that in some of these cases the same result was reached as if the law of the place of payment (which, in the absence of the designation of any other place, is presumptively the place where the note was made) had been applied because the place of indorsement and the place of payment were the same; but the decisions nevertheless rest upon the ground that the law of the place of drawing or indorsement (meaning, of course, not merely the place where the drawer or indorser writes his name, but the place where the bill or note is delivered or transferred so as to become binding upon him) governs.

The court in *Dunnigan v. Stevens*, 122 Ill. 396, 13 N. E. 651, said that, the note in question having been made and indorsed in Indiana, the question of diligence to collect of the maker, in order to hold the indorser, was governed by the law of that state. In this case, however, the note was made, was payable, and was indorsed in Indiana, so that the decision is full authority only for the elimination of the *lex fori* as the governing law on this point.

In *Lee v. Selleck*, 32 Barb. 522, the supreme court seems to have been of the opinion that the

law of the indorsee's residence (New York) governed in respect to suit against the maker as a condition of holding the indorser, even if the indorsement had been made in Illinois. The court, however, was of the opinion that the contract of indorsement must be regarded as having been made in New York, where the indorsee received the indorsed note through the mails, though the indorsement, which was for the accommodation of the maker, was written on the note in Illinois. The decision was affirmed by the court of appeals (33 N. Y. 615), which seems to have taken the same position as the supreme court upon both the points referred to. It is clear, however, that, so far as this case favored the law of the residence of the indorsee as against the law of the place of indorsement, it is contrary to the weight of authority; and Sutherland, J., who wrote the opinion in the supreme court, said, in the subsequent case of *Artisans' Bank v. Park Bank*, 41 Barb. 599, that the decision in *Lee v. Selleck* was probably correct upon the facts, because the indorsement was properly considered as made in New York; but that, so far as anything was said in his opinion in that case, to the effect that, even if the indorsement had been made in Illinois it would still have been a contract to pay the holder or indorsee in New York upon the default of the maker, it was erroneous.

As the foregoing rule apparently rests upon the presumed intention of the parties, it will undoubtedly yield to circumstances which clearly and unmistakably point to an intention on the part of the parties that their contract shall be governed by a different law. While most of the cases above cited state the rule broadly without any such qualification, it does not appear that there were any extrinsic circumstances to overcome the presumption upon which the rule rests. In *Vanzant v. Arnold*, 31 Ga. 210, the court, while apparently conceding that, in the absence of extrinsic circumstances to indicate a contrary intention, the law of the place of indorsement governs as to the necessity of suing the maker as a condition of holding the indorser, takes the view that the rule will yield to circumstances showing that the parties intended to be governed by another law. In this case, therefore, it was held that the question was governed by the law of Georgia, rather than that of Tennessee, notwithstanding that the indorsement was made in Tennessee. The decision rests upon the ground that none of the parties resided in Tennessee, the maker and indorsers being residents of Georgia and the indorsees of New York. (See *Briggs v. Latham*, 36 Kan. 255, 59 Am. Rep. 546, 13 Pac. 393, *supra*, X. c. 2, (a).) The effect of extrinsic circumstances to modify the rule is also recognized in *Carlisle v. Chambers*, 4 Bush, 268, 96 Am. Dec. 304, *infra*.

Conceding the general rule, as above stated, that the law of the place where the bill is drawn or the bill or note indorsed, as the case may be, determines the necessity of suing the acceptor or maker as a condition of holding the drawer or indorser, it may happen that by that law such necessity depends upon whether the note is negotiable or otherwise, and the question may arise whether its character in that respect, for the purposes of such law, is to be determined by the law of the place where it was drawn or indorsed or by that of the place where it was payable. In *Gaylord v. Johnson*, 5 McLean, 448, Fed. Cas. No. 5,285, the court held that, the note being negotiable by the law of Ohio, where it was payable, demand of payment when due, protest, and notice were due diligence which enabled the assignee to hold the assignor, notwithstanding that the assignment was made in Indiana, by the law of which

the note was not negotiable; so that, if the note had been payable there the prosecution of the maker to insolvency would have been a necessary condition of the assignor's liability. This decision, however, seems to rest upon the idea that the entire question as to the necessity of complying with this condition was governed by the law of Ohio, and not upon the distinction above suggested. If the decision rests upon this ground, it is, of course, opposed to the great weight of authority as above cited. The distinction seems to have no support in the cases bearing upon the particular condition precedent now under discussion.

In *Goddin v. Shipley*, 7 B. Mon. 578, the court, while holding that the character of a promissory note as an inland bill of exchange was to be determined by the law of the place where it was payable, said that, if the note were actually assigned in Kentucky for value, by a citizen of Kentucky, so that there was a complete contract of assignment there, it might be doubtful whether the assignor could be held liable as the indorser of a bill of exchange, and upon such diligence against the maker of a note as would be sufficient in case of an actual bill of exchange against the acceptor, notwithstanding that the note was payable in Missouri, according to the law of which it was on the footing of an inland bill of exchange; but in this case it was held that the contract of indorsement was made in Missouri, and therefore the indorser's liability was governed by the law of that state, it appearing that the note, as indorsed, was first delivered in Missouri.

And *Hyatt v. Bank of Kentucky*, 8 Bush, 193, expressly holds that the character of a promissory note as negotiable paper, as affecting the question of the necessity of prosecuting the maker to insolvency as a condition of holding the indorser, is to be determined by the law of the state where the indorsement was made, *i. e.*, where the indorsed note was delivered, notwithstanding that it was made and delivered in another state, and, there being no other place of payment especially named, was by legal intentment also payable there. In this case the note was made and delivered in Louisiana, no place of payment being especially mentioned. It was indorsed by the payee and delivered by him in Kentucky. It was held that the indorser's liability was governed by the law of Kentucky, according to which the note was not commercial paper, and therefore his liability was conditioned upon the prosecution of the maker to insolvency; and that this result was not affected by the fact that the indorser knew that the law of Indiana on the subject was different, the court holding that the assignment of the note is of itself an independent contract, and must be regulated by the law where it was made, and that no presumption shall be indulged to change its legal effect. The court recognized that the last point conflicted to some extent with the reasoning of the court in the case of *Carlisle v. Chambers*, 4 Bush, 268, 96 Am. Dec. 304. In the latter case the court finally reached the same result as was reached in the former case, but its decision is based upon an inference, drawn from the circumstances, as to the intention of the parties. In this case a note, which was made and payable in Ohio, was indorsed in that state to a citizen of Kentucky, who subsequently indorsed and transferred the same in Kentucky to a citizen of that state. The action was by the last indorsee against his immediate indorser, and the defense was that the maker had not been diligently prosecuted to insolvency. According to the law of Ohio, where the note was payable (which concededly determined its character as between the original parties), the note was in effect a bill of exchange, and,

If its character as such, as between the indorser and indorsee, had been recognized, the prosecution of the maker would not have been necessary, even according to the law of Kentucky. It was held that, as between the parties to the indorsement in Kentucky, the law of Kentucky governed, and the prosecution of the maker was therefore a necessary condition of the indorser's liability. The court takes the broad position that, as between the parties to such indorsement, the question was whether they intended only an assignment to a simple promissory note, or a bill of exchange. It was of the opinion that, in the absence of any other circumstances indicating understanding of the parties, it would be presumed that the parties ascribed to the instrument the character stamped upon it by the law of Kentucky (*i. e.*, that it was only a promissory note) from the fact that they were citizens of that state, and that the indorsement was made there; but, in view of the fact that the bill had been previously indorsed in Ohio to the Kentucky indorser, and that the Kentucky indorsee had peculiar means of knowing the character of the bills by the law of Ohio, the presumption was neutralized, and the court therefore looked to the extrinsic circumstances to solve the question as to the intention of the parties, and from those circumstances, including the fact that a mortgage given by the Kentucky indorser to secure his indorsement described the instrument as a promissory note and not as a bill of exchange, and that they were also so described in the petition, the court came to the conclusion that the parties looked to the law of Kentucky for the character of the notes, and considered the indorsements of them as assignments governed by that law as to the duties of the assignee and the legal liability of the assignor, and therefore that the failure to prosecute the maker prevented the recovery of a judgment *in personam* against the indorser. The court approves the position taken in *Hunt v. Standart*, 15 Ind. 73, 77 Am. Dec. 79.

In *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79, and *Rose v. Park Bank*, 20 Ind. 94, 83 Am. Dec. 306, it was held, in accordance with the law of Indiana, where the notes in those cases were indorsed, that the prosecution of the maker to insolvency was a condition of holding the indorser, notwithstanding that that law only applied to notes that were not upon the footing of bills of exchange, and notwithstanding that by the law of New York, where the notes were payable, and which was conceded to determine their negotiability as between the original parties, the same were negotiable.

While none of the foregoing cases expressly excludes the law of the forum as the governing law, and while in some of them the law of the place of indorsement was also the law of the forum, yet they all apparently assume that the law of the forum does not govern. And it is expressly held in *Burrows v. Hannegan*, 1 McLean, 315, Fed. Cas. No. 2,206, that the question as to the necessity of prosecuting the maker of a note to insolvency as a condition of recourse to an indorser is determined by the law of the state where the contract was made, signed, and payable, rather than by the law of the state where the suit is brought. So, it was held in *Williams v. Wade*, 1 Met. 82, that the law of Illinois upon which the indorser of a note is liable only after a judgment obtained against the maker, governed in an action in Massachusetts upon a note made and indorsed in Illinois. The court said that the law in question did not affect the remedy, but merely created, limited, and modified the contract effected by the fact of indorsement.

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XI. Who may bring action; and herein, of the sufficiency of the indorsement or assignment.

The ultimate question as to the right of an assignee or indorsee of a bill or note, at least after his character and substantive rights have been ascertained, to maintain an action in his own name, pertains to the remedy, and is governed by the law of the forum.

Thus, *Foss v. Nutting*, 14 Gray, 484, holds that an assignment without indorsement, in a state whose laws provide that "every action must be prosecuted in the name of the real party in interest," of a promissory note made and payable there to order, does not bar an action upon it in Massachusetts in the name of the payee. The decision was upon the ground that the question relates to the remedy, and is therefore governed by the *lex fori*.

An assignee of a note payable to the payee or his order may maintain an action thereon in his own name in New York, notwithstanding that, by the law of Connecticut, the suit would have to be brought in the name of the original payee. *Lodge v. Phelps*, 1 Johns. Cas. 139, 2 Cal. Cas. 321. The decision is upon the ground that the *lex loci contractus* governs only with respect to the nature and construction of the contract, and not as to the mode of enforcing it. The court said that, by the rule of equity in Connecticut, the assignee was entitled to receive the money in preference to the original payee, and that, that being so, there was no reason why he should be compelled, agreeably to the usage of Connecticut, to use the name of the original payee or a mere nominal plaintiff or *dramatis persona*.

In *Cope v. Daniel*, 9 Dana, 415, it was held that if, by the law of Pennsylvania (*lex loci contractus*), indorsements in blank of a promissory note passed to the holder any right to the note, he might maintain an action thereon in Kentucky in his own name, since the statute of Kentucky authorizes a suit in that state in the name of a foreign assignee of any such obligation, although the *lex loci contractus* may have entitled him to only a beneficial interest; since the *lex fori* controls as to the form of the remedy.

In *Levy v. Levy*, 78 Pa. 507, 21 Am. Rep. 35, it was held that one to whom book accounts were assigned in New York might maintain an action thereon in his own name in Pennsylvania, notwithstanding that, if the assignment had been made in Pennsylvania, he could not maintain such an action. The decision is upon the ground that, while the law of Pennsylvania, as the law of the forum, determines whether an assignee of a chose in action may maintain an action thereon in his own name, and that law provides, in effect, that an assignee must sue in the name of his assignor if the assignment merely passes the equitable title, yet, in applying such law, the court will look to the law of New York, *lex loci contractus*, rather than to the law of Pennsylvania, to determine whether the assignee obtained a legal, or merely an equitable, title. Having ascertained that, by the law of New York, he obtained a legal title, he was permitted to maintain the action in Pennsylvania, notwithstanding that under the law of that state an assignment of book accounts would only pass the equitable title.

In *Jordan v. Thornton*, 7 Ark. 231, 44 Am. Dec. 546, the court seems to have been of the opinion that the question whether the last assignor of a bond or note, payable to an individual or order, may maintain an action thereon in the name of the original payee, was to be determined by the law of Arkansas (*lex fori*), although it was said that, if the law of Ten-

nessee (*lex loci contractus*) governed, the result would be the same.

The statement made at the beginning of the subdivision is also assumed to be true by the cases hereinafter cited.

This right, however, under the law of the forum, may depend upon the character of the instrument and the nature of the substantive rights acquired under the assignment or indorsement; and the question arises whether, for the purpose of applying the remedial law of the forum, those elements are to be determined by the law of the forum or by the law of the substantive contract of the party whose rights are involved. There is a decided conflict of opinion upon this point. Thus, it was stated in *Bank of United States v. Donnelly*, 8 Pet. 361, 8 L. ed. 974, that an instrument may be negotiable in one state which may yet be incapable of negotiability by the laws of another state, and the remedy must be in the courts of the latter on such instrument according to its own laws. The exact question in this case was whether the character of a note as a specialty for the purpose of the statute of limitation of Virginia (the forum) was to be determined by the law of Virginia (*lex fori*), or by the law of Kentucky, where the note was made. The decision was in favor of the law of Virginia. Mr. Justice Story, who wrote the opinion, said: "The remedy, in Virginia, must be sought within the time, and in the mode, and according to the descriptive characters, of the instrument known to the laws of Virginia, and not by the description and characters of it prescribed in another state."

So, it was expressly held in *Roads v. Webb*, 91 Me. 406, 40 Atl. 128, that the law of the forum governs as to the negotiability of a note, because upon it depends the question, Who has the right of action? It will be observed that the language of the decision is broad enough to cover the entire question of negotiability, without distinction between the various consequences that result from the characterization of an instrument in that respect; but the point involved was merely as to the right of the assignee or indorsee to maintain an action in his own name, and, for the reasons stated in VIII., *supra*, it is probably to be confined to cases of the same kind. However, it is clearly authority for the proposition, not only that the law of the forum prescribing the person to bring the action is the prevailing law, but also that, for the purposes of the application of that law, the character of the instrument and of the assignee or indorsee is to be determined by the law of the forum, and irrespective of the place where the note was made, payable, or indorsed. The court, in this case, however, said that in any event the question as to negotiability, being one of general commercial law, would be determined in accordance with the rule as declared in Maine, even if the law of the forum as such did not govern.

So, an action on a note which is negotiable in Illinois is properly brought by an assignee thereof, although under the law of the state in which it was executed it was not negotiable, and by that law the legal title did not pass by the assignment. *Ilakes v. National Bank*, 61 Ill. App. 501.

The question of the negotiability of a note is governed by the *lex fori*, so far as it affects the question of the right of a bona fide holder or assignee to maintain an action in his own name; but, so far as it affects the question what right he has acquired by the note and by the indorsement and transfer thereof, the law of the place where the note was made, and is payable, governs. *Warren v. Copelin*, 4 Met. 594. The note, in this case, was made and 61 L. R. A.

was payable in Connecticut, and, according to the law of that state, was not negotiable because under §35. It was held that the assignee took the note subject to the incidents to which it would be subject had it not been so assigned, including its liability to attachment by creditors of the assignor. The note, in this case, was indorsed and delivered in Connecticut, so that there was no conflict between the law of the place where the note was made and the law of the place where it was indorsed, the only conflict being between the *lex loci contractus* and the *lex fori*.

The negotiability of an instrument for the purpose of enabling an assignee to maintain an action thereon in his own name is to be determined by the law of the forum, and not by the law of the place where the instrument is made. *Logue v. Smith, Wright* (Ohio) 10. The decision is upon the ground that the manner of enforcing payment, and the bringing and conducting suits looking to that end, is the law of the remedy, and not of the contract, and that the remedy is governed by the law of the place where it is sought.

In *Woods v. Ridley*, 11 Humph. 194, the court held that a note under seal, negotiated in Tennessee, being negotiable according to the law of that state, it was immaterial whether it was negotiable by the law of Louisiana, where it was executed, or not. The court further said that, supposing the note to have been negotiated in Louisiana, and that by the law of that state it was not negotiable, it might still incline to the opinion that an action might be begun by the indorsee against the makers according to the law of Tennessee (*lex fori*).

In *Milne v. Graham*, 1 Barn. & C. 192, 2 Dowl. & R. 293, 1 L. J. K. B. 91, it was held that the statute of Anne, declaring promissory notes negotiable, applied to foreign, as well as inland, notes. The question in this case was as to the right of an indorsee of a promissory note made in Scotland to maintain an action thereon in England. It was held that he had such right.

So, in *Lodge v. Phelps*, 1 Johns. Cas. 139, 2 Cal. Cas. 321, *supra*, it will be observed that, for the purposes of the law of New York (*lex fori*) permitting the indorsee of negotiable paper to maintain an action in his own name, the character of the note as negotiable paper was determined by the law of New York as the law of the forum, and not by the law of Connecticut, which, for the purposes of the case, it was assumed would govern the question of negotiability so far as it affected the substantive rights of the parties.

In *Bowne v. Olcott*, 2 Root. 353, however, it was held that an action could be maintained by an indorsee upon a note made and payable in New York, and which, by the law of that state was negotiable, notwithstanding that it was not negotiable by the law of Connecticut (*lex fori*), and, consequently, no such action would lie in favor of an indorsee upon a note executed in Connecticut.

So, in *Lockwood v. Lindsey*, 6 App. D. C. 396, it was held that the effect of a stipulation for attorneys' fees in a note, as affecting its negotiability, was to be determined by the law of Texas, where the note was made and payable, rather than by the law of the District of Columbia, notwithstanding that the question of negotiability was raised as affecting the right of the indorsee to maintain the action.

In *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68, where it was urged that a note made and payable in Illinois was not negotiable, and that, therefore, no action could be maintained thereon in the name of an indorsee, the court apparently assumed that the question of negotiability was

to be determined by the law of Illinois, but, in the absence of evidence to the contrary, assumed that the question was governed by the common law, as amended or declared by statute of 3 and 4 Anne, chap. 9, and that the rule of the common law on the subject is as declared by the Massachusetts decisions.

In *Reddick v. Jones*, 28 N. C. (6 Ired. L.) 107, 44 Am. Dec. 68, it was held that, if a note were negotiable by the law of North Carolina, where it was made, no place of payment being specified, one who took the same by indorsement in Virginia may maintain an action thereon in North Carolina without proving that it was negotiable by the law of Virginia. The decision is not upon the ground that the *lex fori* governs, but that North Carolina was the place where the contract was made and was to be performed.

Where bonds, which by the law of North Carolina are negotiable, are given in that state, and are not payable at any particular place out of the state, an indorsee may sue in that state upon an indorsement made in Georgia, although by the law of Georgia the bonds may not be negotiable; and, if the bonds were given in Georgia, and were indorsed in North Carolina, or at any other place at which the bonds are negotiable, the indorsee would likewise have an action thereon. *Grace v. Hannah*, 51 N. C. (6 Jones L.) 94. It seems to be considered in this case that it would be otherwise if the bonds and indorsements were both executed in Georgia; and it therefore follows that the decision does not rest upon the ground that the character of the bonds was necessarily to be determined by the law of the forum.

So, in *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98, it was held that the question whether a note is negotiable or not relates to its nature and effect, and is therefore to be governed by the *lex loci contractus*, although the remedy is governed by the place where the suit is instituted. Therefore, a note executed and made payable in New York, and negotiable by the law of that state, will be so treated by the court of Virginia; but the question as to what constitutes evidence of presentment and dishonor is to be determined by the *lex fori*. In this case it was held, in accordance with the law of Virginia, that a certificate of protest by a notary in New York was not evidence of the dishonor of a note made and payable in New York. This seems to imply that, for the purposes of applying the remedial laws of the forum, the character of the instrument as negotiable or otherwise is to be determined by the law which governs the substantive contract.

And *Stix v. Mathews*, 63 Mo. 371, held that the negotiability of a note which was made and is payable in another state is to be determined by the law of that state, rather than by the law of the forum. The action in this case was by the holder against the indorsers of the note. It is not clear exactly how the question of negotiability was important. The question was raised upon an objection to the admission of the notes in evidence.

Barrett v. Gillard, 10 Tex. 69, though it did not involve any question as to negotiability, also illustrates the manner in which the courts sometimes look to the laws of another place for the purpose of ascertaining the character of the indorsee or assignee, even when the ultimate object is the application of the law of the forum to the remedy. It was held in this case that an assignment by an executor or administrator of a deceased payee of a note, which was valid by the law of the latter's residence, would be recognized in Texas for the purpose of enabling an assignee to maintain an action on the note in that state.

In *Mendenhall v. Gately*, 18 Ind. 149, it was 61 L. R. A.

assumed that the law of Mississippi, proved or presumed, determined the question whether or not a note was transferred by indorsement, so as to allow the indorsees to sue the indorser, where the note was made and indorsed in that state.

In *Alcock v. Smith* [1892] 1 Ch. 238, 61 L. J. Ch. N. S. 161, 65 L. T. N. S. 335, a bill was drawn in the English language in England, upon English bankers, and was made payable in London; it was indorsed in Norway to the order of a certain person, and by him indorsed in blank and delivered in Norway to an agent of an English firm and of one of the members of such firm individually; while the bill was in the hands of such agent, and before its maturity, it was seized in execution under a judgment obtained in Norway by a creditor of the other member of the firm, and after maturity was sold at auction, in accordance with the law of Norway, and was subsequently sold by the purchaser at such sale to a third person in Sweden, who sent it for collection to his agent in England. The firm and one of the partners (not the one against whom the judgment was rendered in Norway) enjoined the acceptors from paying the bill, and subsequently, by arrangement, the proceeds of the bill were paid into court, and the right to the proceeds contested by the plaintiffs and the last purchaser. By the law of Norway the purchaser at the auction sale acquired a good title, and by that law (which in that respect was the same as the law of Sweden) there was no difference in respect of negotiability, between a current and an overdue bill. It was held by *Romer, J.*, on appeal to the court of appeal, that the last purchaser was entitled to the proceeds as against the plaintiffs, notwithstanding the proviso to subsection 2 to § 72 of the English bills of exchange act of 1882, to the effect that where an inland bill is indorsed in a foreign country the indorsement shall, "as regards the payer," be interpreted according to the law of the United Kingdom. *Romer, J.*, put the decision upon the ground that, as between the parties to the controversy, the validity and effect of the transfers were to be determined by the law of Norway and Sweden, where they took place. He said that the action was in reality one for the recovery of the bill,—a mere question as between two parties, each claiming against the other to be entitled to hold the bill, and, as holders, to obtain payment thereon. He held that the proviso referred to did not apply because no question as to the effect of the transfers or indorsements on the rights or liabilities of the payer was involved. He further said, in this connection, that, if the last purchasers of the bill had presented it for payment to the payers before the injunction was obtained, the latter could safely have paid the bill, irrespective of the rights *inter se* of the parties to the present controversy. He cites, in support of this statement, the provision of § 59 of the above-mentioned act to the effect that a bill is discharged by payment in due course by an acceptor at or after maturity, to a holder thereof in good faith and without notice that his title to the bill is defective; and § 2 of the same act defining the term "holder" as payee or indorsee in possession of the bill. *Lindley, L. J.*, and *Lopes, L. J.*, in the court of appeal, took the position that the last indorsement in Sweden was effectual to confer a good title upon the indorsee, whether it be interpreted according to the English law or to the law of Sweden. This view was based upon § 36, subsection 2, of the foregoing act, providing that, when an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and that thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had. The court

said that, in effect, the latter provision did not adversely affect such indorsee, since there was no defect in his indorser's title because the latter acquired his title at a judicial sale. It will be observed that this theory proceeds upon the assumption that the effect of the judicial sale as a transfer of the title was to be determined solely by the law of Norway, and was not affected by the law of England.

The common-law rule prevailing in New York, by which the legal import of an indorsement in blank of a promissory note cannot be varied by parol evidence that the indorsement was only for collection, does not govern in an action in Connecticut upon a note made and payable and indorsed in New York. The decision is upon the ground that the New York rule does not make parol contracts of indorsement void, but merely requires written evidence before the courts of that state will be satisfied that any other contract was made than the one implied by law from the blank indorsement. In this view the rule of law affected the remedy merely, and therefore did not apply to a suit brought in Connecticut. *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29.

But it was held in *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 13 L. R. A. 52, 28 N. E. 163, that the right to show that the obligation growing out of an indorsement of a promissory note is not absolute, but depends upon a collateral agreement, relates to the nature and validity of the contract, and not to the remedy, and is governed by the *lex loci contractus*.

The question whether a note payable to a specified person or bearer can be transferred by mere delivery so as to vest the legal title in the bearer and enable him to maintain an action at law is to be determined by the law of the forum, and not by the law of the place where the note was made and transferred. *Roosa v. Crist*, 17 Ill. 450, 35 Am. Dec. 679. The decision is upon the ground that the law of the forum must determine the mode in which relief will be administered. It was accordingly held that the transferee had no right to pursue his remedy in his own name in Illinois, since, according to the law of that state, the delivery of the note to him did not transfer the legal title.

The validity of an indorsement made by the agent of the payee is to be determined by the law of the place where the note and indorsement were made. *Yeatman v. Cullen*, 5 Blackf. 240. The note and indorsement, in this case, were both made in Ohio, and, so far as appears, the note was also payable there. The only conflict, therefore, was between the law of Ohio and the law of Indiana as the *lex fori*.

In *Everett v. Vendryes*, 19 N. Y. 436, it was held that the form of an indorsement of a bill of exchange drawn and indorsed in New Granada, but addressed to a corporation resident in New York and consequently payable there, and its sufficiency to transfer the title to the indorsee, were to be determined by the law of New York, rather than by the law of New Granada, as between the drawer and the indorsee, though it was admitted that, as between the indorser and indorsee, the law of New Granada, as the place where the contract of indorsement was made, would govern. The law of New Granada on the subject of indorsement contained certain requisites as to form of the indorsement which were not complied with, and were not required by the law of New York.

In *Trimbey v. Vignier*, 1 Bing. N. C. 151, 4 Moore & S. 695, 6 Car. & P. 25, the court of common pleas, having found as a fact that by the law of France an indorsement in blank does not transfer any property in a note or bill of exchange, held that the holder of a note made in

France and there indorsed in blank could not recover against the maker in England. The decision appears to be upon the ground that the law of France governs, not merely because the note was indorsed there, but because it was made there. No place of payment was specified in the note.

In *Lebel v. Tucker*, L. R. 3 Q. B. 77, 37 L. J. Q. B. N. S. 40, 17 L. T. N. S. 244, 8 Best & S. 330, it was held by the court of Queens Bench that an indorsee could maintain an action in England upon a bill of exchange payable to order drawn, accepted, and payable in England, if the indorsement was valid by the law of England, although it was made in France, and by the law of France gave no right to the indorsee to sue in his own name, notwithstanding that the indorser (who is also drawer and payee) and the indorsee were, at the time the bill was made and indorsed, subjects of France and domiciled and resident in that country. The court expressly refrained from expressing any opinion as to the rights of the indorsee against the indorser, either in England or France. The decision is upon the ground that the acceptor in such a case undertakes to pay the payee or his order by an indorsement valid according to the law of England.

The case of *Bradlaugh v. De Rin*, L. R. 3 C. P. 538, 37 L. J. C. P. N. S. 318, 18 L. T. N. S. 904, 16 Week. Rep. 1128, presented a question intermediate between that in *Trimbey v. Vignier* and *Lebel v. Tucker*. In this case a bill of exchange was drawn in France upon, and accepted by, the drawee in London and indorsed in blank in France. It was held by the majority of the court of common pleas that the case was governed by the decision in *Trimbey v. Vignier*, and that the indorsee could not maintain an action against the acceptor in England. *Montague Smith, J.*, dissented, and took the view that the case was governed by the decision in *Lebel v. Tucker*, holding that the fact that in the case at bar the note was drawn in France, while in the other case it was drawn in England, was immaterial, inasmuch as in both cases it was accepted in England, and the question involved was as to the acceptor's liability. The majority opinion assents to the argument of counsel for the acceptor that his contract was to pay the drawer or the person to whom the drawer has made a valid transfer of his rights, that no intention to make such transfer can be imputed to the drawer in the case at bar, and that without his intention the mere writing of his name was inoperative. The majority opinion does not expressly overrule *Lebel v. Tucker*, and apparently does not regard the decision in the case at bar as opposed to the decision in that case. The decision in *Bradlaugh v. De Rin* was reversed in the exchequer chamber (L. R. 5 C. P. 473, 39 L. J. C. P. N. S. 254, 22 L. T. N. S. 623, 18 Week. Rep. 931), but the reversal was not on a question of law, but upon a question of fact, the exchequer chamber taking the view that, under the law of France, a blank indorsement was sufficient to enable the indorsee to maintain an action, and that the court below was wrong on that point, as was also the court of common pleas in *Trimbey v. Vignier*.

In *Re Marsellies Extension R. & Land Co. L. R. 30 Ch. Div. 598*, 55 L. J. Ch. N. S. 116, bills of exchange were drawn in France by a domiciled Frenchman in the French language, but in English form, on an English company, which duly accepted them. The drawer indorsed the bills and sent them to an Englishman in England. It was held that the acceptor could not dispute his liability upon the ground that the indorsement was informal according to French law. The decision is put upon the ground that, as regards the drawer, the bill being in English

form, was an English bill. The court was not called upon to decide whether an indorsement in France of such a bill by a person other than the drawer would have to conform to the law of France in order to entitle one claiming the bill, under or through such indorsement to maintain an action thereon in England. Pearson, J., said, however: "If I had to decide the question as to whether or not, where a bill is indorsed in different countries, the indorsement must be in every case in conformity with the law of the country in which the indorsement takes place, I should certainly take time to consider before I came to the conclusion that that was the law."

XII. Right to join primary and secondary obligors.

In *Mix v. State Bank*, 13 Ind. 521, it was assumed that the question whether a joint suit could be maintained against the maker and assignor of the promissory note was to be determined by the law of Indiana. This was apparently upon the ground that the *lex fori* governed, as the note, though made in Indiana, was payable in New York. It was held in this case that the note, not being payable at a chartered bank in Indiana, was not governed by the law merchant, and therefore that the rule of the law merchant, that where payment of a note or bill has been duly demanded and notice given of failure to pay the makers and indorsers become jointly liable, did not apply. Here, the court not only applied the law of the forum to the effect that the maker and assignor of a note, not upon the footing of a bill of exchange, cannot be joined, but also applied the law of the forum to determine whether the note was or was not upon the footing of a bill of exchange for the purposes of the former law.

So, the question whether an acceptor of a bill may be sued jointly with the directors and indorsers is to be determined by the *lex fori*, rather than by the law of the place where the bill was accepted. *Smith v. Muncie Nat. Bank*, 29 Ind. 156.

In *Bank of Tennessee v. Smith*, 9 B. Mon. 613, it was held that a bank of a sister state which had purchased a bill of exchange could not avail itself of the rule in Kentucky, that when, by the provisions in the charter of a bank, all bills discounted by it are placed upon the same footing of a foreign bill as to the right of action and mode of recovery thereon, a joint action against the drawer and indorser may be maintained upon a bill of exchange of any description which has been discounted by the bank, in the absence of proof of any law of the sister state that a purchase of a bill by the bank places it upon the footing of a foreign bill. G. H. P.

Charles F. HAHN *et al.*, *Respts.*,
v.

Barbara SUGO, *Appt.*

(169 N. Y. 100.)

1. A single cause of action upon which but one action can be maintained

NOTE.—For a case holding that the abatement of a nuisance and recovery of damages caused thereby constitute but one cause of action, and that judgment in suit to abate is a bar to subsequent proceedings to recover damages, see, in this series, *Gilbert v. Boak Fish Co.* (Minn.) 58 L. R. A. 735, with note as to effect of adjudication respecting abatement of nuisance as bar to action for damages therefor. 61 L. R. A.

under statutes abolishing the distinctions between actions at law and suits in equity, and requiring a complaint to contain a plain and concise statement of the facts constituting each cause of action, and to demand the judgment to which plaintiff supposes himself entitled, is presented by the encroachment of a permanent wall upon another's property, the removal of which cannot be effected by legal process, but requires the aid of equitable remedies.

2. The complaint in an action to require the removal from plaintiff's property of a permanent wall built thereon by defendant, removal of which cannot be effected by legal process, should not only state the facts necessary for an action at law to recover real property, but it should ask for the necessary equitable relief, stating the facts which would entitle the plaintiff thereto, under statutes establishing one form of action, and requiring the complaint to state the facts constituting the cause of action, and demand the judgment to which plaintiff supposes himself entitled.
3. A judgment for plaintiff in an action to remove from plaintiff's land a permanent wall erected by defendant, which cannot be removed by legal process, in which action the plaintiff asks only for the relief appropriate in a legal action to recover real property, is a bar to a subsequent suit in equity to compel the removal of the wall, under statutes establishing one form of action, and requiring the complaint to state the facts constituting the cause of action, and demand the judgment to which plaintiff supposes himself entitled.
4. A prayer for equitable relief in an action to recover real property is properly stricken out when facts are not stated which entitle plaintiff to such relief.
5. Error in striking out a prayer for equitable relief in an action to recover possession of real property must be cured by appeal, and does not justify plaintiff in proceeding with his execution, and then bringing another suit for equitable relief when his execution proves inadequate.
6. Defendant in an action to recover real property brought to compel the removal of a permanent wall erected on plaintiff's property cannot, upon motion, be required to remove the wall, when the return of the execution states that it is impracticable for the sheriff to remove it.

(Haight, J., dissents.)

(December 17, 1901.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Erie County in plaintiff's favor in a suit brought to compel the removal of a wall from plaintiffs' property. *Reversed.*

The facts are stated in the opinion.

Messrs. *Streibel & Corey*, for appellant: The judgment entered January 11th, 1898, is a complete bar to a recovery in this action.

Stovell v. Chamberlain, 60 N. Y. 272; *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663; *Darley v. Brown*, 79 N. Y. 390; *Smith v. Smith*, 79 N. Y. 634; *Dunham v.*

Bower, 77 N. Y. 76, 33 Am. Rep. 570; *Pray v. Hegeman*, 98 N. Y. 351; *Lorillard v. Clyde*, 122 N. Y. 41, 25 N. E. 292.

By the recovery in the former action, the plaintiffs are found to be the owners, not only of the strip of land, but of all permanent improvements and fixtures attached thereto; and, having elected to make title to the strip of wall and eaves resting upon the land recovered, they are estopped from obtaining the relief sought in this action.

DeLancey v. Piegras, 73 Hun, 607, 26 N. Y. Supp. 806; 2 Kent, Com. 13th ed. p. 335; *Sedgw. & W. Trial of Title to Land*, 2d ed. p. 410, § 335; *Re Long Island R. Co.* 6 Thomp. & C. 298; *Re New York, W. S. & B. R. Co.* 37 Hun, 317; *Coatsworth v. Lehigh Valley R. Co.* 156 N. Y. 451, 51 N. E. 301; *Tyler, Ejectment*, 614.

The recovery of real property is no longer a mere possessory action, and a judgment in ejectment can be successfully pleaded in bar to a subsequent action.

Dawley v. Brown, 79 N. Y. 390; *Barrows v. Kindred*, 4 Wall. 399, 403, 18 L. ed. 383, 384.

The judgment in the former action is enforceable by execution under § 1240 of the Code of Civil Procedure, and not by an action brought upon that judgment.

Sedgw. & W. Trial of Title to Land, 2d ed. p. 400, § 549; *Bowie v. Brahe*, 2 Abb. Pr. 161.

The court will never compel, by granting injunctive relief, that which will create a greater wrong than it is intended to remedy.

McSorley v. Gomprecht, 30 Abb. N. C. 412, 26 N. Y. Supp. 917; *Gallatin v. Oriental Bank*, 16 How. Pr. 253; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 8 L. R. A. 175, 24 N. E. 24; *Pappenheim v. Metropolitan Elev. R. Co.* 128 N. Y. 436, 13 L. R. A. 401, 28 N. E. 518; *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741; *Equitable Life Assur. Soc. v. Brennan*, 30 Abb. N. C. 260, 24 N. Y. Supp. 784.

The damage suffered by the plaintiffs is not substantial, and merely nominal, and for this reason the injunctive relief should have been denied.

Smith v. Ingersoll-Sergeant Rock Drill Co. 12 Misc. 5, 33 N. Y. Supp. 70; *Otten v. Manhattan R. Co.* 2 App. Div. 396, 37 N. Y. Supp. 982; *Garvey v. Long Island R. Co.* 159 N. Y. 323, 54 N. E. 57; *O'Reilly v. New York Elev. R. Co.* 148 N. Y. 347, 31 L. R. A. 407, 42 N. E. 1063; *Genet v. Delaware & H. Canal Co.* 122 N. Y. 505, 25 N. E. 922; *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524.

Messrs. Hammond & Hammond, for respondents:

The court has power to compel the wrongdoer to remove from the plaintiffs' land the obstruction she has placed thereon.

Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67; *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804; *Eno v. Christ*, 25 Misc. 24, 54 N. Y. Supp. 400; *Mulrein v. Weisbecker*, 37 App. Div. 545, 56 N. Y. Supp. 240; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191.

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The plaintiffs should be given their own, even though it will cause trouble and expense to the wrongdoer to restore it, because they have no other remedy except a multiplicity of actions.

The rule that, where a choice of two remedies exists, as in a case of tort and on contract, a judgment in one will bar a judgment in the other, applies only when the remedies are inconsistent with each other, and does not apply in a case where equity is invoked in aid of a right which has been established by law, and which it is shown the law cannot enforce.

The usual practice is to first establish the title to the land, by an action of ejectment with jury, then where, as in this case, it is shown that the legal remedy is inadequate, equity may be invoked, on either of the two grounds last mentioned; viz., to prevent a multiplicity of actions, or to prevent a failure of justice.

Corning v. Troy Iron & Nail Factory, 40 N. Y. 191; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67; *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804; *Troy & B. R. Co. v. Boston, H. Tunnel & W. R. Co.* 86 N. Y. 107; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526.

Werner, J., delivered the opinion of the court:

This suit was brought to obtain a decree to compel the defendant to remove that portion of the wall of her building which encroaches upon the lands of the plaintiffs. The plaintiffs and the defendant are, and for many years have been, the respective owners of adjoining lots on the west side of Monroe street in the city of Buffalo, between Howard street on the north and Clinton street on the south. In the summer of 1895 the defendant erected a 2½ story brick house upon her lot, the northerly wall of which encroaches upon plaintiffs' lot, as set forth in the findings of the trial court. In 1896, after said house was completed, the plaintiffs brought an action in the supreme court to recover possession of the strip of land thus invaded by the defendant. The action was tried at a trial term, and a jury rendered a verdict in favor of plaintiffs. The defendant paid the costs and took a new trial, under § 1525 of the Code of Civil Procedure. The action was tried a second time, with the same result, and judgment was entered on the 11th day of January, 1898, establishing the plaintiffs' title in fee to the premises in dispute and their right to the possession thereof. That judgment contained a provision directing the defendant to forthwith remove from said premises all obstructions and erections of every kind placed thereon by her. In all other respects it was the ordinary judgment in an action to recover the possession of real property. That provision of the judgment was stricken out by the court on the defendant's motion, and thereafter the plaintiffs issued to the sheriff of Erie county an execution in the usual form. This execution was subsequently returned by the sheriff with an indorsement thereon stat-

ing, in substance, that the strip of land described therein was occupied by a portion of the stone foundation and brick wall of defendant's house, and that it was impracticable for him to remove the same. After such return of the execution, and before the commencement of the action at bar, the plaintiffs made a motion at a special term for an order directing the defendant to remove that portion of the wall of her house which encroaches upon the plaintiffs' land, which motion was denied. Thereupon the plaintiffs brought this action in equity to compel the defendant to remove said encroaching walls from their land. The supreme court at special term granted the relief prayed for, and the judgment entered upon this decision was unanimously affirmed by the appellate division. The appeal to this court brings up the question whether two separate actions can be maintained upon a single cause of action.

Section 3339 of the Code of Civil Procedure provides: "There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." Under § 481 of the Code, the requisites of a complaint are simply that it shall contain: (1) "A plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition," and (2) "a demand of the judgment to which the plaintiff supposes himself entitled." These sections of the Code, and others which need not be specifically referred to, clearly evince the legislative intent to strip our modern procedure of the cumbrous forms and distinctions which made the practice under the common law and the earlier statutes so burdensome in its details and so uncertain in its results. Upon examining that portion of the Code which deals with actions to recover real property (title 1, art. 1, chap. 14), we find that the old term "ejectment" has been discarded in the title, and it is now entitled "Actions to Recover Real Property." This change of name was, obviously, a part of the plan of the codifiers to reduce our practice to a simple and composite scheme, under which all of the rights of litigants, both legal and equitable, so far as they are consistent with each other and affect the same parties, can be tried in one action and be merged in a single judgment. One of the essential features of such a scheme is to make separate provision for causes of action that are inconsistent with each other or affect different parties or require different places of trial, and this has been done in § 484 and various other kindred sections of the Code, which specifies what causes of action may be joined in the same complaint. It is true that in the chapter of the Code relating to actions to recover real property the name and many of the incidents of the former action of ejectment still persist, but this is undoubtedly due to that conservatism of the law which has ever led our legislators and courts to use familiar names, and to reason in old terms, when enacting or construing statutes designed to produce reforms in our law and practice. We 61 L. R. A.

shall have occasion further on to refer more specifically to this chapter in its application to the concrete question presented by this appeal. Let us now see whether the plaintiffs have more than one cause of action arising out of the wrong of the defendant, and, if not, what that cause of action is. The plaintiffs are the owners of a strip of land upon which the defendant has wrongfully entered and erected a wall, which is a portion of her house. The facts alleged show one primary right of the plaintiffs and one wrong done by the defendant which involves that right. Therefore the plaintiffs have stated but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. The relief prayed for, or to which they may be entitled, is no part of their cause of action. Pom. Code Remedies, § 455. The plaintiffs' right is to recover possession of their land. The defendant's wrong consists in the entry upon and use of that land without plaintiffs' consent. The particular nature of that wrong may require the application of different remedies for the enforcement of the right. But that does not change the nature of the cause of action, nor entitle the plaintiffs to split it into several causes of action. The complaint in the first action stated the facts upon which plaintiffs based their claim of title and right to possession. Under its allegations the title as well as the right to possession could be tested. *Cagger v. Lansing*, 64 N. Y. 417.

The right to possession involved the removal of the encroaching wall, for without such removal there could be no real transfer of possession. This in turn required equitable relief which, under proper pleadings and an appropriate method of trial, could have been granted in the same action in which the title and right to possession were adjudicated. *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Broiestedt v. South Side R. Co.* 55 N. Y. 220. The fact that plaintiffs' complaint lacked the averments which would have apprised the court of their right to equitable relief, and that the course of the trial furnished no indication that they intended to claim such relief, is no excuse for the commencement of a separate and independent action upon the single cause involved in the first action. It would be novel practice, indeed, to permit the correction of errors in that summary and extrajudicial manner.

The complaint in the first action did, as we have seen, pray that defendant be required to remove from the premises. The addition to that complaint of a few simple allegations of fact would have established the necessary basis for equitable relief, and that could have been accomplished under the ample power of amendment provided by § 723 of the Code. Had the complaint been so amended, the case could have been tried according to the familiar practice which prevails in cases where the issues are to be passed upon by the jury, and the court is called upon to grant equitable relief. *Davis v. Morris*, 36 N. Y. 572. The plaintiffs chose not to avail themselves of these rights, and

proceeded to trial precisely as though they claimed, and were entitled to, nothing but legal relief. In the judgment entered upon the second verdict in their first action the plaintiffs did insert a provision for the equitable relief which they now claim, and which was granted in the courts below in the action at bar. This was properly stricken out by the court, because, even if the complaint was one which would have justified such relief, the plaintiffs had not pursued the practice which gave the court the right to grant it. If we assume, however, that the plaintiffs were entitled to such equitable relief in the first action, and that the court had the power to grant it under the practice adopted, then it was error for the court to have expunged it from the judgment, and the plaintiffs should have appealed from the erroneous decision. *Wright v. Nostrand*, 94 N. Y. 31. In total disregard of this familiar rule of practice, the plaintiffs proceeded to issue execution and collect the costs therein provided for, although they were then as fully cognizant of the facts which rendered fruitless, as they claimed, a mere judgment at law, as they were later on when the action at bar was commenced. When the sheriff made his return, stating that it was impracticable for him to remove said wall, the plaintiffs made a motion to compel the defendant to remove the same. It requires no discussion to show that this motion was properly denied. If plaintiffs were entitled to the relief therein sought, it was properly a part of their judgment in the first action, and, as already stated, their motion should have been to vacate that insufficient judgment, and to reopen the case so as to invest the court with the power to proceed in the regular way. But, assuming that the court could have granted the desired relief upon an independent motion, plaintiffs' only remedy in case of a denial thereof was by appeal. *Wright v. Nostrand*, 94 N. Y. 31. In the light of these antecedents of the case at bar it seems plain to a demonstration that there is no foundation for it, unless the "action to recover real property," formerly known as "ejectment," is an exception to the comprehensive scheme of the Code to abrogate the former distinctions between actions at law and suits in equity. It is urged on behalf of the plaintiffs that it is the usual practice in actions of ejectment to first establish title at law and then, if the legal remedy is inadequate, to proceed in equity for such further relief as may be authorized by the facts of the case. The very authorities cited in support of this argument prove its fallaciousness. *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191, and *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804, were cases in which the equitable remedy was held to have been properly invoked in the first instance, although it was contended in the former, as it is here, that it was proper for the plaintiff to establish title at law before commencing his suit in equity. In *Troy & B. R. Co. v. Boston, H. Tunnel & W. R. Co.* 86 N. Y. 128, the action was based upon a single trespass, without

allegation or proof of irreparable injury, and it was to this state of facts that the court applied the *dictum* that an action at law should be had before a suit in equity will be entertained because, "for aught that now appears, one action at law will suffice." In *Wheelock v. Noonan*, 108 N. Y. 186, 16 N. E. 67, also an action for trespass, the court did extend its equitable aid on the ground that an action at law would not furnish an adequate remedy. In referring to the general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law, the learned writer of the opinion in this court said: "Where the facts are in doubt and the right not clear, such, undoubtedly, would be a just basis of decision, though the modern system of trying-equity cases makes the rule less important. Where, as in an intrusion by railroad companies, whose occupation threatens to be continuous, the injury partakes of that character, an action at law to establish the right has not been required." Illustrations of the rule that both legal and equitable relief may be had in the same action may be found in the earlier cases of *Phillips v. Gorham*, 17 N. Y. 270; *Lattin v. McCarty*, 41 N. Y. 107, and *Wright v. Wright*, 54 N. Y. 437, although it must be conceded that proper discrimination has not always been made between single and several causes of action, as distinguished from different kinds of relief upon one cause of action. Turning again from the authorities to the Code, the reason for the retention of some of the incidents of the former action of ejectment is apparent. Many, if not most, of the cases to recover real property are actions at law, pure and simple, in which the right of possession, based upon proof of title, can be adequately enforced by execution. The action may be maintained by the landlord against his tenant: or by one whose land, unencumbered by buildings, is withheld, and can be fully restored under a judgment establishing his right of possession; or by another within the limits of whose land structures have been erected by a wrongdoer which pass as a whole to the plaintiff and follow the right to possession of the land. These incidents of the purely legal side of an action to recover real property are not inconsistent with the equitable remedies which may and should be invoked when, as in the plaintiffs' first action, the naked legal judgment establishing title and the right to possession is claimed to be unenforceable by execution.

The application of these principles to the case at bar requires the reversal of the judgment of the courts below and the dismissal of the plaintiffs' complaint; but, in view of the hardships visited upon the plaintiffs by the palpable and continuing wrong of the defendant, the reversal should be without costs.

Parker, Ch. J., and Gray, O'Brien, Landon, and Cullen, JJ., concur.

Haight, J., dissents.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

COSMOS EXPLORATION COMPANY
App't.,
v.

GRAY EAGLE OIL COMPANY *et al.*

PACIFIC LAND & IMPROVEMENT COM-
PANY, App't.,
v.

ELWOOD OIL COMPANY *et al.*

(50 C. C. A. 79, 112 Fed. 4.)

1. The Federal courts are without jurisdiction to entertain a suit to determine the respective rights of the parties to any land the title to which remains in the government of the United States, in regard to which a contest is pending in the Land Department of the government.
2. A Federal court of equity has no jurisdiction of a suit to try the title to land of which defendant is in possession.
3. A Federal court of equity may issue an injunction to preserve *in statu quo* real property, a controversy with respect to the title to which is pending in the Land Department.
4. Land in possession of persons prospecting for oil thereon with the intention of locating it as mineral land is not vacant and open to settlement, within the meaning of the act of Congress of June 4, 1897, permitting the exchange thereof for land within a forest reserve, although no oil or mineral is known to exist therein, and no claim thereto appears on the records of the land office.

(Gilbert, Circuit Judge, dissents.)

(November 15, 1901.)

A PPEALS by plaintiffs from decrees of the Circuit Court of the United States for the Southern District of California in favor of defendants in suits brought to quiet title to certain real estate. *Affirmed.*

Statement by **Hawley**, District Judge:

The bill of complaint in the Pacific Land & Improvement Company against the Elwood Oil Company alleges, in substance: That the selection by complainant's predecessor in interest, one J. R. Johnston, on the 23d day of December, 1899, under the act of Congress of June 4, 1897, entitled "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June 30, 1898, and for Other Purposes," of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 4 in township 29 S., range 38 E., M. D. B. & M., containing 80 acres of land, and no more, in lieu of a tract of 80 acres of nonmineral land

NOTE.—The authorities on the question involved in the above case, as to what constitutes vacant land under the act of Congress, are presented with great care and diligence by the briefs in the case, and also by the opinion of the court. The affirmance of the decision by the Supreme Court of the United States in 190 U. S. 301, 47 L. ed. —, of course puts the question beyond further controversy.
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included within the limits of a public forest reservation, for which the United States has issued to him a patent, and which the said Johnston on December 20, 1899, under and pursuant to the provisions of said act of June 4, 1897, relinquished to the United States by deed of conveyance recorded in the office of the county recorder of the county in which said tract is situated, which Johnston delivered at the time of his lieu selection, on the 23d day of December, 1899, to the register and receiver of the land office at Visalia, California, within which the selected land is situate, which deed, indorsed as recorded as aforesaid, the said Johnston at the said time filed in said local land office, together with a full and correct abstract of his title to the relinquished tract, duly certified as such by the county recorder of the county in which the tract is situated, showing him to be the owner thereof in fee, free from any encumbrance, at the time of such relinquishment, together with his nonmineral affidavit, and together with his selection of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 4 in lieu of the tract relinquished. That on the said 23d day of December, 1899, said register and receiver duly accepted and filed said deed, abstract of title, nonmineral affidavit, and selection of the said Johnston, and duly entered such selection upon the official records of his office. That the register did then and there certify that the tract so selected by the said Johnston was free from conflict; that there was no adverse filing, entry, or claim thereto; that the selected lands were, at the time of selection, unappropriated, vacant public lands of the United States, open to settlement, and returned by the surveyor general as agricultural in character; that such lands, when selected, did not contain any known minerals or known petroleum or known mineral oils; that no mineral, petroleum, or known mineral oil, or mineral substance of any kind, had ever been discovered within the limits thereof. That on April 11, 1900, Johnston conveyed the tract so selected, and all his right, title, and interest therein, to the complainant, who has ever since been the owner thereof. That the defendants based their claim to the tract in controversy upon a certain pretended placer mining location covering the S. W. $\frac{1}{4}$ of said section 4, alleged to have been made on June 11, 1899, under the mining laws of the United States, by eight named persons, whose interests the defendants claimed to have acquired by mesne conveyances. That said location was void for the reason that no discovery of oil or other mineral was made within its limits until after the selection by said Johnston as aforesaid. That, after the lands in controversy were selected by said Johnston, certain of the defendants filed in the local land office at Visalia a written, verified protest against such selection, wherein it was alleged that said lands were not subject to selection under said act, for the reason that the same

was mineral land, and was included within the boundaries of a valid placer location. That said protest prayed that the commissioner of the General Land Office order a hearing to determine the mineral character of said lands, and that the selection thereof made by said Johnston be rejected. That said protest is pending before the commissioner of the General Land Office. That the same is insufficient to justify a hearing being ordered by the Land Department to determine the character of said land, or to change its classification as fixed by the report of the surveyor general, for the reason that the same does not show that there was any known mine or any known salines or any known or existing petroleum wells or known petroleum deposits on the selected land at the time of its selection, showing the same to be more valuable for mining than agricultural or other purposes. That, notwithstanding Johnston acquired the complete equitable title to the land in controversy by his selection thereof, and notwithstanding that he was entitled to the complete and uninterrupted enjoyment and possession of the same, the defendants, against the will of the said Johnston, knowing that said land had been selected by him under the act of Congress aforesaid, and knowing his rights in the premises, without any right in themselves, or any of them, did, on or about the 6th day of January, 1900, by themselves and their employees, without right, and wrongfully and unlawfully, and without the knowledge or consent of said Johnston, and in disregard of his rights, enter upon and became possessed of the lands in question, and erected a derrick and other machinery thereon, and proceeded to excavate the soil thereof and to bore a well therein, seeking for petroleum oil therein, for the purpose of taking the same, if found, to their own use, and removing the same. That afterward, about the last of January, 1900, the defendants found in said well petroleum oil in profitable quantities, and that they are engaged in wrongfully and unlawfully pumping large quantities of oil from said well, and removing the same from said lands, and selling and disposing of and marketing the same, and appropriating the proceeds thereof to their own use, and will continue to do so, to the great waste and irreparable injury of said premises, unless restrained therefrom by order of injunction, and that, unless restrained by order of the court, the defendants will bore other wells upon said premises, and, if successful in obtaining petroleum therein, will take such petroleum therefrom and market the same for their own use and benefit, and that complainant has no complete or adequate legal remedy against the wrongs complained of. The prayer of the bill is for a temporary injunction, restraining the defendants from further boring of wells upon the premises and the further removing of oil therefrom, and that upon the final hearing such injunction be made perpetual. It also asks a decree adjudging that complainant has the full, complete, and equitable title to the premises; 61 L. R. A.

that the adverse claims of the defendants thereto are wholly without right and unfounded; that a receiver be appointed to take possession of the property, and preserve the same and the products thereof until the further order of the court; and for such other relief as may be proper in the premises. The act of Congress of June 4, 1897, before referred to, contains, among other things, the following provisions: "That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record, or issuing the patent, to cover the tract selected: Provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." 30 Stat. at L. 36, chap. 2. To the bill of complaint the defendants interposed a demurrer upon the grounds: "(1) That enough does not appear upon the face of the bill to show this court's jurisdiction of the subject-matter of the suit: (2) that complainant has not, by its said bill, stated any cause entitling it to any relief against the defendants, or either of them; (3) that the said bill is altogether multifarious; (4) that it appeareth by the plaintiff's own showing, by the said bill, that it is not entitled to the relief prayed by the bill against these defendants, or either or of any of them, nor to any relief against these defendants, or either of them or any of them,"—and prays the judgment of the court whether they, or either of them, should be compelled to make any answer to the said bill.

Argued before *Gilbert and Morrow*, Circuit Judges, and *Hawley*, District Judge.

Messrs. John H. Mitchell, John M. Thurston, and T. C. Van Ness, with *Messrs. Shirley C. Ward, Jefferson Chandler, and J. W. Swanwick*, for appellants:

Pending determination of title in the land office, the court had jurisdiction by injunction, to prevent waste, and preserve the property.

Olive Land & Development Co. v. Olmstead, 103 Fed. 568; *Etna Petroleum Co. v. Cripps*, 44 C. C. A. 679, 105 Fed. 999; *Erhardt v. Boaro*, 113 U. S. 537, 28 L. ed. 1117, 5 Sup. Ct. Rep. 565; *Northern P. R. Co. v. Hussey*, 9 C. C. A. 463, 15 U. S. App. 391, 61 Fed. 231; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 395, 5 Inters. Com. Rep. 545, 54 Fed. 746; *Union Mill & Min. Co. v. Warren*, 82 Fed. 522; *Walker v. Emerson*, 89 Cal. 456, 26 Pac. 968; *Richards v. Dover*, 64 Cal. 63, 28 Pac. 113; *More v. Massini*, 32 Cal. 590; *Kittle v. Pfeiffer*, 22

Cal. 485; *Poirier v. Fetter*, 20 Kan. 49; *Stark v. Starr*, 6 Wall. 418, 18 L. ed. 930; *Kerr, Inj.* 3d ed. pp. 63, 66-68, 98; 3 Pom. Eq. Jur. § 1339; *Bettman v. Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271; *Wood v. Murray*, 85 Iowa, 505, 52 N. W. 356; *West Coast Improv. Co. v. Winsor*, 8 Wash. 490, 36 Pac. 441; *Cox v. Garrett*, 7 Okla. 375, 54 Pac. 546; *Calhoun v. McCornack*, 7 Okla. 347, 54 Pac. 493; *Boyd v. Desrozier*, 20 Mont. 444, 52 Pac. 53; *Waterloo Min. Co. v. Doe*, 27 C. C. A. 50, 48 U. S. App. 411, 82 Fed. 45; *United States v. Guglard*, 79 Fed. 21; *Thomas v. Nantahala Marble & Tale Co.* 7 C. C. A. 330, 8 U. S. App. 429, 58 Fed. 485; *Buskirk v. King*, 18 C. C. A. 418, 25 U. S. App. 607, 72 Fed. 22; *Wood v. Brazton*, 54 Fed. 1005; *Lanier v. Alison*, 31 Fed. 100; *Nantahala Marble & Tale Co. v. Thomas*, 76 Fed. 59; *King v. Campbell*, 85 Fed. 814; *Hall v. Equator Min. & Smelting Co.* Fed. Cas. No. 5,931; *Johnson v. Hughes*, 58 N. J. 406, 43 Atl. 901.

A suit to quiet title may be maintained in the Federal court by a complainant out of possession against a defendant in possession, provided ejectment will not lie.

Parker v. Overman, 18 How. 137, 15 L. ed. 318; *Southern P. R. Co. v. Stanley*, 49 Fed. 263; *Brusie v. Gates*, 80 Cal. 462, 22 Pac. 284; *Whithead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Bardon v. Land & River Improv. Co.* 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. Rep. 650; *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806.

The legal title not being in complainants, they cannot maintain an action at law for the possession of the premises.

Carter v. Ruddy, 166 U. S. 493, 41 L. ed. 1090, 17 Sup. Ct. Rep. 640.

The remedy at law is insufficient.

2 Am. & Eng. Enc. Law, 2d ed. pp. 199, 200; *Watson v. Sutherland*, 5 Wall. 79, 18 L. ed. 583; *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655; *Kilbourn v. Sunderland*, 130 U. S. 505-514, 32 L. ed. 1005-1009, 9 Sup. Ct. Rep. 594; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Brush Electric Co.'s Appeal*, 114 Pa. 574, 7 Atl. 794; *Johnston v. Price*, 172 Pa. 427, 33 Atl. 688.

A court of equity will preserve the status of property, and prevent waste, while the question of title is pending before the Land Department.

Hunt v. Steese, 75 Cal. 620, 17 Pac. 920; *Hess v. Winder*, 34 Cal. 270; *Porter v. Jennings*, 89 Cal. 440, 26 Pac. 965; *Bullard v. Kempff*, 119 Cal. 9, 50 Pac. 780; *More v. Massini*, 32 Cal. 590; *Richards v. Dover*, 64 Cal. 63, 28 Pac. 113; *Erhardt v. Boaro*, 113 U. S. 537, 28 L. ed. 1116, 5 Sup. Ct. Rep. 565; *Bettman v. Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271.

Injunction, not ejectment, is the proper remedy.

Smith v. McCann, 24 How. 398, 16 L. ed. 714; *McCool v. Smith*, 1 Black, 459, 17 L. ed. 218; *Schrack v. Zubler*, 34 Pa. 38; *O'Connell v. Dougherty*, 32 Cal. 458; *Swayze v. Burke*, 12 Pet. 11, 9 L. ed. 980; *United* 61 L. R. A.

States v. Parrott, McAll. 271, Fed. Cas. No. 15,998; *Markham v. Howell*, 33 Ga. 508; *Kain v. Vanderburgh*, 1 Johns. Ch. 11; *Dennett v. Dennett*, 43 N. H. 500; *Denny v. Brunson*, 29 Pa. 382; *Farrant v. Lovel*, 3 Atk. 722; *Birch-Wolfe v. Birche*, L. R. 9 Eq. 683; *Talbot v. Scott*, 4 Kay & J. 96; *Haigh v. Jagger*, 2 Colly. Ch. Cas. 231; *Cornelius v. Post*, 9 N. J. Eq. 1, 196; 1 High. Inj. § 697.

There was no such acquiescence by complainants in the wrongs committed by defendants as to estop complainants from maintaining this action.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; *Schermehorn v. L'Espenasse*, 2 Dall. 360, 1 L. ed. 415, Fed. Cas. No. 12,454; *Laurence v. Bowman*, McAll. 419, Fed. Cas. No. 8,134; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Boggs v. Merced Min. Co.* 14 Cal. 279; *Stockman v. Riverside Land & Irrig. Co.* 64 Cal. 57, 28 Pac. 116; *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842.

Appellants acquired equitable title at the date of their selection of the lands in controversy.

A mineral claimant, contesting an agricultural entry of land returned as agricultural, must show an actual development of the land for its mineral product, and an actual discovery and production of mineral or petroleum, in profitable quantities, from a known mine or producing oil well, at the time the agricultural claimant's title vested, so as to show the same was then more valuable for mineral than agricultural purposes.

Dughi v. Harkins, 2 Land Dec. 721; *Davis v. Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; *Magalia Gold Min. Co. v. Ferguson*, 6 Land Dec. 218; *Nicholas v. Abercrombie*, 6 Land Dec. 393; *Re Downs*, 7 Land Dec. 71; *Cutting v. Reininghaus*, 7 Land Dec. 265; *Creswell Min. Co. v. Johnson*, 8 Land Dec. 440; *Re Laney*, 9 Land Dec. 83; *Barringer & Adams, Mines & Mining*, pp. 376, 377.

Proof that neighboring land contains oil in profitable quantities is not sufficient to defeat an entry as agricultural.

Roberts v. Jopson, 4 Land Dec. 60; *Jones v. Driver*, 15 Land. Dec. 514; *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 673; *Gird v. California Oil Co.* 60 Fed. 541; *Michael v. Mills*, 22 Colo. 439, 45 Pac. 429; *Davis v. Weibbold*, 139 U. S. 507, 509, 35 L. ed. 238, 239, 11 Sup. Ct. Rep. 628; *Peirano v. Penola*, 10 Land Dec. 537; *Johns v. Marsh*, 15 Land Dec. 198; *Dobler v. Northern P. R. Co.* 17 Land Dec. 103; *Deffebach v. Hauke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Central P. R. Co. v. Valentine*, 11 Land Dec. 238.

Neither discovery without location, nor location without discovery, gives title or right of possession.

Nevada Sierra Oil Co. v. Home Oil Co. 98 Fed. 673; *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488; *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93; *Sparks v. Pierce*, 115 U. S. 408, 29

L. ed. 428, 6 Sup. Ct. Rep. 102; *Lewis v. Seattle*, 1 Land Dec. 497.

The complete equitable title vests in the selector of forest reserve lieu lands at the date of selection, if the lands were then subject to selection, and the selector had perfect title to the forest reserve lands surrendered to the government, and no subsequent discovery or production of mineral on the selected land can impair the title of the selector, nor change the legal character of the land as fixed by its known condition at the date of selection. Neither can the selector's rights be affected by his purpose, motive, or intention in making selection.

Re Hyde, 28 Land Dec. 286; *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 31 L. ed. 466, 8 Sup. Ct. Rep. 597; *Sullivan v. Iron Silver Min. Co.* 143 U. S. 431, 36 L. ed. 214, 12 Sup. Ct. Rep. 555; *Olive Land & Development Co. v. Olmstead*, 103 Fed. 568.

Land is vacant and open to settlement, and hence subject to selection, under the forest lieu land act, although within the boundaries of an existing mining location, and although the mining claimants are in possession and improving the property, provided no mineral has been discovered thereon.

Re Hyde, 28 Land Dec. 284; *Etling v. Potter*, 17 Land Dec. 424; *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111; *Lewis v. Seattle*, 1 Land Dec. 497; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280; *Garthe v. Hart*, 73 Cal. 542, 15 Pac. 93; *Horsicell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *Sparks v. Pierce*, 115 U. S. 408-413, 29 L. ed. 428-430, 6 Sup. Ct. Rep. 102; *Deffebach v. Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95.

When the purchase price has been paid and the law otherwise fully complied with, the equitable title vests, and nothing subsequently occurring can impair such title.

Re McDonald, 30 Land Dec. 124; *Clarke v. Northern P. R. Co.* 30 Land Dec. 145; *Benson Min. & Smelting Co. v. Alta Min. & Smelting Co.* 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877; *Re Baca Float No. 3*, 29 Land Dec. 45; *Shaw v. Kellogg*, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632; *Larrieviere v. Madegan*, 1 Dill. 457, Fed. Cas. No. 8,096; *Allen v. Merrill*, 8 Land Dec. 207; *Re Stimson*, 15 Land Dec. 255; *Culver v. Uthe*, 133 U. S. 655, 33 L. ed. 776, 10 Sup. Ct. Rep. 415; *French v. Spencer*, 21 How. 228, 16 L. ed. 97; *Simmons v. Wagner*, 101 U. S. 261, 25 L. ed. 911; *United States v. Hughes*, 11 How. 568, 13 L. ed. 816; *Stark v. Starr*, 6 Wall. 414, 18 L. ed. 928; *Wirth v. Branson*, 98 U. S. 118, 25 L. ed. 86; *Carroll v. Safford*, 3 How. 441, 11 L. ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339; *Deffebach v. Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *Davis v. Weibbold*, 139 U. S. 524, 35 L. ed. 244, 11 Sup. Ct. Rep. 628; *Jones v. Driver*, 15 Land Dec. 518; *Re Jacks*, 7 Land Dec. 570; *Rea v. Stephenson*, 15 Land Dec. 37; *Reid v. La-vallee*, 26 Land Dec. 100.

The rights of the parties to state lieu se-
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lections are determined by the facts as known to exist at the date of the selection.

Howell v. Slauson, 83 Cal. 546, 23 Pac. 692; *Shenandoah Min. & Mill. Co. v. Morgan*, 106 Cal. 416, 39 Pac. 802; *McCreery v. Haskell*, 119 U. S. 327, 30 L. ed. 408, 7 Sup. Ct. Rep. 170; *Bludworth v. Lake*, 33 Cal. 256.

When one has performed all the prerequisite conditions entitling him to the issue of a patent, the maxim, "Equity looks on that as done which ought to have been done," controls; and a court of equity will treat his rights under such entry as if a patent had been issued.

Southern P. R. Co. v. Wiggs, 14 Sawy. 576, 43 Fed. 333; *Southern P. R. Co. v. Smith*, 74 Fed. 591; *Southern P. R. Co. v. Groeck*, 31 C. C. A. 334, 59 U. S. App. 366, 87 Fed. 970; *Aiken v. Ferry*, 6 Sawy. 79, Fed. Cas. No. 112; *Simmons v. Wagner*, 101 U. S. 261, 25 L. ed. 911; *McNee v. Donahue*, 76 Cal. 504, 18 Pac. 438; *Whitney v. Morrow*, 112 U. S. 695, 28 L. ed. 872, 5 Sup. Ct. Rep. 333; *Langdeau v. Hanes*, 21 Wall. 529, 22 L. ed. 608; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 594, 42 L. ed. 591, 18 Sup. Ct. Rep. 208; *Cornelius v. Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Re Abercrombie*, 6 Land Dec. 393; *Re Miner*, 9 Land Dec. 408; *Re Laney*, 9 Land Dec. 83; *Re Plymouth Lode*, 12 Land Dec. 513; *Colorado Coal & I. Co. v. United States*, 123 U. S. 307-328, 31 L. ed. 182-190, 8 Sup. Ct. Rep. 131.

The lands here in question were "open to settlement" under the existing town-site laws when selected under the forest reserve lieu land act, and hence were subject to selection under such act.

Deffebach v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *Davis v. Weibbold*, 139 U. S. 524, 35 L. ed. 244, 11 Sup. Ct. Rep. 628; *Barden v. Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; *Shaw v. Kellogg*, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632.

The character of the right acquired by the selection is to be measured, not by the analogies of the settlement laws, but by the language of the statute, and its purpose and intent clearly were to enable a party to acquire title to land which he selected, if at the time of selection the same was subject to selection under the provisions of the statute. This being done, his title was at once as good as if the patent issued instantly.

Larrieviere v. Madegan, 1 Dill. 457, Fed. Cas. No. 8,096; *Allen v. Merrill*, 8 Land Dec. 207; *Re Stimson*, 15 Land Dec. 255; *French v. Spencer*, 21 How. 228, 16 L. ed. 97; *Culver v. Uthe*, 133 U. S. 655, 33 L. ed. 776, 10 Sup. Ct. Rep. 415; *Re Baca Float, No. 3*, 29 Land Dec. 45; *Shaw v. Kellogg*, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632.

Intent or purpose alone is never material in law.

1 Bishop, Crim. Proc. 1101, 1107, note 6; Wharton, Ev. § 936, note 3.

The act of June 4, 1897, is an offer upon the part of the government, and, until re-

pealed, a continuing offer, to exchange any of its vacant land open to settlement for a like quantity of similar land within a forest reservation for which a patent had been issued, or to which a perfected bona fide claim had been acquired (with a proviso as to the latter class of land, with which, in these cases, we are not concerned), which the owner of such land may desire to relinquish pursuant to such offer.

Olive Land & Development Co. v. Olmstead, 103 Fed. 568; *Re McDonald*, 30 Land Dec. 124; *Clarke v. Northern P. R. Co.* 30 Land Dec. 145.

When the owner of patented land in a forest reserve, desiring to make the exchange permitted by the act, has relinquished and conveyed to the government his title to his forest reserve land, accompanied by proper evidence of his ownership of the land relinquished, and has selected in lieu thereof a tract of vacant land open to settlement, not exceeding in quantity that relinquished, and has notified the government of his selection, he has then done all that the act calls upon him to do to effect the exchange, and, having so complied with the act, he has, in law, accepted the offer, perfected a binding contract as between himself and the government, and acquired full equitable title to the land selected.

Ibid.; *Culver v. Uthe*, 133 U. S. 655, 33 L. ed. 776, 10 Sup. Ct. Rep. 415; *Benson Min. & Smelting Co. v. Alta Min. & Smelting Co.* 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877; *Shaw v. Kellogg*, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632.

Officers of the department, mere agents of the government, have not the power to make any rule or regulation imposing, as a condition to the vesting of a right, the doing of something which the law itself does not make a condition precedent.

Anchor v. Howe, 50 Fed. 366; *Shaw v. Kellogg*, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632.

The mere marking of the boundaries, placing of monuments, and recording a mineral claim did not take the land out of the category in which, but for the doing of these things, it concededly belonged at the time of its selection. The known demonstrable presence of mineral as a present fact is the essential base of a location, without which there is no authority for the location.

U. S. Rev. Stat. § 2320 (U. S. Comp. Stat. 1901, p. 1424); *Olive Land & Development Co. v. Olmstead*, 103 Fed. 568; *Sparks v. Pierce*, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608.

An occupancy of the public land of the United States, not based upon a legally initiated right, is unlawful.

Act 1835 (1 Rev. Stat. Supp. p. 477, chap. 149, U. S. Comp. Stat. 1901, p. 1524); *Whittaker v. Pendola*, 78 Cal. 296, 20 Pac. 680; *McGuinnis v. Friedman*, 2 Idaho, 361, 17 Pac. 636.

A mere *de facto* occupancy does not give any right as against a selector under the lieu land act.

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Sparks v. Pierce, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Lewis v. Seattle*, 1 Land Dec. 497; *Etling v. Potter*, 17 Land Dec. 424; *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608; *Dufrene v. Mace*, 30 Land Dec. 216; *Arthur v. Earle*, 21 Land Dec. 92; *Reid v. Lavallee*, 26 Land Dec. 100.

Messrs. Frank H. Short, C. Linkenbach, J. S. Chapman, and George W. Baker, for appellees:

The judicial department has no jurisdiction of controversies arising between applicants for the purchase of lands, except in such cases as are expressly provided for by the statutes.

Berry v. Cammet, 44 Cal. 347.

The jurisdiction of the Land Department continues until the issuance of a patent, or that which in law is the legal equivalent of a patent.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 593, 42 L. ed. 591, 592, 593, 18 Sup. Ct. Rep. 208; *Knight v. United Land Asso.* 142 U. S. 181, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; *Diller v. Hawley*, 26 C. C. A. 514, 48 U. S. App. 462, 81 Fed. 651, 178 U. S. 470, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986; *Orchard v. Alexander*, 157 U. S. 372, 377, 39 L. ed. 737, 739, 15 Sup. Ct. Rep. 635; *Hosmer v. Wallace*, 47 Cal. 461; *Stimson Land Co. v. Rauson*, 62 Fed. 426.

Until final adjudication has been made, a pre-emption or homestead claim might be, and would be, canceled upon proof of the mineral character of the land.

Coleman v. McKenzie, 28 Land Dec. 349; *Santa Clara Min. Asso. v. Scorsur*, 4 Land Dec. 104; *Hooper v. Ferguson*, 2 Land Dec. 712; *Zadig v. Central P. R. Co.* 20 Land Dec. 26; *Barnstetter v. Central P. R. Co.* 21 Land Dec. 464; *Stinchfield v. Pierce*, 19 Land Dec. 12; *Johns v. Marsh*, 15 Land Dec. 196; *Re Royal K. Placer*, 13 Land Dec. 86; *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *Central P. R. Co. v. Valentine*, 11 Land Dec. 238; *Swank v. State*, 27 Land Dec. 411; *McQuiddy v. California*, 29 Land Dec. 181; *Walker v. Southern P. R. Co.* 24 Land Dec. 172; *Re Harrell*, 29 Land Dec. 553; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 408, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Spratt v. Edwards*, 15 Land Dec. 290; *Wirth v. Branson*, 98 U. S. 118, 25 L. ed. 86; *Hutchings v. Lowe*, 15 Wall. 77, 21 L. ed. 82; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. ed. 668.

If the question of the character of the land is properly presented at any time before a patent, the duty of the department is to ascertain whether or not the land shows valuable deposits, either in an *ex parte* case, or a contest.

Re Royal K. Placer, 13 Land Dec. 86; *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *Central P. R. Co. v. Valentine*, 11 Land Dec. 238.

The deed takes no effect until delivery, and there is no delivery until it is accepted.

Harris v. Harris, 59 Cal. 620; *Tiedeman*, Real Prop. § 812; 3 Washb. Real Prop. § 28, p. 254; *Los Angeles Immigration & Land Co. v. Asso. v. Phillips*, 56 Cal. 539; *Ryan v. United States*, 136 U. S. 68, 85, 86, 34 L. ed. 447, 454, 10 Sup. Ct. Rep. 913.

In pleading a right or privilege given by a statute dependent upon the existence of particular facts, the pleader must state the facts upon which that right or privilege depends.

Dye v. Dye, 11 Cal. 163; *Himmelman v. Danos*, 35 Cal. 441; *Rhoda v. Alameda County*, 52 Cal. 350; *San Luis Obispo County v. Hendricks*, 71 Cal. 242, 11 Pac. 682; *Perine v. Forbush*, 97 Cal. 309, 32 Pac. 226.

One engaged in working and developing mines ought to be protected in such possession during a reasonable period for exploration.

Shoshone Min. Co. v. Rutter, 31 C. C. A. 223, 59 U. S. App. 538, 87 Fed. 801, 75 Fed. 37; *Crossman v. Pendery*, 2 McCrary, 139, 8 Fed. 693; *Castle v. Womble*, 19 Land Dec. 455; *Burke v. McDonald*, 2 Idaho, 1022, 29 Pac. 98; *Montana C. R. Co. v. Migeon*, 68 Fed. 811; *Chambers v. Harrington*, 111 U. S. 350, 28 L. ed. 452, 4 Sup. Ct. Rep. 428; *Book v. Justice Min. Co.* 58 Fed. 106; *Nevada Sierra Oil Co. v. Miller*, 97 Fed. 681; *Magruder v. Oregon & C. R. Co.* 28 Land Dec. 177; *McQuiddy v. California*, 29 Land Dec. 181.

The bill is insufficient, as a bill of equity, to quiet title, because it not only does not show that the complainants are in possession, but it does show that the defendants are in possession, and furthermore, it does not even claim to have the legal title.

Northern P. R. Co. v. Amacker, 1 C. C. A. 345, 7 U. S. App. 33, 49 Fed. 529; *Wehrman v. Conklin*, 155 U. S. 314, 321-327, 39 L. ed. 167, 172, 173, 15 Sup. Ct. Rep. 129; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Frost v. Spitley*, 121 U. S. 556, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1129; *Savage v. Worsham*, 104 Fed. 18.

The bill is bad because it shows that the very question of title, as between these parties, is pending before the Land Department.

Sioux City & St. P. R. Co. v. United States, 34 Fed. 835; *Savage v. Worsham*, 104 Fed. 18; *Gaines v. Thompson*, 7 Wall. 347, 19 L. ed. 62; *Sloan v. United States*, 95 Fed. 193; *Black v. Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; *Ferry v. Street*, 4 Utah, 521, 7 Pac. 712, 11 Pac. 571; *Brandt v. Wheaton*, 52 Cal. 430; *Potter v. Randolph*, 126 Cal. 458, 58 Pac. 906; *Forbes v. Driscoll*, 4 Dak. 336, 31 N. W. 633.

It cannot be maintained as a bill for the appointment of a receiver, for there is no such thing as such a bill.

La Société Française v. 15th Judicial Dist. Ct. 53 Cal. 552; *Havemeyer v. San Francisco City & County Super Ct.* 84 Cal. 365, 10 L. R. A. 627, 24 Pac. 121; *People's Investment Co. v. Crawford* (Tex. Civ. App.) 45 S. W. 738.

The facts prove conclusively that this was a plain, fraudulent attempt to acquire the title to mining lands by means not authorized by the laws of the United States, and 61 L. R. A.

that, in truth, it was a scheme adopted to evade and circumvent those laws. If a patent had been obtained, it would have been canceled at the suit of the United States, if there had been nobody else interested.

United States v. Culver, 52 Fed. 81; *United States v. Williams*, 30 Fed. 309; *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732; *Hosmer v. Wallace*, 97 U. S. 575, 24 L. ed. 1130; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. ed. 626; *Nickals v. Winn*, 17 Nev. 189, 30 Pac. 435; *McBroun v. Morris*, 59 Cal. 64; *Williams v. United States*, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 457; *McGuire v. Brown*, 106 Cal. 660, 30 L. R. A. 384, 39 Pac. 1080; *Rourke v. McNally*, 98 Cal. 291, 33 Pac. 62; *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705; *Woods v. Sautelle*, 46 Cal. 389; *McCoy v. Byrd*, 65 Cal. 92, 3 Pac. 121; *McKenzie v. Brandon*, 71 Cal. 209, 12 Pac. 426; *Chapman v. Quinn*, 56 Cal. 266; *Poppe v. Athearn*, 42 Cal. 607; *Germania Iron Co. v. James*, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811.

The report of the surveyor upon the mineral character of the land is sufficient to prevent anybody from obtaining any rights in it except by first proving its agricultural character.

Kane v. Devine, 7 Land Dec. 532; *Cutting v. Reininghaus*, 7 Land Dec. 265.

Such location as was made in these cases ought to be sustained.

Castle v. Womble, 19 Land Dec. 455; *Burke v. McDonald*, 2 Idaho, 1022, 29 Pac. 98; *Montana C. R. Co. v. Migeon*, 68 Fed. 811; *Harrington v. Chambers*, 111 U. S. 350, 28 L. ed. 452, 4 Sup. Ct. Rep. 428; *Book v. Justice Min. Co.* 58 Fed. 106; *Shoshone Min. Co. v. Rutter*, 31 C. C. A. 223, 59 U. S. App. 538, 87 Fed. 801; *Nevada Sierra Oil Co. v. Miller*, 97 Fed. 681; *Magruder v. Oregon & C. R. Co.* 28 Land Dec. 177; *McQuiddy v. California*, 29 Land Dec. 181.

If plaintiff was in possession of the ground in dispute, and defendant a mere intruder, the plaintiff could recover upon that prior possession.

Davidson v. Calkins, 92 Fed. 230; *Aurora Hill Consol. Min. Co. v. 85 Min. Co.* 12 Sawy. 359, 34 Fed. 515; *Northern P. R. Co. v. Sanders*, 1 C. C. A. 192, 7 U. S. App. 47, 49 Fed. 129; *Campbell v. Rankin*, 99 U. S. 261, 25 L. ed. 435; *Cowell v. Lammers*, 10 Sawy. 246, 21 Fed. 200; *Washington & I. R. Co. v. Osborn*, 160 U. S. 103, 40 L. ed. 356, 16 Sup. Ct. Rep. 219; *Attwood v. Friot*, 17 Cal. 37, 76 Am. Dec. 567; *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574; *Field v. Grey*, 1 Ariz. 404, 25 Pac. 793; *Lincoln-Lucky & L. Min. Co. v. Hendry*, 9 N. M. 149, 50 Pac. 330; *Northern P. R. Co. v. Cannon*, 4 C. C. A. 303, 7 U. S. App. 507, 54 Fed. 252.

Hawley, District Judge, delivered the opinion of the court:

The legal questions involved in these cases on appeal are identical. The facts are substantially the same. There is no difference between them, so far as the demurrer to the bill is concerned, except in two particulars. The demurrer in the *Pacific Land & Im-*

provement case makes, as one of its objections to the bill, that it is multifarious. No such objection is urged against the bill in the Cosmos Exploration case. In the Pacific Land & Improvement case there was no amended application made in the land office. It stands upon the single application made on the 23d day of December, 1899. Following the course adopted by appellant's counsel, we shall confine the discussion to the Pacific Land & Improvement case, because, as was said by the court below, "these cases were heard together, and may be so considered and determined, as the principal questions involved are common to them both."

Upon the filing of the bill the court made an order requiring defendants to show cause, if any they had, why a preliminary injunction should not be granted as prayed for. The defendants appeared and interposed a demurrer to the bill. Upon the hearing of the rule to show cause a large number of affidavits were presented by both sides. The defendants in the meantime had answered the bill, and their answers were used as affidavits upon the hearing of the rule to show cause. The demurrer was argued at the same time and submitted. Thereafter the court rendered its decision and decree, on September 24, 1900, "that the application for a receiver and for an injunction be, and the same hereby is, denied; that the demurrer be, and hereby is, sustained; and that the bill of complaint be dismissed at complainant's costs,"—and on September 26th entered its regular decree dismissing the bill. This appeal is taken only from the order and decree sustaining the demurrer and dismissing the bill. The discussion of these questions will be confined to the facts alleged in the bill.

Did the court err in sustaining the demurrer? Did it err in dismissing the bill? Does it appear upon the face of the bill that the circuit court had jurisdiction of the parties and the subject-matter of the suit? The contentions of the respective parties are clearly outlined by the several allegations contained in the bill of complaint, and the first and most important question that arises herein is whether or not appellant has by such averments "stated itself out of court." This is the vital point upon which the merits of this case, in so far as the demurrer is concerned, hinge.

The demurrer, interposed by defendants, questions the jurisdiction of the circuit court. We are of opinion that the Federal courts are without jurisdiction to entertain a suit to determine the respective rights of the parties to any land to which the title remains in the government of the United States, in regard to which, as shown by the averments in the present bill, a contest between the parties is pending in the Land Department of the government. In *Savage v. Worsham*, 104 Fed. 18, Judge Ross said: "It would seem from the bill that the title to the land in question is still in the United States, and that the contest between complainant and respondent in respect to it is yet pending in the Land Department. If so, 61 L. R. A.

it is clear that the suit cannot be maintained. 'After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds may be enforced, but not before.' *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800." *Humbird v. Avery*, 110 Fed. 465, 471.

An action of ejectment cannot be maintained in the courts of the United States on a merely equitable title. *Frost v. Spilley*, 121 U. S. 552, 556, 30 L. ed. 1010, 1012, 7 Sup. Ct. Rep. 1129; *Carter v. Ruddy*, 166 U. S. 493, 496, 41 L. ed. 1090, 1091, 17 Sup. Ct. Rep. 640, and authorities there cited.

The averments in the bill, by whatever name it may be called, are susceptible of the construction that the defendants are in possession of the land in controversy. "It is true," as was said by Wellborn, J., in *California Oil & Gas Co. v. Miller*, 96 Fed. 12, 23, "that the bill does not, in terms, allege that the defendants are in possession, but the acts charged against the defendants are such as necessarily imply actual possession or occupancy of the land." While such a bill might be maintained under the state law, it is not cognizable by a Federal court of equity, the remedy being at law.

In *Erskine v. Forest Oil Co.* 80 Fed. 583, 585, Buffington, J., in discussing this question, said: "While the bill does not, in words, pray to acquire possession of the wells, yet in substance and effect that is its purpose. It seeks to restrain respondent from operating the wells or taking the oil, and these acts are, where oil and gas are concerned, the essential attributes of possession. The supreme court of Pennsylvania, in the case of *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 250, 5 L. R. A. 733, 18 Atl. 725, after discussing the peculiar character of gas and oil and their production, says: 'The one who controls the gas [the subject-matter of the case before it]—has it in his grasp, so to speak—is the one who has possession in the legal, as well as in the ordinary, sense of the word.' A bill, then, which, in substance, would deprive one in possession of everything which constitutes possession, whatever it is in name, is in fact one to divest possession, or what is known as an 'ejectment bill.' . . . In the Federal courts the line between law and equity, and consequently between legal and equitable rights and remedies, has been sharply defined, and strictly observed. The provision of the Constitution vesting judicial powers 'in cases in law and equity . . . between citizens of different states' recognizes the distinction. A constitutional amendment insures the right of trial by jury 'in suits at common law when the value in controversy shall exceed \$20,' and the 16th section of the judiciary act of 1789 provides 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law.' And to such length have these provisions been extended that it

has been held (*Allen v. Pullman's Palace Car Co.* 139 U. S. 662, 35 L. ed. 305, 11 Sup. Ct. Rep. 683): 'If the court, in looking at the proofs, found none of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact, and give it effect, though not raised by the pleadings nor suggested by counsel.' And rightly so, for we are here dealing with the constitutional right of the citizen, and, as was said by Mr. Justice Campbell in *Hipp v. Babin*, 19 How. 278, 15 L. ed. 635, 'when-ever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' . . . After careful consideration, we are of opinion complainants' title is wholly a legal one, that ample remedy exists at law, that there are no special facts or circumstances in this case calling for the exercise of equitable jurisdiction, and that the bill is an ejectment one. With a disposition on our part to, if possible, retain jurisdiction to dispose of the case by construing the will, and end the controversy between the parties, we are unable to do so. The cases of *Hipp v. Babin*, 19 How. 278, 15 L. ed. 635; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276, and others that might be referred to, block the way to a Federal court assuming jurisdiction of what is, in substance and real purpose, an ejectment bill."

In *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276, the bill of complaint, among other things, alleged that, notwithstanding complainant's ownership of the property and his right to its immediate possession and enjoyment, the defendants claimed title to it, and were in its possession, holding the same openly and adversely to him; that their claim of title was without foundation in law or at equity; and that it was made in fraud of the rights of the plaintiff. To this bill the defendants demurred on the ground, among others, that it appeared from it that the plaintiff had a plain, speedy, and adequate remedy at law, by ejectment, to recover the real property described, and that it showed no ground for equitable relief. The demurrer was sustained. In the course of the opinion the court said: "The Code of Iowa enacts that 'an action to determine and quiet the title to real property may be brought by anyone having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession,' implying that the action may be brought against one in possession of the property. And such has been the construction of the provision by the courts of that state. . . . If that be its meaning, an action like the present can be maintained in the courts of that state, where equitable and legal remedies are enforced by the same system of procedure and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the state courts; 61 L. R. A.

but the law of that state cannot control the proceedings in the Federal courts, so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury."

The opinion in that case was written by Mr. Justice Field, who also wrote the opinion in *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495, relied upon by appellant, and he explains and distinguishes that case from the one under consideration.

In *Black v. Jackson*, 177 U. S. 349, 361, 44 L. ed. 801, 806, 20 Sup. Ct. Rep. 648, the court, in discussing similar questions, quotes with approval the language of the court in *Lacassagne v. Chapuis*, 144 U. S. 119, 124, 36 L. ed. 368, 370, 12 Sup. Ct. Rep. 661, as follows: "The plaintiff was out of possession when he instituted this suit, and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff by injunction to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which had been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another.

. . . The plaintiff has a full, adequate, and complete remedy at law, and the case is not one for the jurisdiction of a court of equity." See also *Gordan v. Jackson*, 72 Fed. 86; *Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23, 30; *Grether v. Wright*, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 742, 748; *Childs v. N. B. Carlslein Co.* 76 Fed. 86, 95; *Davidson v. Calkins*, 92 Fed. 230, 232, and authorities there cited; *Morrison v. Marker*, 93 Fed. 692, 695, and authorities there cited; *Hanley v. Kansas & T. Coal Co.* 110 Fed. 62, 69.

We are of opinion that the circuit court had no jurisdiction to try the title to the property, or to adjudge the complainant to be entitled to the possession thereof.

Appellants' counsel claim that the bill was framed upon the theory that the controversy of the parties before the Land Department turned solely upon a pure question of law, to be finally determined by the court, and did not and does not involve any question of fact over which the Land Department had or has exclusive jurisdiction. But in any event, if the court should hold that it had no jurisdiction to try the title between the parties, or to enter a decree for the possession thereof as prayed for in the bill, it nevertheless has jurisdiction and should have entertained the bill in so far as it asked for an injunction to preserve the *statu quo* pending the determination of the controversy between the parties in the Land Department. The general disposition of the courts is to retain jurisdiction of any subject where there is any plausible ground of equitable cognizance (*Waite v. O'Neil*, 72 Fed. 348, 356; *Randolph v. Allen*, 19 C. C. A. 353, 41

U. S. App. 117, 73 Fed. 23, 30; *Grether v. Wright*, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 742, 749; *Greeley v. Louce*, 155 U. S. 58, 75, 39 L. ed. 69, 75, 15 Sup. Ct. Rep. 24), especially where such jurisdiction would not infringe upon the constitutional rights of the parties to a trial by jury.

Does the bill of complaint, from any legal or equitable standpoint, state facts sufficient to show that complainant is entitled to any relief? It will be observed from the allegations contained in the bill that the pleader did not confine himself to a statement of the facts, but interjected therein his construction and conclusion, not only as to the facts, and the meaning of the act of Congress of June 4, 1897, but also his views in regard to the legal principles applicable thereto. While the rule is well settled that, in considering the points raised by a demurrer, the facts stated in the bill must be treated as true, it does not by any means follow that the conclusions of counsel as to the law must likewise be accepted as correct. It is the duty of the court to determine the principles of law applicable to the facts stated in the bill. The act of June 4, 1897, is the measure of the appellant's rights and of its duties. By the averments in its bill of complaint, has it brought itself within the requirements of the law? A person making selections of land under the provisions of the act of Congress of June 4, 1897, must relinquish to the government the tract in the forest reservation, and submit satisfactory evidence respecting the title thereto, and must make selection of the tract desired in exchange for the tract of land relinquished, and accompany his selection by proof showing the selected land to be of the condition and character making it subject to selection. These are the essential requirements of the act.

The principal contentions of the respective parties in their briefs and upon the oral argument may be briefly stated as follows: On the part of appellant: (1) That lands are vacant and open to settlement, and hence subject to selection under said act, when no other claim thereto is disclosed by the land-office records, unless at the date of selection they are known to contain minerals to such an extent as to make them more valuable on account thereof than for agricultural purposes; (2) that defendants' mining locations are void because no discovery of petroleum had been made at the time of the location, nor until after the lands had been selected by appellant's grantor, and that, notwithstanding the mining locations of appellees, the land was vacant and open to settlement at the time it was selected by Johnston; (3) that the equitable title to lands selected in lieu of patented lands relinquished vests at the date of selection, and cannot be impaired by subsequent mineral discoveries in the land. On the part of appellees: (1) That lands are vacant and open to settlement, and therefore subject to selection under said act, only when they are unoccupied by others, are free from other claim of record, and are non-mineral in character; (2) that lands selected under said act in lieu of relinquished

forest reserve lands, covered by patent, remain open to exploration under the mining laws until the approval of the selection by the Land Department, and if at any time after the selection, and before its approval, the selected land is discovered to contain valuable mineral deposits, its mineral character will be thereby established, and the selection defeated.

In the homestead and pre-emption cases questions have frequently arisen as to the known character of the land at the date of the cash entry, and it has been generally held that if the land was then known to be mineral land, chiefly valuable for its mineral contents, or more valuable for mining than agricultural purposes, it is not subject to entry. If no such facts as to the mineral character of the land are shown to exist, the pre-emptioner or homesteader, if he is possessed of the necessary qualifications and has fully complied with the pre-emption or homestead laws, as the case may be, at the time of his cash entry, is entitled to the land. The general rule is well settled that the right to a patent, once vested, is treated by the government, in dealing with the public lands, as equivalent to a patent issued, and, when the patent does issue, it relates back to the inception of the right of the patentee. *Carroll v. Safford*, 3 How. 441, 11 L. ed. 671; *United States v. Hughes*, 11 How. 552, 568, 13 L. ed. 809, 816; *French v. Spencer*, 21 How. 228, 19 L. ed. 97; *Hughes v. United States*, 4 Wall. 232, 18 L. ed. 303; *Stark v. Starr*, 6 Wall. 402, 414, 18 L. ed. 925, 928; *Wirth v. Branson*, 98 U. S. 118, 121, 25 L. ed. 86, 87; *Simmons v. Wagner*, 101 U. S. 260, 261, 25 L. ed. 910, 911; *Deffebach v. Hauke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Davis v. Weibbold*, 139 U. S. 507, 528, 35 L. ed. 238, 246, 11 Sup. Ct. Rep. 628; *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 679, 42 L. ed. 320, 322, 17 Sup. Ct. Rep. 922. The commissioner of the General Land Office has authority to make regulations respecting the disposal of the public lands, and such regulations, when not repugnant to the acts of Congress, have the force and effect of laws. The regulations of the commissioner relative to lieu land selections under the act of June 4, 1897 (prescribed June 30, 1897), are, in our opinion, reasonable, and evidently were intended and are well calculated to carry into effect the intent and true meaning of the act of Congress. They are properly within the limitations of the law for the enforcement of which they were promulgated, and should be complied with. *Anchor v. Howe*, 50 Fed. 366; *Germania Iron Co. v. James*, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811, 814; *Hoover v. Salling*, 102 Fed. 716, 720; *Poppe v. Athearn*, 42 Cal. 606, 609; *Chapman v. Quinn*, 56 Cal. 266, 273. We understand it to be virtually admitted that the party making an exchange of land under the forest reserve act, like any other entryman upon the public lands of the United States, only secures a vested interest in the lands which he has selected in exchange for or in lieu of the lands relinquished by him when he lawfully enters upon

the same, and in all respects complies with the requirements of the law under which he claims his rights. This general principle is too well settled to require any elaborate discussion. It has been so decided by this court in *American Mortg. Co. v. Hopper*, 12 C. C. A. 293, 29 U. S. App. 12, 64 Fed. 553, 555; *Diller v. Hawley*, 26 C. C. A. 514, 48 U. S. App. 402, 81 Fed. 651, 653. The latter case was taken to the Supreme Court of the United States, and was there affirmed. 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986. As illustrative and decisive of many of the questions discussed by counsel, we quote from *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208, 209: "Generally speaking, while the legal title remains in the United States, the grant is in process of administration, and the land is subject to the jurisdiction of the Land Department of the government. It is true, a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother v. Lucas*, 12 Pet. 410, 454, 9 L. ed. 1137, 1154; *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283; *Chouteau v. Eckhart*, 2 How. 344, 372, 11 L. ed. 293, 304; *Glasgow v. Hortiz*, 1 Black, 595, 17 L. ed. 110; *Langdeau v. Hanes*, 21 Wall. 521, 22 L. ed. 606; *Ryan v. Carter*, 93 U. S. 78, 23 L. ed. 807. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title. Rev. Stat. § 2449, [U. S. Comp. Stat. 1901, p. 1516]; *Frasher v. O'Connor*, 115 U. S. 102, 29 L. ed. 311, 5 Sup. Ct. Rep. 1141. But, wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent. *Bagnell v. Broderick*, 13 Pet. 436, 450, 10 L. ed. 235, 242. And while so remaining the grant is in process of administration, and the jurisdiction of the Land Department is not lost. It is, of course, not pretended that, when an equitable title has passed, the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius v. Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Orchard v. Alexander*, 157 U. S. 372, 383, 39 L. ed. 737, 741, 15 Sup. Ct. Rep. 635; *Parsons v. Venzke*, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. 'A warrant and survey authorize the proprietor of them to demand the legal title, but do not in themselves constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination.' *Miller v. Kerr*, 7 Wheat. 1, 6, 5 L. ed. 381, 382. After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings. *United States v.*

Stone, 2 Wall. 525, 535, 17 L. ed. 765, 767; *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848; *United States v. Schurz*, 102 U. S. 378, 396, 26 L. ed. 167, 172; *Bicknell v. Comstock*, 113 U. S. 149, 151, 28 L. ed. 962, 963, 5 Sup. Ct. Rep. 399; *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 34 L. ed. 155, 10 Sup. Ct. Rep. 765; *Williams v. United States*, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 457. This jurisdiction of the department has been maintained in cases of pre-emption where the entire purchase money has been paid and a receiver's final certificate issued. *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635, and cases cited in the opinion; *Parsons v. Venzke*, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27." See also *Knight v. United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; *Hawley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986.

Referring to the provisions of the act of June 4, 1897, upon which the right of appellant is founded, we find it there stated that the party relinquishing his forest reserve land "may select in lieu thereof a tract of vacant land open to settlement." He cannot select in lieu thereof any tract of public land that is not vacant nor open to settlement. The bill of complaint alleges a full compliance on behalf of appellants' grantor, Johnston, with all the provisions of the statute, and further alleges that defendants controvert this proposition, and "base their rights in and title to the premises" upon a certain pretended placer mining location, covering the southwest quarter, alleged to have been made upon the 11th day of June, 1899, under the mining laws of the United States, by parties under whom the defendants claim to have acquired title by mesne conveyance, and then alleges that these alleged placer mining locations were and are irregular and void because the same were not based upon any discovery of mineral or oil thereon, and that in fact no discovery of oil was made thereon until after the said land was selected by said Johnston under the act of Congress, and that since said land was selected by Johnston the defendants have entered thereupon, bored for and obtained petroleum thereon, and are now engaged in marketing the same therefrom. It will be noticed that these locations were made over six months prior to the date of selection under the forest reserve act by the grantor of appellant. What is the meaning of the words "vacant lands open to settlement," used in the act with reference to the facts as alleged in the bill? The ordinary meaning of the word "vacant," in its general use, is to be empty or unfilled. When applied to an office, it means the condition when it is first created, and not filled by any incumbent, or after the death or removal of an incumbent before his successor is appointed. Vacant lands are such as are absolutely free, unclaimed, and unoccupied. "The word 'vacant,' when applied to lands, means those which have not been appropriated by individuals." *Marshall v. Bompart*,

18 Mo. 84, 87. Under the wise and beneficent policy of the government of the United States, all its public lands were thrown open to its citizens, and those who had declared their intention to become such, for exploration for the precious minerals and development thereof. Rev. Stat. § 2319 (U. S. Comp. Stat. 1901, p. 1424): "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States."

The grantors of defendants, at the invitation of the government, and assurance of protection from it, and believing that the lands in question contained oil, lawfully entered thereon and made locations of 20-acre tracts, as they were authorized to do by the laws of the United States, and commenced to search for oil.

Chapter 216, 20 Stat. at L. 526 (U. S. Comp. Stat. 1901, p. 1434), reads as follows: "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: Provided, that lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof."

From the allegations of the bill it appears that at the time of appellants' selection of the lands in question no discovery of any mineral had been made. Appellees could not at that time have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose, but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had located. They claimed it to be mineral and were diligently at work to prove it to be such. Under these circumstances it cannot, in our opinion, be said to be vacant land at the time of appellants' selection thereof under the provisions of the act of 1897. The land was not vacant and open to settlement at that time, because it was then occupied by the defendant's grantors under a claim and color of right. It matters not that they had not at that time acquired any rights against the United States. It is true that no valid location of a mining claim can be made, under the mining laws, until the discovery of mineral. Section 2320 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1424) expressly

provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." It does not, however, follow that, because no mineral was found, the land in question was unoccupied. It is true, as was held in *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93, that the mere possession of a piece of mining ground is only good as against an intruder, but not as against one who subsequently located the same in compliance with the mining laws. The same principle was announced in *Crossman v. Pendery*, 2 McCrary, 139, 8 Fed. 693, but Miller, J., in the course of his opinion, said: "A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession, so held, is good as a possessory title against all the world, except the government of the United States."

The location of a mining claim is but one step toward the acquirement of a title thereto. As a matter of fact, the location is seldom the first act. It is sometimes the last step taken. As was said in *Erwin v. Perego*, 35 C. C. A. 482, 485, 93 Fed. 608, 611: "The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date. *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 17 Sawy. 96, 11 Fed. 606, 676; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522, 531; *Zollars v. Evans*, 2 McCrary, 39, 5 Fed. 172, 175; *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111, 114; *Thompson v. Sprary*, 72 Cal. 528, 533, 14 Pac. 182; *Erhardt v. Boaro*, 113 U. S. 527, 536, 28 L. ed. 1113, 1116, 5 Sup. Ct. Rep. 560."

But, whatever his rights may be, the fact that the miner is in the actual possession without having made any location at all shows that the land is not "vacant."

Prior to the passage of the acts of Congress for the disposition of the mineral lands, it was expressly held that, when a notice was posted and the boundaries marked, possession extended to the entire limits, although the location was not made in the manner prescribed by local rules. *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567; *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574. Since the enactment by Congress of the laws for the disposition of the public mineral lands the same doctrine has been applied. *Field v. Grey*, 1 Ariz. 404, 25 Pac. 793; *Lincoln Lucky & L. Min. Co. v. Hendry*, 9 N. M. 149, 50 Pac. 330. The fact that defendants, under their mining locations, had not, at the time of Johnston's selection of the land as agricultural, discovered any petroleum,—that being the mineral for which their locations were made,—shows that they had not perfected their locations under the mining laws; that their absolute right to the exclusive possession of the ground covered by their locations, as against the gov-

ernment of the United States, had not accrued to them, and the government might, if it had seen fit so to do, have terminated the license theretofore given to them to occupy the land, and Congress might have granted the land to others. But under the act of June 4, 1897, it will be observed that Congress did not grant the right under the forest reserve act to select any lands unless they were vacant. It therefore necessarily follows that, if the land was not vacant and open to settlement, Johnston did not acquire any title to the lands in question. He was, in the eye of the law, a trespasser, because, so far as that act is concerned, the lands were excepted from such selection, and, by attempting to make such selection, he was a mere intruder, and his grantee is not in a position to question the validity of the defendants' locations. From the averments contained in the bill, we cannot agree with the poetic fancy of the learned counsel for appellant that this land at the time of Johnston's entry "lay under the sunshine of God, just as denuded of possession as it was on the dawn of the primal morning." In *Tarpey v. Madsen*, 178 U. S. 215, 220, 44 L. ed. 1042, 1045, 20 Sup. Ct. Rep. 849, 851, the court, in discussing a similar question, with reference to the occupancy of public land by parties whose claims rested on no statute, and upon no other right than the general recognition by the government in its disposition to protect actual settlers, said: "It must be remembered that mere occupation of the public lands gives no right as against the government. It is a matter of common knowledge that many go on to the public domain, build cabins, and establish themselves, temporarily, at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and inclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not, in the eye of the law, considered as technically trespassers. No individual can interfere with their occupation or compel them to leave. Their possessory rights are recognized as of value, and made the subjects of barter and sale. *Lamb v. Davenport*, 18 Wall. 307, 21 L. ed. 759."

In *Shaw v. Kellogg*, 170 U. S. 312, 332, 42 L. ed. 1050, 1057, 18 Sup. Ct. Rep. 632, 641, the court discussed many questions which are directly applicable to the present case. The facts in relation to the selection of lands were very similar to the act under consideration. The court, in reference to the subject we are now considering, said: "The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant."

In *Kern Oil Co. v. Clarke*, 30 Land Dec. 61 L. R. A.

550, 555, the Secretary of the Interior, among other things, said: "The act in question contains an offer by the government to exchange any of its lands that are vacant and open to settlement for a like quantity of lands, within a forest reservation, for which a patent has been issued, or to which an unperfected bona fide claim has been acquired. If he desires to accept the offered exchange, the owner or claimant of the tract in the forest reservation can relinquish the same to the government, and select a tract of public land of like quantity in lieu of the tract relinquished. He is to make the selection, and in doing so he is confined to lands which are both vacant and open to settlement. They must not be occupied by others, nor reserved from settlement on account of their known mineral character or otherwise."

The contention of appellant that the act of Congress has reference only to vacant land open to settlement which appears upon the books of the Land Department cannot be sustained. In the brief of appellant, counsel say: "It is respectfully and confidently submitted that this word 'vacant' has never been held to apply merely to 'unoccupied public lands,' but to all public lands which the records of the land office show are unreserved and unappropriated, whether actually occupied or not. In other words, the term 'vacant lands,' in general land office parlance, from time immemorial, has meant simply this: Those public lands which are unreserved and unappropriated, as shown by the records of the General Land Office."

Some of the richest mineral lands in the United States, which have been owned, occupied, and developed by individuals and corporations for many years, have never been patented. It would be absurd to say that such lands were vacant and open to settlement because the books of the Land Department do not show that they have been settled upon. The possessory rights of the miners have always been recognized by law, although in all such cases the legal title to the land remains in the government.

In *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 313, the court, in relation to the subject we are discussing, in the course of its opinion, said: "Congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for those ores, and without requiring the miner to buy or pay for the land. It has gone further, and recognized the possessory rights of these miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims." Rev. Stat. §§ 2318-2352 (U. S. Comp. Stat. 1901, pp. 1423-1441).

In *Kern Oil Co. v. Clarke*, 30 Land Dec. 550, Secretary Hitchcock, in discussing this subject said: "The statute authorizes selection only of 'vacant land open to settlement.' To be vacant, the land must not be occupied by others. To be open to settlement, it must

not be known to be valuable for minerals, or reserved from settlement for any other reason. In so far as the existing conditions appear from the land-office records,—that is, whether the selected tract is of lands to which the settlement laws have been extended, and whether the same is free from record appropriation, claim, or reservation,—no showing by the selector in respect thereto need be made, for the reason that the officers of the government can and must take notice of the public records. But as to conditions, the existence or nonexistence of which cannot be determined by anything appearing upon the public records, and as to which the officers of the government must depend entirely upon outside evidence,—that is, whether the selected tract is occupied by others or known to be valuable for minerals,—it is manifestly necessary that the required evidence should be furnished by the selector. The officers of the government cannot be expected to know whether land selected under the act is vacant and not known to be valuable for minerals, and in these respects subject to selection. . . . Obviously, therefore, it could not have been contemplated that the local officers of the various land districts should or could, from personal knowledge, determine the physical conditions pertaining to lands selected under said act. The argument is intensified when applied to the Commissioner of the General Land Office and the Secretary of the Interior. Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential conditions are made to appear. They do not appear from the public surveys. In this case the lands were surveyed in 1854. Whether since that date they have been continuously or at any time vacant or occupied, and whether at any time known to be valuable for minerals, and, if so, whether stripped of their minerals and worked out, are matters not shown by the land-office records."

The contention of appellant would, if its doctrines were to prevail, lead to results which are denounced in *Atherton v. Fowler*, 96 U. S. 513, 516, 24 L. ed. 732, 733, as being antagonistic to the true intent and meaning of the pre-emption laws. In that case it was held that the right to make a settlement is only to be exercised on unsettled lands, that the right to make improvements is to be exercised on unimproved land, that the right to erect a dwelling house is to be exercised only on vacant land, and that none of these things can be done on land when it is occupied and used by others. No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent, or clandestine entry thereon. *Cowell v. Lammers*, 10 Sawy. 246, 21 Fed. 200, 202; *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 674, 680; *Hosmer v. Wallace*, 97 U. S. 575, 579, 24 L. ed. 1130, 1132; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. ed. 626; *Mower v. Fletcher*, 116 U. S. 380, 61 L. R. A.

385, 386, 29 L. ed. 593, 595, 6 Sup. Ct. Rep. 409; *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 317, 40 L. ed. 436, 440, 16 Sup. Ct. Rep. 282; *Nickals v. Winn*, 17 Nev. 188, 193, 30 Pac. 435; *McBrown v. Morris*, 59 Cal. 64, 72; *Goodwin v. McCabe*, 75 Cal. 584, 588, 17 Pac. 705; *Rourke v. McNally*, 98 Cal. 291, 33 Pac. 62. The decisions upon this point are not all confined to cases where the entry was forcible, although in such cases the courts did not discuss the question whether the same principles would apply to cases of an entry upon lands in the actual possession of another without the use of force. In *Quinby v. Conlan*, 104 U. S. 420, 423, 26 L. ed. 800, 801, the element of force is not shown to have existed, and is not adverted to in the opinion. The court said: "A settlement cannot be made upon public land already occupied. As against existing occupants, the settlement of another is ineffectual to establish a pre-emptive right. Such is the purport of our decisions in *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732, and *Hosmer v. Wallace*, 97 U. S. 575, 24 L. ed. 1130."

In *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705, the court said: "If the plaintiff was in the actual possession of the land, we think the defendant's proceedings were invalid, although his entry was accomplished without the use of force. This seems to be the result of the authorities. . . . The reasoning of the court in all cases seems to us to forbid the invasion of the actual possession of another, whether such invasion is accomplished by the use of force or not."

In *Gird v. California Oil Co.* 60 Fed. 531, 545, this principle is recognized. The court said: "If Irland was in the actual possession, and working the ground for himself, and Bradfield, Henley, and Thompson were acting for themselves in making the location of the Razzle Dazzle on December 6, 1890, the location so made by them would be void, because in that event the location would have been made upon ground not vacant and open to location, but upon ground in the actual and adverse occupancy of another."

Having arrived at the conclusion, from the facts stated in the bill of complaint and the principles of law applicable thereto, that the lands selected by the grantor of appellant were not at the time of such selection "vacant land open to settlement," it is unnecessary to review the many other questions which were elaborately argued by the learned counsel. It necessarily follows from the views we have expressed that the bill of complaint does not state any cause of action entitling appellant to any relief against the defendants. The court did not, therefore, err in sustaining the demurrer and dismissing the bill.

It is proper to state that, after the preparation of this opinion, appellant was given permission to present to this court the brief filed in its behalf before the Secretary of the Interior upon its application for a review of its decision in *Kern Oil Co. v. Clarke*, 30 Land Dec. 550, and *Gray Eagle Oil Co. v. Clarke*, 30 Land Dec. 570, wherein, among

other things, the question of the meaning of the words "vacant lands open to settlement," as used in the act of Congress of June 4, 1897, is elaborately discussed. It is enough to say in reply thereto that we have examined this brief and the additional authorities therein cited, and deem it unnecessary to further discuss the question.

The judgment of the Circuit Court in both cases is affirmed, with costs.

Gilbert, Circuit Judge, dissenting:

I agree with the majority of the court that the crucial question of the present cases is whether or not the appellees had such possession or right of possession of the premises in controversy as to take them out of the list of vacant lands open to settlement at the date when the appellant's grantor selected them as lieu lands. Assuming the settled law to be that land is not mineral land on which mineral has not been discovered, and that therefore the premises in question here were not excluded from selection on the ground that they were not agricultural land, the case resolves itself into the inquiry, What was the nature of the right which the appellees had secured prior to December, 1899, when the appellant's grantor made his selection? The bill alleges that in the month of June of that year the appellees had located upon these premises certain placer mining claims. The nature of the act by which such locations were made is not stated. It may be assumed that it consisted in marking and establishing the four corners, and posting at one of them a notice of the claim. These acts by themselves alone gave no right whatever to the locator. They were not the initiation of a claim, nor did they constitute constructive possession. The most that could be claimed for them is that the locations took effect at the date of the discovery of mineral in paying quantity, provided that rights of others had not then intervened. *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608. So far as the present controversy is concerned, therefore, the acts of location made in June, 1899, may be eliminated from the case, for they can have no bearing upon the question under discussion. According to the allegations of the bill, no other act was done by the locators between the date of location and the date of the selection of the land by the appellant's grantor in the following December. The bill charges, however, that after such selection was made the defendants, on or about January 6, 1900, entered upon the lands, and erected derricks thereon, and bored for oil, which on or about the last day of January, 1900, they discovered in paying quantity. This is the state of the facts as presented by the bill, and by which we must be guided in dealing with the demurrer. I submit that the mere location of a mining claim on land that is not mineral, unaccompanied by other acts, is insufficient to initiate any kind of right to the land, and that land covered by such a claim is as truly vacant land open to settlement as §1 L. R. A.

is any other land of the public domain. But the opinion of the majority of the court contains the statement that the appellees were, at the time of the selection of these lands as lieu lands, "in the occupancy of the land they had located. They claimed it to be mineral, and they were diligently at work to prove it to be such." This statement is based upon the assumption that there must be read into the bill certain facts which are found in the affidavits filed on behalf of the appellees upon the application which was made for an injunction. I know of no rule of chancery practice which permits us to do this, or to take as proved any allegation that the complainant has not admitted to be true; but if, indeed, we are authorized to consider the case as if these facts had been incorporated in the bill, I am still of the opinion that the demurrer should have been overruled. What is the nature of the right of a prospector upon the public lands of the United States? It is settled that he is not a trespasser. On the contrary, he is invited to explore and to occupy. By the act of May 10, 1872, all valuable mineral deposits are declared to be free and open for exploration and purchase, "and the land in which they are found to occupation and purchase." It will be observed that by the terms of the statute the right to occupy follows the discovery. There is no statutory right of possession or occupation, or any other right whatever conferred by any statute, prior to discovery, save and except the right of exploration. While permitting the freest exploration, it does not appear to be the purpose of the legislation in regard to the mineral lands of the United States to permit a prospector or an intending locator to initiate any kind of right to such lands prior to a discovery, or to permit him by any act of his prior to discovery to interfere with the appropriation and settlement of lands as agricultural lands under the public land laws, or other laws offering such lands to selection or appropriation. All the decisions to which my attention has been directed are reconcilable with this view. The courts have gone no further than to hold that the possession of a prospector may not be interfered with by one who has no better right than he. This has been held, not as the construction of the mining laws, but, upon motives of public policy, to prevent entries by force and violence. One in possession of premises without right or title may prevent the intrusion of another who is equally without right or title solely upon the ground that possession is prima facie evidence of title. *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732; *Brandt v. Wheaton*, 52 Cal. 430; *Campbell v. Rankin*, 99 U. S. 261, 25 L. ed. 435. It is contended that certain decisions go further than the doctrine above announced, and reference is made to the opinion of Mr. Justice Miller in *Crossmun v. Pendery*, 2 McCrary, 139, 8 Fed. 693, and to the language of the Supreme Court in *Tarpey v. Madsen*, 178 U. S. 215, 44 L. ed. 1042, 20 Sup. Ct. Rep. 849. In the first of these cases it was held that a prospector upon the public mineral domain

may, as against another prospector, protect his *pedis possessionem* while searching for mineral. The learned justice proceeded to remark: "His possession, so held, is good as a possessory title against all the world, except the government of the United States." I submit that this language means no more than that such possession is good as against all except those who may initiate a right to the land under the land laws of the United States, or who may place themselves in the attitude of acquiring the right or title of the United States. The court in that case was called upon to discuss no question save the relative rights of rival prospectors, and the language used is referable only to that controversy. So, in *Tarpey v. Madsen* the question before the court was whether one who had actually occupied public land with the intention to make a homestead or pre-emption entry could be defeated by the mere lack of a place where to make a record of his intention. Incidentally the court remarked: "It is a matter of common knowledge that many go on to the public domain, build cabins, and establish themselves, temporarily, at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and inclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not, in the eye of the law, considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value, and made the subjects of barter and sale."

Clearly, this language means no more than that the possession of the public lands which is referred to in the quotation is good as against a stranger. Can it be said that the Supreme Court intended to say that one who enters upon and takes possession of public land for purposes of "hunting or trapping," and with "no thought of acquiring title to the land," acquires a right which he can hold as against an intending settler under the homestead laws? The language is susceptible of no such construction,—a construction totally at variance with the trend and policy of all legislation concerning the disposition of the public lands, and directly contrary to the provisions of the statute of February 25, 1885, entitled "An Act to Prevent Unlawful Occupancy of the Public Lands." The true meaning of the language so quoted from the opinion of the court is found in the words of the same court in *Sparks v. Pierce*, 115 U. S. 413, 29 L. ed. 429, 6 Sup. Ct. Rep. 105, where it was said: "Mere occupancy of the public lands, and improvements thereon, give no vested right therein as against the United States, and consequently not against any purchaser from them."

The appellants in the cases under consideration are purchasers from the United States.

The right to explore for minerals upon the public domain is but a license. It does not, 61 L. R. A.

prior to discovery, constitute a legal right in or to the land on which the exploration is made. The attitude of the prospector to the land is not like the entry of a settler under the pre-emption law, or like that of any other permitted appropriator of the public lands. He is not required to enter with any intention of ultimately acquiring title, nor does he in fact enter with such intention. His intention must, of necessity, depend upon the result of his investigation. He may rove over the public lands at will, and may dig and excavate wherever he may choose, provided that he shall not interfere with another who is making like explorations, or trespass upon the lawful possession of another. Until the discovery of the mineral, the law gives him no right whatever, except to defend himself against the invasion of another who has no greater right. If a prospector while exploring for mineral permit another to enter peaceably upon the same premises and to explore, there can be no question that the latter, if he first discover mineral, will acquire the right thereto, and the right to locate the claim. *Belk v. Meagher*, 3 Mont. 65, 104 U. S. 279, 26 L. ed. 735. The general nature of the right of the prospector has often been defined by the courts. Said Judge Sawyer in *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 675: "No rights can be acquired under the statute by a location made before the discovery." The circuit court of appeals for the eighth circuit, in *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 611, speaking of the two essential acts of discovery and location said: "But when these requirements have been complied with the land is no longer public, but the possession, the right to the possession, and the right to acquire the title are irrevocably vested in the locator." There are similar expressions in the decisions of the state courts. "The right of possession comes only from a valid location." *Russell v. Hoyt*, 4 Mont. 421, 2 Pac. 25. "The mere naked possession of a mining claim upon the public lands is not sufficient to hold such claim as against a subsequent location made in pursuance of the law." *Hopkins v. Noyes*, 4 Mont. 556, 2 Pac. 280. "Possession is good against mere intruders. . . . but is not good as against one who has complied with the mining laws." *Garthe v. Hart*, 73 Cal. 543, 15 Pac. 93. If it be the law that vacant, nonmineral land, upon which a prospector is making his explorations, is not open to settlement or to selection as lieu land, and that such a prospector, by his mere presence, or by having dug a hole or erected a derrick, acquires the right to retain possession of the land until his explorations shall be finished, what is the limit of his right, and where is the halting place? What acts of a prospector shall be sufficient and what shall not be sufficient, to withdraw such lands from settlement or from selection as agricultural lands? How shall a lien-land selector or a homestead settler know that a prospector is not, or has not recently been, digging or otherwise exploring for mineral in some gulch or cañon of the nonmineral land in-

cluded in the entry or selection? And how shall he ascertain that exploration once begun has ceased? How extensive an area of the public domain, and for how long a period of time, may a single prospector so occupy that it shall not be open to settlement or selection? It is no answer to these inquiries to say that the court will not in the present case define the nature of the acts which will constitute such a possessory right, but will content itself with the conclusion that the acts set forth in the case at bar are sufficient. I submit that the decision imports into the statute terms that are not there written, and that were not within the intention of

Congress, and that by the use of the words "vacant land open to settlement" the intention was to refer the selector of lieu lands to the records of the land office, and to the condition of the land itself,—whether in the open occupation of a settler holding the possession with the avowed intention of acquiring title under the public land laws,—and not to leave the question, What are vacant lands open to settlement? to be variably answered by the judgments of courts upon the special facts presented in each case.

Affirmed by Supreme Court of United States May 18, 1903.

CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *Respt.*,
v.
Robert L. McFARLANE, *Appt.*

(138 Cal. 481.)

1. The granting of a new trial after conviction of a lower offense than is charged in the indictment will not authorize a conviction of the offense originally charged, under a statute providing that no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and acquitted.
2. An information charging murder is sufficient to sustain a prosecution for manslaughter.
3. A conviction of manslaughter may be sustained, although the evidence establishes murder on a second trial of an indictment for murder upon which there was a conviction of manslaughter at the former trial, which was set aside and a new trial granted, where the evidence does not prove a case where the verdict must be for murder or acquittal as justifiable homicide.
4. A witness may testify from the record of his testimony at a former trial if he swears that the evidence then given was true, and he testifies to certain facts of his own recollection, although he has only an imperfect recollection of the events there narrated after hearing it read, under a statute providing that a witness may testify from a writing made when the facts therein stated were fresh in his memory, or he knew that the facts were correctly stated therein, although he retained no recollection of the particular facts.
5. The reading of evidence given at a former trial by a witness for defendant may properly be denied where, two or three days immediately before the day set for trial, one of defendant's counsel was informed that a certain person could tell him exactly where the witness was located, and he gave up the search for him after two or three unsuccessful efforts to see the person, although subpoenas previously issued for the witness had been fruitless.

NOTE.—For a case holding that conviction of a battery bars a subsequent prosecution for the same acts as an assault with intent to murder, see, in this series, *People v. McDaniels* (Cal.) 59 L. R. A. 578.
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6. Objection to a juror because he is a nonresident of the county comes too late on motion for new trial.

(February 7, 1903.)

APPEAL by defendant from a judgment of the Superior Court for Merced County convicting him of manslaughter. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Miles Wallace and Frank H. Farrar for appellant.

Messrs. U. S. Webb, Attorney General, and *A. A. Moore, Jr.*, for respondent:

A jury has the right to render a verdict of manslaughter, even though the evidence shows that the offense was murder.

Cal. Penal Code, § 1159; *People v. Muhler*, 115 Cal. 304, 47 Pac. 128; *People v. Bennett*, 114 Cal. 56, 45 Pac. 1013.

Pennycook was properly permitted to refresh his memory by his former testimony.

Cal. Civ. Proc. § 2047; *People v. Durrant*, 116 Cal. 213, 48 Pac. 75.

If the juror was in reality not a resident, his nonresidence was a ground of challenge, and not a matter that could be inquired into or reviewed, for the first time, on a motion for a new trial, or on an appeal from the final judgment.

People v. Mortier, 58 Cal. 266; *People v. Henderson*, 28 Cal. 466; *People v. Sanford*, 43 Cal. 29; *People v. Coffman*, 24 Cal. 230.

Chipman, C., filed the following opinion: Defendant was accused by information charging him with the crime of murder. His trial resulted in a verdict of manslaughter. At a previous trial, upon the same information, the same verdict was rendered. From that judgment there was an appeal by defendant to this court, and the cause was remanded for a new trial. 134 Cal. 618, 66 Pac. 865. Defendant again appeals from the judgment and from the order denying his motion for a new trial. The transcript does not give the defendant's pleas, but it seems to be conceded that he pleaded not guilty, and also that by the verdict rendered in a former trial, to wit, March 24, 1901 he was

acquitted of the offense of murder, and also that he has once been in jeopardy.

1. The court refused an instruction asked by defendant: That if "you should believe from the evidence that the defendant killed the deceased, James Tucker, with malice, deliberation, or premeditation, and not in a sudden quarrel or heat of passion, you should find the defendant not guilty. In other words, you cannot find the defendant guilty of manslaughter if you believe from the evidence that he killed the deceased, James Tucker, by means, solely and alone, of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, or premeditated killing, for the defendant is not now on his trial for any other offense than manslaughter, and therefore cannot be convicted because he may have been guilty of some other offense." In addition to correctly instructing the jury as to what constitutes murder in the first and second degree, and also as to what constitutes manslaughter, the court charged the jury as follows: "That by reason of previous trials of this cause the defendant cannot now be convicted, in any event, of any higher crime than the crime of manslaughter." And again: "Upon the information in this case the defendant may, if the evidence warrant it, be convicted of manslaughter" (followed by a correct definition of manslaughter). And again the jury were told: "If you believe from the evidence to a moral certainty, and beyond a reasonable doubt, that the defendant is guilty of murder in the first degree, or murder in the second degree, or manslaughter, then your verdict should be, 'We, the jury, find the defendant guilty of manslaughter.'" Defendant claims that murder and manslaughter are as separate and distinct offenses as burglary and larceny, and that "for the court to instruct them [the jury] that, if the evidence showed the defendant guilty of murder, it was their duty to find him guilty of manslaughter, was just as much error as if the defendant had been on trial for grand larceny, and the court had instructed that a verdict of burglary might be rendered if the evidence warranted." Defendant's contention is: First, that the trial could only be for manslaughter, and that the former conviction of manslaughter made it necessary for the people to present a new information charging that offense; second, that it was error to instruct as to murder; third, if the evidence showed that the defendant committed murder, he could not be convicted of manslaughter. The illustration given by defendant is not apposite. One charged with murder may be convicted of manslaughter, for the reason that the law declares that the jury may find the defendant guilty of any offense the commission of which is necessarily included in that which is charged. Penal Code, § 1159; *People v. Muhlner*, 115 Cal. 304, 47 Pac. 128. Burglary is not necessarily included in the offense of larceny, for there may be burglary without larceny (Penal Code, § 459), or the possibility of committing larceny, as where a house has been burglariously entered (i. e.,

with intent to commit larceny), and it should turn out, contrary to the calculations of the burglar, that the building is empty. *People v. Shaber*, 32 Cal. 36. See also *People v. Garnett*, 29 Cal. 622, where it is said that a larceny, though committed at the same time, is not necessarily included in a burglary, as manslaughter is in murder. When the defendant was granted a new trial, he still stood charged with murder, and he could avail himself of the former acquittal of that crime only by plea and proof supporting it. *People v. Bennett*, 114 Cal. 56, 45 Pac. 1013. The plea and proof were that he had been convicted of the offense of manslaughter, by virtue of which the law acquitted him of the higher offense, but this by no means acquitted him of the offense of which he had been found guilty. If a new information had been lodged against defendant charging manslaughter, there would have been no occasion for a plea of former conviction or jeopardy, for he would have been in no peril to which he was not rightly subjected. This court has held, where, on an indictment for murder, the jury found a verdict of manslaughter and the verdict was set aside on motion of defendant, that upon a second trial for murder upon the same or different indictment he may be again tried and convicted for manslaughter (*People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620); and we think the rule is not changed by the Penal Code. Section 687 of the Penal Code provides that "no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted, and convicted or acquitted." Penal Code, § 1023, provides that, "when the defendant is convicted or acquitted, or has been placed in jeopardy upon an indictment or information, the . . . acquittal or jeopardy is a bar . . . for an offense necessarily included therein, of which he might have been convicted under that indictment or information." And § 1180 of the Penal Code provides: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment." The latter part of § 1180 has been held unconstitutional if made to apply to an offense of which the defendant has been acquitted by virtue of a conviction of another offense of less degree included in the information (*People v. Gordon*, 99 Cal. 227, 33 Pac. 901); i. e., he may still plead jeopardy and the bar to the offense of which he has been acquitted, but aside from this the section would seem to countenance a trial of the lesser crime upon the same information. If the prosecution in the present case can be said to have been with a view to convict for murder, it must be held to have been in direct violation of § 687.

But at the commencement of the trial the defendant made his plea of former conviction and jeopardy, and was told that proof was unnecessary in view of the admitted fact

that he had been convicted of manslaughter, and the court informed counsel that it would, in its instructions, properly direct the jury to protect the defendant against any verdict for murder. The trial proceeded, without objection to the information, on the assumption that there could be no conviction for any higher offense than manslaughter, and under such circumstances the defendant could not have been prejudiced by reason of the fact that the trial was on the original information, rather than on a new one charging manslaughter. The crime of manslaughter being necessarily included in that of murder, the information was sufficient, since in alleging the major it necessarily alleged the minor offense. It was, perhaps, unnecessary to instruct the jury fully as to what constitutes the crime of murder, as the defendant was not being prosecuted for, and could not be convicted of, that crime, after making his plea, which was practically confessed. It would probably have been sufficient to instruct the jury as to what constituted the crime of manslaughter. But, inasmuch as the offense of manslaughter is necessarily involved in the offense of murder, we cannot see that the defendant was prejudiced by instructions defining the latter crime and in telling the jury that, if the evidence warranted a conviction of murder, they should find the defendant guilty of manslaughter, and could not, in view of the plea of former conviction, find him guilty of murder. The facts on which the information charging murder was based did not change when, by reason of the former conviction for the lesser offense, the defendant was acquitted of the greater. At the second trial the same evidence would go to the jury, whether it pointed to murder or only to manslaughter (§ 1180), and this same evidence would have gone to the jury had the information charged manslaughter, instead of murder. In effect the instruction was that, although the jury might regard the evidence as establishing the crime of murder as defined by the court, the jury must render a verdict of guilty of manslaughter only. Clearly, if murder was made out, so, necessarily, also was manslaughter. Furthermore, defendant was contending, as his refused instruction indicates, that, if the evidence showed that he had committed murder, he must be acquitted altogether, and this would seem to have warranted the court in defining the offense of murder, and in showing its relation to the offense for which the defendant was on trial, and to refute the claim of defendant that he should escape if murder was established.

The last point urged assumes an anomalous condition of the law to which we cannot consent. It is that, if a jury has found a defendant guilty of manslaughter on the first trial, where the charge is, and the evidence shows, murder, he cannot, on a second trial, granted on his own motion, for some error occurring at the trial, be again convicted of manslaughter, but must be acquitted. In the present case we do not think the evidence presents the case where, as is 61 L. R. A.

claimed, the verdict must have been for murder, or acquittal as a justifiable homicide. The circumstances, as narrated, show a conflict as to who was the aggressor. There are divergent facts testified as to whether deceased or defendant fired the first shot, and as to whether the intention on defendant's part to kill was formed before the fatal meeting, or in the heat of the encounter, and under an impression that his life was in danger. Whether a homicide amounts to murder or to manslaughter merely, depends upon the presence or absence of the intent to kill. In either case there may be a present intention to kill at the moment of the commission of the act (*People v. Freel*, 48 Cal. 436), but not necessarily malice aforethought, or deliberate premeditation. But conceding that the evidence showed that defendant was guilty of murder, and would so show at the second trial, it would still be true that manslaughter is necessarily included in the supposed murder, and it is immaterial how the murder is perpetrated.

2. One Pennycook was a witness for plaintiff. The defendant moved "to strike out the entire testimony of this witness as hearsay, and not to be relied on at all. The witness has testified that he has no recollection of any of the facts to which he has testified, . . . and that he testified entirely from having a portion of his testimony read to him by Mr. McSwain (district attorney), and his memory of what was read to him." Whereupon the court asked the witness the following questions:

Do you say that when you testified before that the events to which you testified, and which have been called to your attention, were fresh in your memory when you testified to them?

A. Yes, sir.

Q. You now testify to the same facts from the record that has been called to your attention?

A. Yes, sir.

The record spoken of was a duly verified transcript of the testimony of the witness given on a former trial of this same cause, written out in longhand from the notes of the official reporter, and duly certified by him as being a correct transcript of such testimony. The court denied the motion, and defendant excepted. The witness was cross-examined at great length, in the course of which counsel apparently read to him most, if not all, his former testimony. The witness, in reply to questions of counsel, would almost invariably say that, if the record represented him as testifying as appeared, the testimony was true; that his memory was better then; and that he tried to tell the truth and did tell the truth, as far as he knew, in his former testimony. The witness would, in most instances, further state that the reading did not refresh his recollection so that he could say he had any present recollection of the facts to which he had formerly testified. The witness did, however, in several particulars, state facts from his present recollection;

and I do not think it can be truthfully said that he testified to no material fact upon his then present recollection, or that the reading of his former testimony did not refresh his recollection of any single material fact. It is true, however, that nearly all his testimony was of the character described by defendant in his objection. The purpose of reading from a memorandum made by the witness, or under his direction, is to refresh his recollection, so as to enable him to testify from his refreshed memory, and not to get before the jury the written memorandum. The rule is found in Code Civ. Proc. § 2047, part of which is as follows: "So, also, a witness may testify from such a writing [i. e., "anything written by himself or under his direction, at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing"], though he retain no recollection of the particular facts, but such evidence must be received with caution." It was conceded at the trial that the transcript from which counsel read was a correct transcript of the witness's former testimony, and this court has held "that such a transcript may at least be regarded as a private memorandum." *People v. Durrant*, 116 Cal. 179, at page 213, 48 Pac. 75, at page 84; citing *Reid v. Reid*, 73 Cal. 206, 14 Pac. 781. The court did not err in its ruling.

3. One Adrian was a witness for defendant, and testified at the former trial to matters material to the defense. Counsel for defendant offered his former testimony, claiming that due diligence had been used to find him, without success. The trial was set for March 31, 1902. Mr. Farrar, one of defendant's attorneys, testified that he caused a subpoena to issue for Adrian on March 5th, which he sent to the sheriff of the city and county of San Francisco, with a letter informing him that Adrian's address could be found by inquiring at the Florence Lodging House. This subpoena was returned with indorsement that the sheriff was unable to find Adrian. Mr. Farrar also testified that on the 18th of March he sent another subpoena to Ed. Gibson, of the San Francisco police force, suggesting that, if he would go to a certain saloon on Market street, or the Florence Lodging House, he could learn where the witness could be found. The letter and subpoena were handed by Gibson to one Chandes, who, on March 20th, wrote Mr. Farrar, informing him that after much trouble and search he found that Adrian had left for the town of Mariposa the day before, and stating: "If you will forward to that place, you will be sure to get service on him." Mr. Farrar then testified that he had "made inquiries of parties who ought to know, and who were in Mariposa about that time, and they told me that Mr. Adrian had not been in Mariposa." On cross-examination he testified that his son was in Mariposa a day or two after the 21st, and he told him to inquire if Adrian was there, and that when he came back he reported that Adrian had not

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been there. Witness also testified that he did not send a subpoena to Mariposa, because he thought it useless. Mr. Frost, one of defendant's attorneys, had occasion to visit San Francisco, and Mr. Farrar gave him a subpoena for Adrian, with request to find him. Mr. Frost made some effort by visiting two saloons, known to have been previously frequented by Adrian. At one of them he was told that Adrian was working in a barber shop on one of two streets, which were named. He was also told that there was a man working at night in one of the saloons, who could tell him exactly where to find Adrian; but witness Frost did not see this man, although he made two or three trips to the saloon to find him. Whether he searched for the barber shop does not appear. This was two or three days immediately before the day set for the trial. In ruling against defendant the court said: "Three or four days before the trial began, one of the counsel for defendant was informed that a certain person in San Francisco could tell him exactly where this Adrian was located, and after one or two or three vain efforts to see the person he seems to have given up the search. I think it was the duty of the counsel at that time, if they desired the attendance of this witness, to either give a subpoena again into the hands of the sheriff of that county, with instructions to hunt this man up who knew where George Adrian was, or to search those streets, instead of abandoning the attempt." We cannot say that the court erred in sustaining the objection.

4. On hearing of defendant's motion for a new trial he offered to prove that one of the jurors who tried defendant was, at the time of the trial, a resident of the county adjoining the one in which he was tried. The court refused the evidence, and defendant excepted. The objection to the juror went to his competency, and, had it been timely made, full opportunity for which was given defendant before the jury was sworn, should have been sustained. It was too late to raise the objection after the trial. So held where the question of competency related to the fact that the juror was not on the assessment roll, and also where it appeared that the juror was an alien. See *People v. Mortier*, 58 Cal. 262, and cases there cited. In *People v. Evans*, 124 Cal. 206, 56 Pac. 1024, the juror was not a citizen of the United States, and it was held that the objection came too late after verdict. These cases are decisive of the question against defendant.

The judgment and order should be affirmed.

We concur: **Haynes, C.; Gray, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

A petition for rehearing having been filed,

the following *Per Curiam* response was handed down March 10, 1903:

A rehearing is denied, but in denying such rehearing the court places the denial, so far as the ruling of the trial court upon the motion to strike out the testimony of the

witness Pennycook is concerned, solely upon the ground that the record shows that said witness did testify to certain facts from his own recollection, and the motion to strike out, being addressed to all of the testimony, was properly denied.

GEORGIA SUPREME COURT.

SAVANNAH, THUNDERBOLT, & ISLE OF HOPE RAILWAY of Savannah, *Plff. in Err.*,

v.

Zaid WILLIAMS.

(.....Ga.....)

*A chartered street railroad is a railroad company within the meaning of §§ 2297 and 2323 of the Civil Code of 1895, and therefore is liable to one servant for injuries inflicted by the negligence of a fellow servant.

(March 17, 1903.)

ERROR to the City court of Savannah to review a judgment in favor of plaintiff an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Affirmed.*

The facts are stated in the opinion.

Messrs. Osborne & Lawrence, for plaintiff in error:

Sections 2297 and 2323 of the Code, which make railroad companies liable for injuries of one servant by another, do not embrace street railway companies, and the ordinary common-law rules concerning the relation between master and servant apply to street railway companies.

The statute requiring trains to stop at crossings (Code, § 2214) does not apply to street railroads.

Savannah, T. & I. of H. R. Co. v. Beasley, 94 Ga. 140, 21 S. E. 285.

The tax ordinance of 1874, which provides for the taxation of railroad companies, does not apply to street railroad companies.

Savannah, T. & I. of H. R. Co. v. Savannah, 112 Ga. 164, 37 S. E. 393.

The act of 1881, for the incorporation of railroad companies, does not embrace street railroad companies.

Dieter v. Estill, 95 Ga. 370, 22 S. E. 622.

Under the old law, railroad companies were not liable to their employees for the negligence of a fellow servant.

Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 697.

When railroad companies began business,

*Headnote by LAMAR, J.

it was found that they employed "many persons who necessarily could not possibly control those charged with care and diligence in the running of trains." The old rule was not a just one, and did not offer protection to the employee, and to remedy this evil the act of 1856 was passed. It was not applied to street railroad companies: First, because there were then no such companies, and, second, because the evil in reference to them did not exist.

Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L. R. A. 209, 63 N. W. 1099; *Henderson v. Walker*, 55 Ga. 481; *Robinson v. Huidekoper*, 98 Ga. 306, 25 S. E. 440.

A railroad company is not a street railroad company.

Carli v. Stillwater Street R. & Transfer Co. 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205; *Front Street Cable R. Co. v. Johnson*, 2 Wash. 112, 11 L. R. A. 693, 25 Pac. 1084; *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839; *Louisville & P. R. Co. v. Louisville City R. Co.* 2 Duv. 178; *Thompson-Houston Electric Co. v. Simon*, 20 Or. 60, 10 L. R. A. 251, 25 Pac. 147; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; *Sears v. Marshalltown Street R. Co.* 65 Iowa, 742, 23 N. W. 150.

This court has never decided that § 2321 related to street railroads, except in their capacity as carriers of passengers.

Augusta & S. R. Co. v. Renz, 55 Ga. 126; *Holly v. Atlanta Street R. Co.* 61 Ga. 215, 34 Am. Rep. 97; *City & Suburban R. Co. v. Findley*, 76 Ga. 311; *Augusta & S. R. Co. v. Randali*, 79 Ga. 305, 4 S. E. 674; *Electric R. Co. v. Carson*, 98 Ga. 652, 27 S. E. 156.

Messrs. Twiggs & Oliver, for defendant in error:

Section 2321 includes street railroad companies within the meaning of that statute.

Augusta & S. R. Co. v. Renz, 55 Ga. 126; *Holly v. Atlanta Street R. Co.* 61 Ga. 215, 34 Am. Rep. 97; *City & Suburban R. Co. v. Findley*, 76 Ga. 311; *Electric R. Co. v. Carson*, 98 Ga. 652, 27 S. E. 156; *Perry v. Macon Consol. Street R. Co.* 101 Ga. 407, 29 S. E. 304.

The presumption against railroad companies, as embodied in § 2321, Civil Code,

NOTE.—For other cases in this series as to whether street railroad is a "railroad," see *Montgomery v. Philadelphia City Pass. R. Co.* (Pa.) 9 L. R. A. 369; *Thompson-Houston Electric Co. v. Simon* (Or.) 10 L. R. A. 251; *Front Street Cable R. Co. v. Johnson* (Wash.) 11 L. R. A. 693; *Katzenberger v. Lawo* (Tenn.) 13 61 L. R. A.

L. R. A. 185; *Byrne v. Kansas City, Ft. S. & M. R. Co.* (C. C. App. 6th C.) 24 L. R. A. 693; *Funk v. St. Paul City R. Co.* (Minn.) 29 L. R. A. 208; *Bloxham v. Consumers' Electric Light & Street R. Co.* (Fla.) 29 L. R. A. 507; and *State v. Duluth Gas & Water Co.* (Minn.) 57 L. R. A. 63.

applies as well to street railroad companies as to others.

Electric R. Co. v. Carson, 98 Ga. 654, 27 S. E. 156; *Perry v. Macon Consol. Street R. Co.* 101 Ga. 407, 29 S. E. 304; *Johnson v. Louisville City R. Co.* 10 Bush, 231.

A railroad company in this state is liable for injuries done to the person of an employee by the negligence or misconduct of other employees of the company, whether such injuries are connected with the running of the cars or not; and in his case as in others, presumption is against the company.

Thompson v. Central R. & Bkg. Co. 54 Ga. 509; *Central R. & Bkg. Co. v. Gleason*, 69 Ga. 204; *Georgia R. Co. v. Ivey*, 73 Ga. 499; *Georgia R. & Bkg. Co. v. Brown*, 86 Ga. 320, 12 S. E. 812; *Georgia R. & Bkg. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939; *Georgia R. & Bkg. Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613.

Lamar, J., delivered the opinion of the court:

The sole question in this case is whether a street railroad is a "railroad company" within the meaning of §§ 2297 and 2323 of the Civil Code, making railroad companies liable to one servant for injuries inflicted by a fellow servant. The importance of the question, the fact that it has never been directly decided by this court, that the decisions outside of this state are in some conflict, and that the courts of Texas and Minnesota have reached a conclusion different from ours, make it proper to refer to the authorities at some length. We think the conflict is more apparent than real, and that a close examination will show that there was always present some special reason for holding that a street railroad was not a railroad within the meaning of the statute under consideration.

A statute giving a laborer a lien on railroads does not apply to a street railroad, since the fee of the street on which the track is laid is in the city. *Front Street Cable R. Co. v. Johnson*, 2 Wash. 112, 11 L. R. A. 693, 25 Pac. 1084. Street railroads are not within the jurisdiction of the California Railroad Commission. The court reached this conclusion on general principles, though the act itself was limited to companies owning railroads "other than street railroads." *Railroad Comrs. v. Market Street R. Co.* 132 Cal. 677, 64 Pac. 1065. A horse railroad is not a railroad within the meaning of a statute which provides that every engine or train shall be brought to a full stop before crossing a railroad. Taft, J., in *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 606. A statute referring to any railroad corporation whose line is wholly or partly within Montana, or reaches the boundary thereof, and giving a judgment for injury to the person a lien superior to a mortgage on the property, evidently refers to lines extending for long distances, and does not include street railroads. *Massachusetts Loan & T. Co. v. Hamilton*, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588. The franchise to

use the streets being granted by legislative or municipal authority, and the tracks being laid on established streets, and usually restricted to the bounds of the city, statutes providing for condemnation of rights of way have little or no reference to street railways using electricity or horse power. *Thompson-Houston Elec. Co. v. Simon*, 20 Or. 60, 10 L. R. A. 251, 25 Pac. 147. Compare *South & North Ala. R. Co. v. Highland Ave. & Belt R. Co.* 119 Ala. 105, 24 So. 114. In Kentucky a street railroad is said to be, in a technical and popular sense, as different from an ordinary railroad as a road and a street, or as a bridge and a railroad bridge. *Louisville & P. R. Co. v. Louisville City R. Co.* 2 Duv. 176. In *Riley v. Galveston City R. Co.* 13 Tex. Civ. App. 247, 35 S. W. 826, it was held that the act of 1893 defining fellow servants, while applicable to any railroad company, does not include street railways, though the question had been expressly left open by the supreme court of Texas in *Austin Rapid Transit R. Co. v. Grothe*, 88 Tex. 262, 31 S. W. 196. In *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L. R. A. 208, 63 N. W. 1099, it was said that a statute making every railroad company liable for injuries inflicted by reason of the negligence of a fellow servant did not include street railroads operated by cable, the court holding that it could recur to the history of the time when the statute was enacted, "and, when the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view." "It is a matter of common knowledge that street cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. Street cars are generally run separately, rarely with more than two or three coupled together. . . . They do not run so rapidly; their movements are easily and quickly checked. . . . Nor do street railways carry freight. . . . Especially is the danger in coupling freight cars entirely absent. . . . The words in the law of 1887 making a railroad corporation operating a railroad in this state liable for damages 'when sustained within this state,' were undoubtedly aimed at the railroads operated by steam, where their lines extended beyond the jurisdiction of the state. It is true these restrictive words would include railroads operated by steam wholly within the state, but they were inserted to prevent the bringing of suits where the injury was sustained upon railroads outside of this state, but where the lines of the same railroad came within the boundary of our own state. Hence the words 'when sustained within this state' evidently refer to railroads operated by locomotives, and it was such railroads the legislature had in contemplation when this term was used. Through our territorial and state legislation the term 'railroad' has acquired a definite and well-understood meaning, and it has never been

understood to include street railways." In the concurring opinion of Mitchell, J., he concludes that "railroads" mean steam railroads only, because "in all legislation of this state I have found no act which has reference to street railroads in which the word 'street' was not prefixed." See also *State v. Duluth Street R. Co.* 76 Minn. 96, 57 L. R. A. 63, 78 N. W. 1032. This reasoning is not applicable here, because in Georgia the contrary is true. The word "railroad" includes street railroad, unless the context shows that a particular kind of railroad was intended.

The foregoing citations are the strongest we find in support of the contention of the plaintiff in error. Opposed to them are cases from New York, Pennsylvania, Massachusetts, Tennessee, Alabama, and Kentucky. The New York general railroad law of 1850 was held to include horse railroads, though the act referred to other motive power. *Re Washington Street Asylum & P. R. Co.* 115 N. Y. 442, 22 N. E. 356. A street railroad using dummy engines is a railroad within the meaning of the Alabama statute requiring trains to stop within 100 feet of a track crossing. *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 202, 12 L. R. A. 830, 9 So. 320 (Stone and Clopton, JJ., dissenting). A dummy line, whether operated within or without the limits of a municipality, and although exclusively engaged in carrying passengers, is a railroad within the meaning of the statutes prescribing certain precautions for the prevention of accidents on railroads. *Lorton, J., in Katzenberger v. Lawco*, 90 Tenn. 235, 13 L. R. A. 185, 16 S. W. 611. Street railroads are within the Pennsylvania act relating to merger. *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 210. A horse railroad is within the exception of the Massachusetts statute providing that insolvent proceedings may be instituted against any corporation except railroad and banking companies, though at the time of the passage of that statute no company had been established in that state for the purpose of laying rails on the public highways and running horse cars thereon. *Central Nat. Bank v. Worcester Horse R. Co.* 13 Allen, 105. The Kentucky statute making railroad companies liable for negligence is applicable to any kind of railroad, whether impelled by horse or steam power. *Johnson v. Louisville City R. Co.* 10 Bush, 231. The similarity of urban and interurban railroads to the ordinary steam railroad, the rapidity of their movements, the enlargement of their cars, the marvelous increase in their business, have compelled the courts to recognize, if not the identity, at least the close resemblance, between the two; and, while the reasoning may not in all respects support our contention, it was held in *Stillwater & M. Street R. Co. v. Boston & M. R. Co.* 171 N. Y. 589, 59 L. R. A. 489, 64 N. E. 511, that the act of 1850, re-enacted later in 1890, which conferred on a steam railroad company the right to cross or unite its railroad with any other railroad before constructed, and further providing that every railroad company whose road was

intersected by any new railroad should unite with such in having the necessary connections with the requisite facilities, applied to the intersection and connection of a street railroad operated by electricity with a railroad operated by steam. This decision was put on the language of the act, but it refers to the ruling of the lower court, which was somewhat similar to the contention of the plaintiff in error here, denying that street-surface railways could be recognized as an integral part of the great system of steam railroads.

After this citation of foreign authorities, it will be proper to examine the state of our own decisions on the subject.

We think the Constitution, statutes, and decisions of this state recognize that the word "railroad" is generic, and includes street railroads, narrow-gauge roads, horse car companies, dummy lines, and street railroads operated by electricity. Whether a particular statute applies to any one of these various forms of railroads is to be determined from the language of the statute, from the context, or from the intent of the lawmakers. See *Gyger v. Philadelphia City Pass. R. Co.* 136 Pa. 96, *sub nom. Montgomery v. Philadelphia City Pass. R. Co.* 9 L. R. A. 369, 20 Atl. 399. Street railroads were not within the general corporation act of 1881 (*Dieter v. Estill*, 95 Ga. 370, 22 S. E. 622), because the provisions requiring the articles of association to state the places and the counties to and through which it was to run, fixing the right of way at 200 feet, and authorizing the maintenance and construction of docks, stations, etc., indicate that the legislature was dealing with railroads other than street railroads. So, in *Savannah, T. & I. of H. R. Co. v. Savannah*, 112 Ga. 164, 37 S. E. 393, a street railway company doing a city business was held to be as much subject to city taxation as an omnibus company, though an ordinary steam railroad operating between different places would not be subject to such a tax. They were both railroads, though one could be taxed on infra-city business while the other was exempt from municipal tax on inter-city business. The terms of the act providing for county taxation of railroads show that it was evidently intended to apply to those roads running from one county to another, and not to those doing business in and near a single city. Pol. Code 1895, §§ 784-789. Civil Code 1895, § 2199, recognizes that street railroad companies would have been subject to the jurisdiction of the railroad commission had they not been expressly excepted from the operation of that law; and Civil Code 1895, § 2180, providing how street railroads may be incorporated, treats them as in most respects identical with ordinary railroads, by conferring on them all of the powers of the ordinary railroad except such as are not necessary and proper for companies whose tracks are laid on the streets of a city. If they are not railroads, then there are few, if any, that have been duly chartered, for not only under the Constitution of 1877, but prior thereto,

while the legislature could incorporate railroads, their charters ought to have been granted by the courts if these companies are not railroads. Civil Code 1895, § 5780; Const. 1868; Code 1873, § 5068; Cobb's Digest, 424, 431, 542. In Civil Code 1895, § 5782, the convention was protecting municipalities, not defining the differences between various species of railroads. Civil Code 1895, § 2334, provides that all railroad companies shall be sued in the county where the cause of action originated, and, while the point does not appear to have been distinctly made, its provisions were, in *Devereux v. Atlanta R. & Power Co.* 111 Ga. 855, 36 S. E. 939, held to apply to the case of a street railroad. In *Price v. State*, 74 Ga. 378, the act of 1837 (Acts 1837, p. 203) codified in § 520 of the Penal Code, providing a penalty for obstructing a railroad, was held to apply to a street railroad operated by horse power, though no such species of railroad existed when the act was passed. In *Perry v. Macon Consol. Street R. Co.* 101 Ga. 407, 29 S. E. 304, a minor, not a passenger, was injured, and the court applied the statutory presumption against railroad companies, citing Civil Code 1895, § 2321. "The presumption against a railroad company where an injury is shown to have been occasioned by the running of its cars applies as well to street railroad companies as to others." *Electric R. Co. v. Carson*, 98 Ga. 654, 27 S. E. 156; *Augusta & S. R. Co. v. Renz*, 55 Ga. 126, citing Civil Code 1895, § 2321. Compare *City & Suburban R. Co. v. Findley*, 76 Ga. 311; *Augusta & S. R. Co. v. Randall*, 79 Ga. 305, 4 S. E. 674; *Holly v. Atlanta Street R. Co.* 61 Ga. 215, 34 Am. Rep. 97,—where the persons injured were passengers, and the plaintiffs in error claimed that the presumption was from common law, and not from the act of 1856. But, even if that were so, it could by re-enactment have been made a statutory presumption. Certainly, even as to passengers, it is more extensive than it was at common law. But the point is that the court applied such statutory presumption to street railroads, and cited a section which on its face only refers to railroads.

The contention of the plaintiff in error is that, if "railroad" can mean "street railroad," § 2297 of the Civil Code does not apply to street railroads, because the abrogation of the fellow-servant rule is therein shown to have been because railroad companies "necessarily have many employees who cannot possibly control those who should exercise care and diligence in the running of trains." It claims that this language shows that the legislature was considering a state of affairs applicable only to steam lines. This reason, given in § 2297, does not appear in the act of 1856, but was apparently codified from Judge Stephens' opinion in *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638. The rule and the act were codified in somewhat different language, and without any reason therefor being stated, in Civil Code 1895, § 2323. But even if the act of 1856 had stated a specific cause for its adoption, 61 L. R. A.

the operation of the statute need not have been coextensive with the reason given. The maxim, *Cessante ratione, cessat ipsa lex*, is of great assistance in construing doubtful, impossible, and unreasonable provisions. But it should not override the express language of a statute. An act may originate from a desire to remedy a particular evil, and yet the language may be so framed as to extend its provisions into a territory where the special evil does not exist. So, too, the language may be so framed as to prevent its application in a territory where the same evil does exist. This is well illustrated in this very section changing the doctrine of fellow servant, for this court, in holding that a "receiver" was not a "railroad company," and therefore not within the language of § 2323 (3036), said: "It would be uncandid to deny that to a certain extent the same reasons of public policy and private justice which call for the protection of the operatives on a railroad when owners or lessees are in possession apply when receivers are in possession," etc. *Henderson v. Walker*, 55 Ga. 483; *Robinson v. Huidekoper*, 98 Ga. 306, 25 S. E. 440; *Ellington v. Beaver Dam Lumber Co.* 93 Ga. 53, 19 S. E. 21. Conversely, the section has been construed to apply to those working on bridges and in railroad machine shops, though these cases were not within the evil sought to be corrected. *Thompson v. Central R. & Bkg. Co.* 54 Ga. 509; *Central R. & Bkg. Co. v. Gleason*, 69 Ga. 203; *Georgia R. Co. v. Ivey*, 73 Ga. 499; *Georgia R. & Bkg. Co. v. Brown*, 86 Ga. 320, 12 S. E. 812; *Georgia R. & Bkg. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939; *Georgia R. & Bkg. Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613. But these plaintiffs were servants of a railroad company, and within the letter of the law, and therefore entitled to its provisions. The same literalism that denied the benefit of the statute to the employees of a receiver when the reason, and not the letter, applied, gave it to bridge and planing machine employees of a railroad when the reason did not apply, but the letter did. These bridge and planing machine cases are within the letter of the statute, though beyond the evil that may have prompted the adoption of the act. So, while street railroads may not then have been so dangerous, they were still railroad companies, and within the purview of the law. They are not outside of the policy underlying the statute. They had tracks, and had, or might have had, bridges. The utmost diligence on the part of the driver might not have enabled him to guard against the negligence of other fellow servants who were charged with the duty of keeping the track in repair. While there might not be as many injuries occasioned by the negligence of a fellow servant in street-car service, yet the language of the statute was broad enough to take in these few instances as they arose. If the legislature used language which was broad enough to include street railroads, and if, to some extent, they were within its spirit, even though not as much so as steam railroads, the courts have

no right to pare down its meaning, and say that the law does not apply to the employees of a street railroad. The word "railroad," in 1856, was generic, as it is now, and broad enough to take in the new species as they arose from time to time. There may not have been any street railroads in Georgia in 1856, but the legislature must have known that horse power had been the first motive power used in hauling cars on rails, and was even then being used either in this state or elsewhere in hauling single cars through the streets of cities. The fact that a reason was given by the codifiers in inserting the act of 1856 in § 2207 could not have been intended to announce a variable rule, which would make the company liable in cases where an employee separated from his fellow servants was injured, and not liable when he was on the same engine and injured; or apply where the injury occurred by the movement of a heavy train with great momentum, and not apply where only a single car was being slowly moved through a freight yard; or apply where the cars were pulled by steam, and not to the same companies whose cars were pulled by horses. While dangers incident to the operation of trains was the moving cause for the enactment of the law, it has frequently been held that the language applied to injuries inflicted by fellow servants whether connected with the running of trains or not. *Georgia R. & Bkg. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939. But when we consider the development of the street railroad business; the fact that in many instances they use steam;

that they use a motive power capable of generating a speed greater than that of steam; that the act of 1856 was inserted in the Code of 1863 and in the Code of 1868; that this fellow-servant law was inadvertently repealed by the act of 1869 (Acts 1869, p. 157), and then re-enacted in 1873 (Acts 1873, p. 24); that at the time of such re-enactment there were street railroads, some using horse power and others using horse and steam power; and when we further recall that these Code sections were again re-enacted in 1895, at a time when there were very many horse railroads, narrow-gauge roads, and electric roads, and that in 1885, before the adoption of the Code of 1895, this court had held that a street railroad was within the meaning of the word "railroad" as used in the act of 1837, Penal Code, § 520, and in 1875, in *Augusta & S. R. Co. v. Renz*, 55 Ga. 127, applied to them the law as to presumptions against railroads,—the conclusion is irresistible that the legislature was satisfied with the construction which had been placed on the meaning of this word by the courts, and willing to re-enact these sections in the light of the express or implied definition of the word "railroad." Not only the language of the Code, but the principle of *stare decisis*, requires us to hold that a street railroad is liable for injuries inflicted upon an employee by reason of the negligence of a fellow servant.

Judgment affirmed.

All the Justices concur, except **Lumpkin**, P. J., absent on account of sickness.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

James H. GILBERT, for Use of Andrew D. BISHOP, *Plff. in Err.*,
v.

AMERICAN SURETY COMPANY of New York *et al.*

(121 Fed. 499.)

1. A dismissal of a replevin suit for want of prosecution, with judgment for return of the property, after reversal by the appellate court of a judgment in plaintiff's favor, and remanding of the case for new trial, is not conclusive as to the title to the property in a subsequent suit on the replevin bond.
2. The decision of a state court in a replevin suit in which the construction of a state statute is not involved is not binding on a Federal court in a subsequent suit upon the replevin bond.
3. One who has sold his property to a combination, and been placed in possession as agent of the purchaser, cannot,

NOTE.—On the general question of the estoppel of a party in possession of property to deny the title of the party placing him in possession, see *Franklin County Grammar School v. Bailey* (Vt.) 10 L. R. A. 405, which was the case of a tenant; also some cases in brief in *Hax v. Seaman* (Colo.) 9 L. R. A. 342.
61 L. R. A.

after years of service under that agreement, repudiate the contract, and reclaim the property, on the ground that the contract under which the sale was effected was in restraint of trade.

4. In a suit on a replevin bond plaintiff is not entitled to prove the value of stenographer's fees and costs, including attorneys' fees necessary and incidental to conducting the replevin suit.

(October 7, 1902.)

ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment in favor of plaintiff for a less amount than was demanded in an action upon a replevin bond. *Affirmed.*

Statement by **Jenkins**, Circuit Judge:

The American Preservers' Company, a corporation of the state of West Virginia, on May 11, 1891, brought suit in replevin against Andrew D. Bishop in a court of the state of Illinois, and caused a writ to be therein issued, directing the sheriff to take certain described property from the possession of Bishop and to deliver the same to the plaintiff in the writ, upon receiving proper

bond in double the value of the property, stated to be of the value of \$9,000. The property mentioned was taken from Bishop and delivered to the American Preservers' Company, the plaintiff in the writ, the sheriff taking from the plaintiff the bond in suit executed by the preservers' company as principal and by the American Surety Company as surety, conditioned as follows: "Now, therefore, if the American Preservers' Company, plaintiff, shall prosecute its said suit to effect and without delay, and make return of the property recovered and taken under and by virtue of said writ of replevin issued in said cause, if return thereof shall be awarded, and shall save and keep harmless the said sheriff for having replevied the said property, and shall pay all costs and damages occasioned by wrongfully suing out said writ of replevin, then this obligation to be void; otherwise to remain in full force and effect."

The issues in the replevin suit are stated at length in *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 765. The trial of that suit resulted in a judgment for the plaintiff, which upon appeal was affirmed by the appellate court, and, upon further appeal to the supreme court, was reversed, and a new trial awarded upon the ground of the improper exclusion of evidence. The cause was thereupon redocketed in the trial court, and by an order therein entered on December 15, 1898, amending an order of May 5, 1898, the replevin suit was dismissed without a trial upon the merits, and a return of the property taken under the writ, together with the costs of suit, was adjudged. From the judgment awarding a writ of *retorno* the preservers' company, plaintiff in the suit, appealed to the appellate court, and the judgment of dismissal with *retorno habendo* was there affirmed, and subsequently, upon further appeal, affirmed by the supreme court of the state.

This suit is brought against the principal and surety upon the replevin bond to recover, failing a return of the goods, the value of them, and damages by way of attorneys' fees and expenses incurred in the defense of the replevin suit.

To the declaration the defendants in error, *inter alia*, pleaded that the property in the replevin suit sought to be recovered was the property of the American Preservers' Company. To this it was replied that the property mentioned was not the property of the preservers' company, but was the property of Bishop, because Bishop, being engaged in the business of manufacturing fruit butters and like products, was induced, by threats that otherwise his business would be ruined, to enter into a trust combination to prevent competition and to secure a monopoly in the manufacture of like articles of food throughout the United States (this agreement is set forth at large in the opinion of the court in 157 Ill. 284, 41 N. E. 765); that his goods then on hand, inventoried at \$9,063.03, were transferred by bill of sale under seal executed by him in July, 1888, to the American Preservers' Company, for which he received 61 L. R. A.

331 shares of stock of that company, of the par value of \$33,100, which he assigned to the trustee of the trust, and received in lieu thereof 662 certificates of trust, of the par value of \$66,200; that said bill of sale was executed to aid the trust in controlling the entire manufacture of fruit butters and like products throughout the United States, and to create a monopoly in such manufacture and sale and to stifle competition; that such bill of sale constitutes the title of the American Preservers' Company to the goods in question, and was held by the supreme court of Illinois in the case mentioned to be void, and that such ruling is conclusive and binding upon the parties to the suit; that in December, 1888, and in March, 1889, Bishop tendered his trust certificates to the general manager of the trust, and demanded a return of the property covered by its bill of sale, which being refused, he was induced to continue the management of the business and to render to the trust reports thereof until March, 1891, when he was advised that the trust agreement was illegal; that at the making of the bill of sale he was in possession of the property therein mentioned, and ever since that time has been in such possession, except so far as articles have been changed through sales and purchases.

At the trial it was shown that upon delivery of the bill of sale in July, 1888, Bishop was employed by the American Preservers' Company at a salary of \$50 per week, to conduct the business sold by him to it, was placed in possession of the property as its agent for the purpose, opened a new set of books, insured the property in the name of the American Preservers' Company, and made reports periodically to the company of the business, and continued so to do and to receive his stipulated salary, until just prior to the 11th of May, 1891, the date of the commencement of the replevin suit. The court refused to allow proof of the facts stated in the replication, directed the jury to return a verdict for the plaintiff, and to assess "the plaintiff's damages at debt \$22,000, and damages at the sum of one cent, said debt to be satisfied upon payment of said damages of one cent and costs of suit," which was done. To review the judgment entered upon such verdict this writ of error is brought.

Argued before *Jenkins and Baker*, Circuit Judges, and *Bunn*, District Judge.

Messrs. Lynden Evans, Charles Arnd, and Frederick Arnd, for plaintiff in error:

The parties to this suit were bound by the opinion of the supreme court of Illinois in *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 765.

111. Stat. chap. 37, § 38; *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Cousin v. Labatut*, 19 How. 203, 15 L. ed. 601; *Grand Gulf R. & Bkg. Co. v. Marshall*, 12 How. 165, 13 L. ed. 938; *Murdock v. Memphis*, 20 Wall. 590, 633, 22 L. ed. 429, 443; *Mitchell v. First Nat. Bank*, 180 U. S. 471, 45 L. ed. 627, 21

Sup. Ct. Rep. 418; *McGinnis v. Hart*, 6 Iowa, 204; *Karthauss v. Owings*, 2 Gill & J. 430.

By the dismissal of the replevin suit the American Preservers' Company lost the right to contest the claim of Bishop, the defendant therein, to the right of possession of property, inasmuch as replevin is an action to determine, not the title to, but the right to possession of, the property.

Cobbey, Replevin, § 12; *Warner v. Matthews*, 18 Ill. 83; *Reynolds v. McCormick*, 62 Ill. 412; *Hall v. Durham*, 113 Ind. 327, 15 N. E. 520.

The surety in a replevin bond is just as much bound by the proceeding in replevin as the principal.

Washington Ice Co. v. Webster, 125 U. S. 426, 446, 31 L. ed. 799, 807, 8 Sup. Ct. Rep. 947; 1 Greenl. Ev. § 523; *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591; *Gradle v. Kern*, 109 Ill. 557; *Mitchell v. First Nat. Bank*, 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418.

After parties have submitted to a final adjudication in the highest court of the state or Federal district, they cannot afterwards, in another forum, be allowed to question the decision rendered, to which they have submitted.

West v. Douglas, 145 Ill. 164, 34 N. E. 141; *Newberry v. Blatchford*, 106 Ill. 584; *Champaign County v. Reed*, 106 Ill. 389; *Loomis v. Coven*, 106 Ill. 660; *Moshier v. Norton*, 100 Ill. 63; *Semple v. Anderson*, 9 Ill. 546; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Dikworth v. Curtis*, 139 Ill. 508, 29 N. E. 861; *National Foundry & Pipe Works v. Oconto City Water Supply Co.* 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

Even upon a second appeal to the same court, the same question cannot be again adjudicated.

Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. ed. 658; *Union Mut. L. Ins. Co. v. Kirchoff*, 51 Ill. App. 67; *Bane v. Wick*, 6 Ohio St. 13; *Deucey v. Gray*, 2 Cal. 374; *Clary v. Hoagland*, 6 Cal. 685; *Thomason v. Dill*, 34 Ala. 175.

Where a plaintiff had brought suit in a state court, and had appealed to the supreme court, and the case was reversed and remanded, and the plaintiff then dismissed his suit and brought suit in the United States court, the opinion of the state court is conclusive.

Hazard v. Chicago, B. & Q. R. Co. 1 Biss. 503, Fed. Cas. No. 6,275, 4 Biss. 453, Fed. Cas. No. 6,276; *New Orleans, M. & C. R. Co. v. New Orleans*, 14 Fed. 373; *Lookout Mountain R. Co. v. Houston*, 44 Fed. 449; *Cleaver v. Traders' Ins. Co.* 40 Fed. 711.

The trust agreement is illegal and void.

American Preservers' Trust Co. v. Taylor Mfg. Co. 46 Fed. 152; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *Cravens v. Carter-Crume Co.* 34 C. C. A. 479, 92 Fed. 479; *National Harrow Co. v. Hench*, 39 L. R. A. 299, 27 C. C. A. 349, 54 U. S. App. 53, 61 L. R. A.

38 Fed. 36; *Merz Capsule Co. v. United States Capsule Co.* 67 Fed. 414.

If the bill of sale under which the preservers' company claims title to the property replevied was given pursuant to and as part and parcel of such a contract to create a monopoly, then the bill of sale and the contract under which it was given were void, and no court of law would aid either party to the transaction.

Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; *Dunkin v. Hodge*, 46 Ala. 523; *Kivett v. Wynne*, 89 N. C. 39; *Mudgett v. Morton*, 60 Me. 260; *Worcester v. Eaton*, 11 Mass. 368; *Clarke v. Lincoln Lumber Co.* 59 Wis. 662, 18 N. W. 492; *State v. Lazarre*, 12 La. Ann. 166; *White v. Franklin Bank*, 22 Pick. 189; *Quirk v. Thomas*, 6 Mich. 111; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132.

Where the prosecution or defense of suits is rendered necessary, naturally and proximately, by a breach of contract or any wrongful act, the costs of that litigation reasonably and judiciously conducted, incurred or paid, including reasonable counsel fees, are recoverable as part of the damages.

1 *Sutherland, Damages*, p. 142; *Hughes v. Graeme*, 33 L. J. Q. B. N. S. 335; *Ziegler v. Powell*, 54 Ind. 173; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Krugg v. Ward*, 77 Ill. 603; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *New Haven & N. Co. v. Hayden*, 117 Mass. 433; *Noyes v. Ward*, 19 Conn. 250; *Pond v. Harris*, 113 Mass. 114; *White v. Madison*, 26 N. Y. 117; *Henderson v. Squire*, L. R. 4 Q. B. 170; *Webber v. Nicholas*, 4 Bing. 16; *Noble v. Arnold*, 23 Ohio St. 264; *Alexander v. Jacoby*, 23 Ohio St. 358; *Godwin v. Francis*, L. R. 5 C. P. 295; *Ryerson v. Chapman*, 66 Me. 557; *Dubois v. Hermancc*, 56 N. Y. 673; *Call v. Hagar*, 69 Me. 521; *Bonesteel v. Bonesteel*, 30 Wis. 511; *Ah Thae v. Quan Wan*, 3 Cal. 216.

Messrs. **T. A. Moran, Levy Mayer, Isaac H. Mayer, Alfred S. Austrian,** and **F. F. Norcross**, for defendants in error:

The merits of the replevin suit not having been determined, defendants in the suit on the bond have a right to plead that fact, and title to the property; and upon defendants' making such proof, plaintiff is entitled to recover but nominal damages, i. e., one cent and costs.

Hurd's Rev. Stat. (Ill.) chap. 120, § 26; Lyon v. Pease, 86 Ill. App. 251; *Webber v. Mackey*, 31 Ill. App. 369; *Chinn v. McCoy*, 19 Ill. 604; *Schweer v. Schwabacher*, 17 Ill. App. 78; *King v. Ramsay*, 13 Ill. 619; *Warner v. Matthews*, 18 Ill. 83; *Little v. Bliss*, 55 Kan. 94, 39 Pac. 1025; *Miller v. Cheney*, 88 Ind. 466; *Stockwell v. Byrne*, 22 Ind. 6; *Wallace v. Clark*, 7 Blackf. 298; *Consolidated Tank Line Co. v. Bronson*, 2 Ind. App. 1, 28 N. E. 155; *Cobbey, Replevin*, § 1355; *Wells, Replevin*, § 458; 2 *Sutherland, Damages*, § 46; *Shinn, Replevin*, §§ 827, 828.

Even assuming that the preservers' company took the title of the property in furtherance of an illegal combination, that transaction was closed, and nothing re-

mained to be done except to turn over the property to the preservers' company, and this defense will not now avail.

Planters' Bank v. Union Bank, 16 Wall. 483, 21 L. ed. 473; *Brooks v. Martin*, 2 Wall. 70, 78, 79, 17 L. ed. 732, 734, 735; *Western U. Teleg. Co. v. Union P. R. Co.* 1 McCrary, 558, 3 Fed. 423; *Western U. Teleg. Co. v. St. Joseph & W. R. Co.* 1 McCrary, 565, 3 Fed. 430; *Wann v. Kelly*, 2 McCrary, 628, 5 Fed. 584; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 469, 33 L. ed. 747, 760, 10 Sup. Ct. Rep. 450; *Cook v. Sherman*, 4 McCrary, 20, 20 Fed. 167; *Rhea v. White*, 7 Lea, 628.

Assuming the purpose of the incorporation was illegal, this cannot be inquired into collaterally, but only by the state.

Macon County v. Shores, 97 U. S. 272, 277, 24 L. ed. 889, 890; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 628, 25 L. ed. 188, 190; *American Cable R. Co. v. New York*, 68 Fed. 227; *Miller v. Ferris Irrig. Dist.* 85 Fed. 693; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 28 C. C. A. 202, 56 U. S. App. 208, 84 Fed. 539; *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729; *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. 403; *Demarest v. Flack*, 128 N. Y. 205, *sub nom.* *Demarest v. Grant*, 13 L. R. A. 854, 28 N. E. 645.

Assuming that the preservers' company is an unlawful monopoly, still Bishop cannot convert the property.

Smith v. Sheeley, 12 Wall. 358, 20 L. ed. 430; *Lafayette Bridge Co. v. Streater*, 105 Fed. 729; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 479, 22 Sup. Ct. Rep. 431, 99 Fed. 354; *Dennehy v. McNulta*, 41 L. R. A. 609, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825; *Strait v. National Harrow Co.* 51 Fed. 819; *Scott v. Wisucall*, 42 L. R. A. 85, 30 C. C. A. 339, 57 U. S. App. 179, 86 Fed. 671; *American Steel & Wire Co. v. Wire Drawers & D. M. Unions Nos. 1 & 3*, 90 Fed. 608; *Cœur D'Alene Consol. Min. Co. v. Miners' Union*, 19 L. R. A. 382, 51 Fed. 280; *National Distilling Co. v. Cream City Importing Co.* 86 Wis. 352, 56 N. W. 864; *Southern P. Co. v. United States*, 28 Ct. Cl. 77; *National Folding-Box & Paper Co. v. Robertson*, 99 Fed. 985; *Edison Electric Light Co. v. Sawyer-Man Electric Co.* 3 C. C. A. 605, 11 U. S. App. 712, 53 Fed. 598; *American Soda-Fountain Co. v. Green*, 69 Fed. 333; *Harrison v. Glucose Sugar Ref. Co.* 58 L. R. A. 915, 53 C. C. A. 484, 116 Fed. 304.

Bishop, holding the property in question as the agent of said preservers' company, is estopped from asserting a title adverse to his principal. The fact that the property may have been illegally acquired would not change the rule.

Snell v. Pells, 113 Ill. 145; *Norton v. Blinn*, 39 Ohio St. 145; *O'Bryan v. Fitzpatrick*, 48 Ark. 487, 3 S. W. 527; *Simpson v. Wrenn*, 50 Ill. 222, 99 Am. Dec. 511; *Applewhite v. Allen*, 8 Humph. 697; *Lund v. Seamen's Bank for Savings*, 37 Barb. 132; *Osgood v. Nichols*, 5 Gray, 420; *Sinclair v. Murphy*, 14 Mich. 392; *Chapman v. Searle*, 61 L. R. A.

3 Pick. 38; *Mechem, Agency*, § 525, p. 362; *Cobbey, Replevin*, § 471; *Edwards, Bailments*, 2d ed. § 73.

The decision of the supreme court of Illinois in *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 765, is not binding upon the Federal court in the suit at bar.

Gardner v. Michigan C. R. Co. 150 U. S. 349, 351-358, 37 L. ed. 1107, 1108-1110, 14 Sup. Ct. Rep. 140; *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 578, 31 L. ed. 795, 797, 8 Sup. Ct. Rep. 974; *Chicago, B. & Q. R. Co. v. Lee*, 87 Ill. 454.

The Federal court must determine for itself all questions of general law, public policy, and the construction of contracts, etc.

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 30 L. R. A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201, Affirmed in 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 368, 21 L. ed. 627, 636; *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 661, 666, 668, 20 L. ed. 757, 759, 760; *Swift v. Tyson*, 16 Pet. 1, 16, 18, 10 L. ed. 865, 870, 871; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 29, 31, 26 L. ed. 61, 67, 68; *Boyce v. Tabb*, 18 Wall. 546, 548, 21 L. ed. 757, 758; *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 511, 10 L. ed. 1044, 1051; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 443, 32 L. ed. 788, 792, 9 Sup. Ct. Rep. 469.

This rule is applicable, even where the same instruments are being passed on for a second time.

Lane v. Vick, 3 How. 464, 476, 11 L. ed. 681, 687; *Pana v. Boulter*, 107 U. S. 529, 544, 545, 27 L. ed. 424, 430, 2 Sup. Ct. Rep. 704; *Barber v. Pittsburgh, Ft. W. & C. R. Co.* 166 U. S. 83, 41 L. ed. 925, 17 Sup. Ct. Rep. 488; *Burgess v. Seligman*, 107 U. S. 20, 32, 35, 27 L. ed. 359, 364, 365, 2 Sup. Ct. Rep. 10; *Hambly v. Bancroft*, 83 Fed. 444; *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 109, 27 L. ed. 325, 326, 1 Sup. Ct. Rep. 425; *Harrison v. Glucose Sugar Ref. Co.*, 58 L. R. A. 915, 53 C. C. A. 484, 116 Fed. 304.

Jenkins, Circuit Judge, delivered the opinion of the court:

It is provided by statute of the state of Illinois that in an action upon a bond given upon replevin the obligors in the bond may plead in mitigation of damages, title to the property in dispute in the replevin suit, when the merits of the case have not been determined in that suit. 3 Starr & C. Anno. Stat. (Ill.) chap. 119, § 26, p. 3388; *Stevenson v. Earnest*, 80 Ill. 513. It was therefore open to the defendants in error to show in this suit that the title to the property involved in the replevin suit was in the American Preservers' Company. This was shown by the bill of sale executed by Bishop to that company. That title, however, was sought to be rendered nugatory by evidence that the bill of sale was given in pursuance of an il-

legal trust agreement in restraint of trade; in other words, that Bishop, who had sold his plant and had received the stipulated consideration, and for nearly three years thereafter had been in the service of the vendee at a stipulated salary, could defeat his vendee's title, and hold as his own the plant sold by him of which he was in possession only as agent of his vendee, and including goods subsequently purchased by the vendee, because the agreement under which the bill of sale was executed was in restraint of trade.

It is primarily urged in support of this contention that the supreme court of Illinois had so ruled in the replevin suit between Bishop and the American Preservers' Co. (157 Ill. 284, 41 N. E. 765), and that its decision is *res judicata* between the parties to that suit, and therefore conclusive in this suit. The vice of this contention is not difficult to be ascertained. It is not doubted that a decree of a court of competent jurisdiction is conclusive, in a second suit between the same parties or their privies, of every matter that was decided therein and that was essential to the decision made, and we have so held. *David Bradley Mfg. Co. v. Eagle Mfg. Co.* 6 C. C. A. 661, 18 U. S. App. 349, 57 Fed. 980. In the replevin suit, however, there was no judgment determining the merits of the cause. The case was dismissed for want of prosecution, with the ordinary judgment for the return of the property taken in replevin. The decision of the supreme court merely ruled that certain evidence tending to show the illegality of the transaction, and which was excluded at the trial of the replevin suit, should have been allowed, and the judgment was therefore reversed, with a direction for a new trial. There was no new trial. The dismissal of the suit for want of prosecution is no bar to a subsequent action—certainly not so persuasive as a judgment of nonsuit when the plaintiff's evidence has been heard; and the latter is not a bar to a second suit. *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99; *Blicher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140. The case of *Mitchell v. First Nat. Bank*, 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418, does not, as was urged at the bar, hold otherwise. In that case there was final judgment of a state court, which was properly held conclusive under the general rule above stated.

Nor, while we read with great respect the decisions of the highest appellate court of the state of Illinois, can we recognize its ruling in the replevin case as binding upon us. The question upon which it passed was one of general law, and was not founded upon the construction of a statute of the state. In respect of such questions of general law, the Federal courts cannot avoid the responsibility of deciding them for themselves as they may arise. In *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 661, 668, 20 L. ed. 757, 759, the Supreme Court said: "But, as we have already said, this is not the class of ques-

tions in which we are bound to follow the state courts. It is not based on a statute of the state, or on a construction of such a statute, nor on any rule of law affecting the title to lands, nor any principle which has become a settled rule of property; but on those principles of public policy designed for the protection of the state or the public, of which we must judge for ourselves, as they do when the question is fairly presented."

See also *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Boyce v. Tabb*, 18 Wall. 546, 21 L. ed. 757; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 358, 37 L. ed. 1107, 1109, 14 Sup. Ct. Rep. 140.

Assuming that the agreement pursuant to which Bishop executed his bill of sale was, as held by the supreme court of Illinois in *Bishop v. American Preservers' Co.* and within the principle laid down in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, void as against public policy and in restraint of trade, and that therefore a court will not lend its aid to either party to such unlawful agreement, it is to be remarked that the supposed unlawful agreement had in fact been executed by the parties thereto. Bishop had made his bill of sale and given possession of his property to the preservers' company in execution of the unlawful agreement. Such possession as he afterward had of that property was not in his own right as owner, but as agent of the preservers' company. A trust character was assumed by him. We doubt if such illegal transaction can be made the subject of defense in an action at law, unless the suit be brought upon the illegal contract itself. We doubt if it can be thus attacked collaterally. It is true that contracts which in themselves are directly in restraint of trade may in a suit based thereon be declared void and unenforceable by the court, but certainly one dealing with the principal of the illegal combination cannot defend against his contract made with such principal, although it was collateral to the arrangement for the combination, the action not being one to enforce the terms of the arrangement. *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732; *Smith v. Sheeley*, 12 Wall. 358, 20 L. ed. 430; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 473; *Connolly v. Union Seamer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Strait v. National Harrow Co.* 51 Fed. 819; *Dennehy v. McNulta*, 41 L. R. A. 609, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825; *Scott v. Wiswall*, 42 L. R. A. 85, 30 C. C. A. 339, 86 Fed. 671; *National Folding-Box & Paper Co. v. Robertson*, 99 Fed. 985; *Harrison v. Glucose Sugar Ref. Co.* 58 L. R. A. 915, 53 C. C. A. 484, 116 Fed. 304.

In the case at bar Bishop had sold his property to the American Preservers' Com-

pany and parted with his title to it. He had delivered possession to that company. The illegal agreement between him and the promoter of the trust was executed. He thereafter was in possession of the property by virtue of his employment as agent of the company. He occupied a position of trust, holding the property and dealing with it for the company for a stipulated compensation, which he promptly received. He may not, after years of service under that arrangement, hold as his own the property which he had sold and for which he had received the agreed price. "An obligation will be enforced though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case." *Armstrong v. American Eash. Bank*, 133 U. S. 433, 469, 33 L. ed. 747, 760, 10 Sup. Ct. Rep. 450. We are not asked to enforce an agreement in restraint of trade. We are asked to declare that a trustee, receiving property from his principal and holding it in trust for the principal, shall not be permitted to convert it to himself. He is estopped to deny the title of his principal. There is no public policy which would warrant us to hold otherwise. We concur with the remark of the court in *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319, 20 Atl. 383: "And, however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent

in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associate, contrary to express agreement and every principle of fair dealing, and which in conscience the benefited party cannot retain."

And we approve the observation of Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 535: "There is a homely proverb current in my part of the country which says you may not 'sell the cow and sup the milk.' . . . It seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act."

It is said that the court erred in not permitting the plaintiff below to prove the value of stenographer's fees and costs, including therein attorneys' fees necessary and incidental to the conduct of a replevin suit. In this ruling we think the court was entirely right. *Conard v. Pacific Ins. Co.* 6 Pet. 262, 8 L. ed. 392; *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580; *Oelrichs v. Spain*, 15 Wall. 211, *sub nom.* *Oelrichs v. Williams*, 21 L. ed. 43; *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181.

The judgment is affirmed.

Petition for writ of certiorari denied by Supreme Court of United States June 1, 1903.

ILLINOIS SUPREME COURT.

John O. STETSON *et al.*, *Appts.*,

v.

Ezra Sherman STETSON *et al.*

(200 Ill. 601.)

1. **The destruction of a will expressly revoking a former one revives the latter**, under a statute providing that a will can be revoked only by a subsequent will declaring the revocation of former ones.
2. **The destruction of a will animo revocandi will be presumed**, where it was taken into the custody of the testator, and cannot be found after his death.

(February 18, 1903.)

A PPEAL by complainants from a decree of the Circuit Court for Bureau County in favor of defendants in a suit to set aside the probate of a will. *Affirmed.*

Statement by **Magruder**, Ch. J.:

This is a bill in chancery, filed in the cir-

NOTE.—As to revival of will by destruction of revoking will, see also, in this series, *note* to *Cheever v. North* (Mich.) 37 L. R. A. 561. 61 L. R. A.

cuit court of Bureau county by the appellants, John O. Stetson, Anna Stetson, Emma J. Chandler, and David Chandler, against the appellees, Ezra Sherman Stetson, Merriam Stetson, Joseph M. Stetson, Hannah Stetson, James B. Stetson, Sarah Stetson, and Ezra Sherman Stetson, executor of the last will and testament of Jesse Stetson, deceased, praying that the will of Jesse Stetson, deceased, bearing date December 3, 1897, and admitted to probate June 5, 1899, and the probate thereof, be set aside, and that the estate of the deceased be distributed among his heirs at law as intestate estate. The bill was answered by the appellees Ezra Sherman, Joseph M., and James B. Stetson, who were defendants below. Replication was filed to the answer. By agreement jury was waived, and the cause was tried by consent before the circuit judge without a jury. Upon hearing had, the trial court dismissed the bill at the cost of the complainants below, appellants here. The present appeal is prosecuted from such decree of dismissal so entered by the court below.

The allegations in the pleadings and the proofs introduced upon the hearing show

substantially the following state of facts: Jesse Stetson, of Neponset township, Bureau county, died on April 27, 1899, leaving no widow, nor children, nor descendants of children, but leaving, him surviving, as his only heirs at law, four brothers and one sister, to wit, the appellant John O. Stetson, a brother, and the appellant Emma J. Chandler, a sister, and the appellees Ezra Sherman Stetson, Joseph M. Stetson, and James B. Stetson, brothers. Jesse Stetson left a will, dated December 3, 1897, and this will was admitted to probate by the county court of Bureau county on June 5, 1899. By the terms of the will the testator, after providing for the payment of his funeral expenses, bequeathed and devised all the residue and remainder of his estate, both real and personal, to his brothers the appellees Ezra Sherman, Joseph M., and James B. Stetson, share and share alike, and left nothing in said will to appellants his brother John O. Stetson, and his sister Emma J. Chandler. It is alleged in the bill, and the proof tends to show, that at some time between September 1, 1898, and the death of the testator on April 27, 1899, he procured an attorney at Kewanee to prepare for him another will, which is alleged to have been signed by him and attested in the presence of the said attorney and said attorney's daughter, who acted as a stenographer for him. What the contents of the will last mentioned were is not clearly shown. The will last mentioned was not found among the papers of the deceased testator, nor in his possession, and it has never been produced or seen by any person since the death of the testator. What proof there is in the record as to the execution of the last-named will and as to its contents is purely oral, and consists mainly of the testimony of the attorney, who states that he drew it, and of his daughter, the stenographer above mentioned. The testimony of the draftsman of the last-named will and of his daughter tends to show that said last-named will contained a clause revoking all former wills made by the testator, Jesse Stetson. The bill alleges that by virtue of the last will, alleged to have been executed by the testator between September 1, 1898, and April 27, 1899, and by virtue of the revocatory clause contained therein, the former will of December 3, 1897, admitted to probate on June 5, 1899, was revoked and annulled, and became of no force and effect. The bill also alleges that the second will, so alleged to have been made by the testator, had not appeared to be in existence since his death, but was lost or otherwise disposed of, and that its whereabouts were unknown to appellants. The answer filed below by the appellees admitted the execution and probate of the will of December 3, 1897, but denied the execution of the second will, and also denied that the testator ever made any other will than that of December 3, 1897. The original bill charged that the will of December 3, 1897, was executed through the use of undue arts and fraudulent practices and misrepresentations and threats by the appellees Ezra Sherman, Joseph M., and James B. Stetson. In an 61 L. R. A.

amended bill, however, filed by complainants below, they eliminated the charges of undue influence and fraud, and left as the sole ground of their contest the charge that the will of December 3, 1897, had been revoked by the subsequent will, alleged to have been executed as above stated.

The complainants below (appellants here) submitted to the court, to be held as law in the decision of the case, four propositions, all of which were refused; and their refusal is one of the errors relied upon by the appellants. One of these propositions asserted that the court below, the circuit court of Bureau county, had jurisdiction to entertain proof tending to show the execution and contents of a will containing a revoking clause, and made by Jesse Stetson subsequently to the will dated December 3, 1897, for the purpose of determining the validity or invalidity of the former will of December 3, 1897, although such proof had never been offered in the county court. The other propositions asserted, in substance, that if, after the execution of the will of December 3, 1897, Jesse Stetson made another will, containing a clause expressly revoking all former wills made by him, the loss or destruction of the subsequent will, even if destroyed by the testator himself, would not operate to revive the former will of December 3, 1897; that upon the execution of the subsequent will the former will was immediately revoked and annulled, and could only be revived by a retestament or republication thereof in the manner required by law for the execution of wills; and that if, subsequent to the execution of the will of December 3, 1897, Jesse Stetson made another will, containing a clause expressly revoking all former wills, the clause of revocation therein contained operated at once by its own force to immediately revoke and annul the former will of December 3, 1897; and that, if the subsequent will was traced into the possession of the testator, though not found after his death, and if the former will was in existence and found uncanceled after his death, still, under the evidence, the former will was not revived, and was of no force or effect, and the probate thereof should be vacated and set aside.

Messrs. Cairo A. Trimble and George S. Skinner, for appellants:

Illinois has even asserted the inherent power in her courts of chancery to establish a will that has been destroyed after the death of the testator, on the ground that the law is intended to be practical in its application to the varied transactions and circumstances which go to make up the affairs of life.

Anderson v. Irwin, 101 Ill. 411.

On a bill in chancery to contest the validity of a probated will, the trial is *de novo*, and all questions about the validity of the disputed will are forever put at rest.

Rigg v. Wilton, 13 Ill. 15, 54 Am. Dec. 419; *Shaw v. Camp*, 61 Ill. App. 68, Affirmed in 163 Ill. 144, 36 L. R. A. 112, 45 N.

E. 211; *Wolf v. Bollinger*, 62 Ill. 368; *Tate v. Tate*, 89 Ill. 42.

The due execution of a subsequent will revoked the former will.

Re Cunningham, 38 Minn. 169, 36 N. W. 269; *Wallis v. Wallis*, 114 Mass. 510; *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799; *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698; *Wurzell v. Beckman*, 52 Mich. 478, 18 N. W. 226; *Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; *Cheever v. North*, 106 Mich. 390, 37 L. R. A. 561, 64 N. W. 455.

The statute of wills, § 17, does not designate the only ways and means by which revocations are effected, although it purports to forbid all others.

Tyler v. Tyler, 19 Ill. 151; *Duryea v. Duryea*, 85 Ill. 41; *Lynn v. Lynn*, 135 Ill. 18, 25 N. E. 634.

A subsequent will with clause of revocation revokes a former will; and the fact that the last will cannot be found will not change the rule.

Moore v. Griswold, 1 Redf. 388; *Re Griswold*, 15 Abb. Pr. 299.

All the contents of a will need not be proved if enough is proved to show that it revoked the former one.

1 Underhill, Wills, § 266; Schouler, Wills, § 412; *Cheever v. North*, 106 Mich. 390, 37 L. R. A. 563, 64 N. W. 455.

Where a will has once been revoked by a later will, nothing can ever be claimed under it, even though the later will has been lost or destroyed.

Stevens v. Hope, 52 Mich. 65, 17 N. W. 698; *Re Cunningham*, 38 Minn. 169, 36 N. W. 269.

An express clause of revocation is a positive act of the party, which operates by its own proper force, without being at all dependent on the consummation of the will in which it is found.

James v. Marvin, 3 Conn. 577; *Cheever v. North*, 106 Mich. 390, 37 L. R. A. 561, 64 N. W. 455; *Colvin v. Warford*, 20 Md. 391; *Haues v. Nicholas*, 72 Tex. 481, 2 L. R. A. 863, 10 S. W. 558; *Boudinot v. Bradford*, 2 Dall. 266, 1 L. ed. 375; *Powell, Devises*, 549; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Burns v. Travis*, 117 Ind. 44, 18 N. E. 45; *Barksdale v. Hopkins*, 23 Ga. 332; *Cutto v. Gilbert*, 9 Moore P. C. C. 131; *Hellier v. Hellier*, 1 L. R. 9 Prob. Div. 237; *Nelson v. McGiffert*, 3 Barb. Ch. 158, 49 Am. Dec. 170.

The making of the revocatory will is a revocation of the preceding will, though such former will is not formally canceled.

Price v. Maxwell, 28 Pa. 23; *Hairston v. Hairston*, 30 Miss. 276; *Boudinot v. Bradford*, 2 Dall. 266, 1 L. ed. 375; *Lutheran Congregation's Appeal*, 113 Pa. 32, 5 Atl. 752; *Re Thompson*, 11 Paige, 453.

If the later will contains an express clause of revocation, the mere execution thereof renders an earlier will invalid, even if for any reason the other provisions of the will prove ineffectual.

Page, Wills, § 267, pp. 296, 310; Schouler, Wills, §§ 417, 418; 1 Jarman, Wills, p. 337; *Smith v. McChesney*, 15 N. J. Eq. 359, 61 L. R. A.

Laughton v. Atkins, 1 Pick. 535; *Read v. Manning*, 30 Miss. 308; *Brown v. Brown*, 8 El. & Bl. 876; *Haues v. Nicholas*, 72 Tex. 481, 2 L. R. A. 863, 10 S. W. 558; *Jones v. Murphy*, 8 Watts & S. 275; *Wallis v. Wallis*, 114 Mass. 510; *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. 719.

If a testator makes a second will, and actually revokes a first by an absolute act rendering it void, and then cancels the second will, the first is not thereby revived; in such case republication is essential to restore the first will.

4 Kent, Com. 531; *James v. Cohen*, 3 Curt. Eccl. Rep. 770; *Major v. Williams*, 3 Curt. Eccl. Rep. 432; *Moore v. De la Torre*, 1 Phillim. Eccl. Rep. 375; *Hale v. Tokelove*, 14 Jur. 817; *Boulcott v. Boulcott*, 2 Drew. 25; *Goodright v. Harwood*, 3 Wils. 497; *Underhill, Wills*, § 269, pp. 365-367.

A will revoked by a revocation clause in a second will must be republished to be in force.

Page, Wills, §§ 271-274, 310; 29 Am. & Eng. Enc. Law, p. 330; Schouler, Wills, §§ 342, 412-415; 1 Jarman, Wills, 362, note 2; *Barker v. Bell*, 46 Ala. 216; *Carey v. Baughn*, 36 Iowa, 540, 14 Am. Rep. 534; *Love v. Johnston*, 34 N. C. (12 Ired. L.) 355; *Sawyer v. Sawyer*, 52 N. C. (7 Jones L.) 134; *Warner v. Warner*, 37 Vt. 356; *Witter v. Mott*, 2 Conn. 67; *Cogdell v. Widou*, 3 Desaus. Eq. 346; *Dunlap v. Dunlap*, 4 Desaus. Eq. 321; *Sharp v. Wallace*, 83 Ky. 584; *Re Penniman*, 20 Minn. 245, Gil. 220, 18 Am. Rep. 368; *Jackson ex dem. Rogers v. Potter*, 9 Johns. 312; *Musser v. Curry*, 3 Wash. C. C. 481, Fed. Cas. No. 9,973; *Jones v. Hartley*, 2 Whart. 110; *McClure v. McClure*, 86 Tenn. 174, 6 S. W. 44; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Cheever v. North*, 106 Mich. 390, 37 L. R. A. 561, 64 N. W. 455.

The nonproduction of the alleged revoking will is immaterial, if there is sufficient proof that it ever existed.

Scott v. Fink, 45 Mich. 241, 7 N. W. 799; *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698; *Wurzell v. Beckman*, 52 Mich. 478, 18 N. W. 226; *Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; *James v. Marvin*, 3 Conn. 576; *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393; *Williams v. Williams*, 142 Mass. 515, 8 N. E. 424; *Rudisill v. Rodes*, 29 Gratt. 147; *Ludlum v. Otis*, 15 Hun, 410; *Re Lones*, 108 Cal. 688, 41 Pac. 771; *Stewart v. Mutholland*, 88 Ky. 38, 10 S. W. 125; *Harwell v. Lively*, 30 Ga. 315, 76 Am. Dec. 649; *Biggs v. Angus*, 3 Dem. 93; *Page, Wills*, §§ 271-274; *Day v. Day*, 3 N. J. Eq. 549; *Bohannon v. Walcott*, 1 How. (Miss.) 336, 29 Am. Dec. 631; 1 Wms. Exrs. & Admsrs. p. 212, and note; *American Board v. Nelson*, 72 Ill. 565; *Wolf v. Bollinger*, 62 Ill. 369; *Hesterberg v. Clark*, 166 Ill. 241, 46 N. E. 734.

Messrs. Watts A. Johnson and Wilson & Moore, for appellees:

A court of chancery has no jurisdiction to admit a will to probate, or establish it. That jurisdiction is expressly conferred, by the

Constitution and statutes of Illinois, on the probate or county court.

Ill. Const. 1870, art. 6, § 18; Ill. Stat. of Wills, §§ 2, 3, 15; *Wild v. Succeney*, 84 Ill. 213; *Dublin v. Chadbourne*, 16 Mass. 433; *Laughton v. Atkins*, 1 Pick. 548; 1 Underhill, Wills, p. 370; *McCormick v. Jernigan*, 110 N. C. 406, 14 S. E. 971; *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. 110.

An instrument, if properly executed as a will, though merely revoking prior wills, and making no disposition of property, is a valid will, and should be admitted to probate.

Laughton v. Atkins, 1 Pick. 535; *Reid v. Borland*, 14 Mass. 208; *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650; *Stickney v. Hammond*, 138 Mass. 116; 1 Underhill, Wills, § 260; *Brenchley v. Still*, 2 Rob. Eccl. Rep. 162; *Schouler v. Wills*, 2d ed. § 419; *Rudy v. Ulrich*, 69 Pa. 177, 8 Am. Rep. 238.

A revoking instrument is not admissible in evidence to revoke or set aside a former probated will without first being probated in the probate court, and there subjected to an original examination as to whether or not it was duly executed and attested according to the statutory requirements.

Laughton v. Atkins, 1 Pick. 535; *Wallis v. Wallis*, 114 Mass. 510; *Stickney v. Hammond*, 138 Mass. 116; *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650; 1 Underhill, Wills, § 266, note 5.

A subsequent will containing a clause of revocation is no evidence of revocation until it is admitted to probate.

Sewall v. Robbins, 139 Mass. 164, 29 N. E. 650.

To authorize the probate of a lost will by parol proof of its contents depending on the recollection of witnesses, the evidence must be clear, strong, and most satisfactory.

Davis v. Sigourney, 8 Met. 488; *Neuell v. Homer*, 120 Mass. 277; 13 Am. & Eng. Enc. Law, p. 1113; *Johnson's Will*, 40 Conn. 587; *Page, Wills*, § 434, p. 516; 1 Wms. Exrs. & Admsrs. *p. 138.

If a will is traced to testator's possession, and not forthcoming at the time of his death, the presumption is that he destroyed it *animo revocandi*, and such presumption will require strong proof to rebut it.

Taylor v. Pegram, 151 Ill. 106, 37 N. E. 837; 1 Jarman, Wills, 290; *Johnson's Will*, 40 Conn. 587.

A will revoked, but not canceled, by a subsequent will, is re-established by the destruction *animo revocandi* of the subsequent will.

Goodright v. Glazier, 4 Burr. 2512; *Harwood v. Goodright*, 1 Cowp. 92; 1 Jarman, Wills, *136; 29 Am. & Eng. Enc. Law, p. 288, § 7; *Taylor v. Taylor*, 2 Nott & M'C. 482; *Randall v. Beatty*, 31 N. J. Eq. 643; *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 686; *Rudisill v. Rodce*, 29 Gratt. 149; *Lauson v. Morrison*, 2 Dall. 286, 289, 1 L. ed. 384, 385; *Boudinot v. Bradford*, 2 Dall. 267, 268, 1 L. ed. 376; *Flintham v. Bradford*, 10 Pa. 85; *Colvin v. Warford*, 20 Md. 357; *Marsh v. Marsh*, 48 N. C. (3 Jones L.) 77, 64 Am. Dec. 598; 1 Underhill, Wills, § 269.

The revocation of a revoking will, *prima facie*, is evidence that the testator intended to revive the former unanceled will.

Harwood v. Goodright, 1 Cowp. 92; *Colvin v. Warford*, 20 Md. 357; 1 Underhill, Wills, § 269; 4 Kent, Com. 516.

Magruder, Ch. J., delivered the opinion of the court:

In the case at bar Jesse Stetson died testate on April 27, 1899, leaving a will, dated December 3, 1897, and executed by him on that day in accordance with the statute in such cases made and provided. This will was found, after his death, unanceled, and among his papers in the Citizens' National Bank of Princeton, in Bureau county, with which bank the deceased was in the habit of doing business in his lifetime. The will, when found in the bank, was in an envelope, which was sealed. After the death of the testator it was taken by the president of the bank to the judge of the county court, where the envelope was opened, and the will was filed. It was duly admitted to probate on June 5, 1899, and the present bill in chancery to set aside the probate thereof was filed May 2, 1901, about a month before the expiration of the two years allowed by the statute for filing a bill in chancery to contest the validity of the same. The sole ground upon which the validity of the will of December 3, 1897, duly admitted to probate, is contested, is that a subsequent will was executed by the testator, containing a clause revoking all former wills. Such subsequent will, alleged to have been executed between September 1, 1898, and the death of the testator, has been lost or destroyed; or, at any rate, it was not found in the possession of the testator, and has never been produced, either for probate in the county court, or otherwise.

The question presented for our consideration, and raised by the refusal of the court below to hold as law the propositions submitted by the appellants, and by the rulings of the court below in the admission and exclusion of evidence, is twofold in its character, and, as formulated in the briefs of counsel on both sides, may be thus stated: If the second will made by Jesse Stetson contained an express clause of revocation, did such clause operate at once, and of its own force, to immediately revoke and annul the first will, made on December 3, 1897; and did the loss or destruction of the second will, containing such clause of revocation, even though such loss or destruction was the act of the testator himself, operate to revive the former will dated December 3, 1897? Perhaps in no branch of the law is there more conflict among the decisions of the courts than in that which relates to the revocation of a former will by a subsequent will, and to the effect of the cancelation of a subsequent revoking will in reference to the revival or nonrevival thereby of the first will. There are cases which hold—and many of the textbooks indorse and sustain the holdings of such cases—that where a person, having made a will, afterwards makes another will, containing a clause expressly revoking all

former wills, and afterwards destroys the second will, and dies, leaving the former will uncanceled, the revoking clause operates instantaneously to effect a revocation; and that, consequently, the destruction of the second will does not revive the former one. 1 Underhill, Wills, § 266; Schouler, Wills, §§ 412-418; *James v. Marvin*, 3 Conn. 577; *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799; *Cheever v. North*, 106 Mich. 390, 37 L. R. A. 561, 64 N. W. 455; *Haues v. Nicholas*, 72 Tex. 481, 2 L. R. A. 863, 10 S. W. 558; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Barksdale v. Hopkins*, 23 Ga. 332. Many of the cases which thus hold that the loss or destruction by the testator himself of a subsequent will containing a revoking clause does not revive a former will, though found in the possession of the testator, uncanceled, at his death, are based upon statutes dissimilar to the Illinois statute upon this subject, and upon considerations which have no force or application in this state and under our decisions. In England what is known as the "statute of Victoria," passed in 1837, provided (chap. 26, § 22) that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same," etc. 29 Am. & Eng. Enc. Law, p. 289, note 2. Some 13 of the American states have adopted either the statute of Victoria or a similar statute upon this subject. But no such statute was ever passed or adopted in this state. In some of the cases a distinction is drawn between a subsequent will, whose provisions are inconsistent with the former will, thereby operating to effect a revocation by implication, and a subsequent will which contains a clause expressly revoking all former wills. This distinction, however, is done away with under the terms of the Illinois statute. Section 17 of the Illinois statute of wills provides as follows: "No will, testament, or codicil shall be revoked, otherwise than by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament, or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament, or codicil in writing, executed as aforesaid, in due form of law." 3 Starr & C. Anno. Stat. 2d ed. pp. 4044, 4045. By the terms of this statute the subsequent will, which shall have the effect of revoking a former will, must be a will "declaring the same;" that is to say, must be a will which, upon its face and by its terms, declares a revocation. If the will must expressly contain a clause revoking all former wills, the question as to any inconsistency between the provisions of the later will and the former will is immaterial.

Again, many of the cases are based upon statutes which authorize the revocation of a will to be made by a subsequent writing

which is not necessarily a will, or testamentary in its character. A large part of the American legislation upon this subject has its basis in the English statute of frauds, by one of the provisions of which "no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same," etc. 1 Underhill, Wills, § 247. It will be noticed that by the terms of this statute a devise in writing of lands, etc., may be revoked, not only by some other will or codicil in writing, but by some "other writing declaring the same;" in other words, the writing declaring the revocation may be some other writing than a will or codicil. Where the instrument of revocation is not necessarily, by the terms of the statute, a will, it may have the effect of operating instantaneously, so as to effect a revocation before the death of the testator; and if the instrument of revocation may be in writing, it will make no difference that its terms are embodied in a will, rather than in some other writing, which is not a will. For example, one of the cases relied upon by counsel for appellants to support their contention upon this subject is the case of *Re Cunningham*, 38 Minn. 169, 36 N. W. 269, where the court says: "The testator might effectually revoke his former will by a writing so declaring, and executed as this instrument was executed (Gen. Stat. 1878, chap. 47, § 9), as he might also by other means." By reference to § 9 of chap. 47 of the General Statutes of Minnesota of 1878 it is found that a will may be revoked "by some will, codicil, or other writing signed, attested, and subscribed in the manner provided for the execution of a will." By § 17, however, of the Illinois statute of wills, the revocation must be by a will declaring such revocation, and not by some other writing than a will, which may not be testamentary in its character. So, also, in *Cheever v. North*, 106 Mich. 393, 37 L. R. A. 561, 64 N. W. 455, it appears that by the terms of the Michigan statute a former will may be revoked, not only by a subsequent will, but "by some other writing signed, attested, and subscribed in the manner provided in this chapter for the execution of a will." The case of *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799, is based largely upon the case of *James v. Marvin*, 3 Conn. 576; but the latter case of *James v. Marvin* has been materially weakened, if not actually overruled by the subsequent case of *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685. In *Peck's Appeal*, the criticism of *James v. Marvin*, 3 Conn. 576, made by Redfield in his work on Wills, is referred to and quoted; and there the supreme court of Connecticut says: "The weight of authority seems to be in harmony with the views expressed by Mr. Redfield. . . . The testatrix, by executing the second will, evinced no intention to become intestate, but rather a contrary intention. By destroying the last will and carefully preserving the first she affords satisfactory evidence that she intended until the very last to die tes-

tate, and that that should be her will. In the absence of an express provision to that effect, we cannot presume that the legislature intended that the mere execution of a will should in all cases revoke a prior will. Such a construction would in many cases defeat the manifest intention of the testator. The statute requires a 'later will or codicil.' We think that means an operative will or codicil. . . . We would say, however, that we have carefully examined the cases cited by the counsel for the appellees, and find that many of them are cases in which the later wills became operative as wills; and, of course, the language of the courts must be interpreted with reference to that circumstance, and cannot properly be applied to a case like this." So, also, in the case of *Barksdale v. Hopkins*, 23 Ga. 340, it appears that, under the statute of Georgia, a will may be revoked "by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses declaring the same." Under the Georgia statute, not only may the revocation be by an instrument not testamentary in its character, but Georgia is one of the states which has adopted the Victoria statute, or a statute similar to the Victoria statute, above quoted. In Virginia, also, § 22 of the statute of Victoria, 1837, is in force. *Rudisill v. Rodes*, 29 Gratt. 148. In Texas, also, where the doctrine seems to prevail that the destruction of a duly executed will containing an express revocation of a former will does not have the effect of reviving the former will, the statute provides that a will may be revoked "by subsequent will, codicil, or declaration in writing, executed with like formalities," etc. *Hawes v. Nicholas*, 72 Tex. 483, 2 L. R. A. 863, 10 S. W. 558.

It being established, then, that under § 17 of the Illinois statute of wills a former will can only be revoked by a subsequent will declaring the revocation of all former wills, and not by a subsequent instrument in writing not testamentary in character, which declares the revocation of the former will, it cannot be said that, in this state the destruction of a duly executed will containing an express revocation of a former will does not have the effect of reviving the former will. We have held that "a will takes effect at the death of the testator." *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351. Indeed, the general doctrine is that a will is ambulatory, and has no effect until the death of the testator. It follows that a testamentary paper which the testator permits to survive him must be his will. A will is inoperative and ineffectual, and has no legal existence, until it is consummated by death. *Taylor v. Taylor*, 2 Nott & M'C. 483. In *Marsh v. Marsh*, 48 N. C. (3 Jones L.) 78, 64 Am. Dec. 598, it is well said: "As wills are ambulatory, and have no operation until the death of the testator, it is difficult to see how the execution of a second will, which is afterwards destroyed by the testator, can in any wise affect the validity of a will previously executed. Both are inactive during the life of the testator, and the cancellation

of the second, it would seem, must necessarily leave the first to go into operation at the testator's death. Nor is it perceived how the fact that the second contained a clause of revocation can alter the case, because that clause is just as inactive and inoperative as the rest of it, and so continues up to the time that the whole is canceled. This principle is settled in the common-law courts in England in regard to devises." In *Taylor v. Pegram*, 151 Ill. 108, 37 N. E. 837, we said: "As a general rule, if a will is traced into the testator's possession, and at his death cannot be found, the presumption is (in the absence of circumstances tending to show a contrary conclusion) that he destroyed it *animo revocandi*." "Where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is that he has destroyed it himself. It cannot be presumed that the destruction has taken place by any other person without his knowledge or authority, for that would be presuming a crime." *Rickards v. Mumford*, 2 Phillim. Eccl. Rep. 24; 29 Am. & Eng. Enc. Law, p. 292, note 3. See also *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140. In *Boyle v. Boyle*, it was held that a will will be presumed to have been destroyed by the testator himself, or at his direction, where he took it from the custodian, with whom it had been for several months, and carried it away, and it could not be found after his death. In the case at bar the will which is said to have been executed by Jesse Stetson between September 1, 1898, and his death on April 27, 1899, is shown by the testimony of the appellants to have been taken possession of by him as soon as it was executed, and to have been carried away by him from the office of the attorney who is said to have drawn it; nor could it be found among his papers or elsewhere after his death. It is to be presumed, therefore, that Jesse Stetson destroyed this will *animo revocandi*. If he destroyed it with the intention of canceling or revoking it, it was canceled or revoked as an entirety. So long as Jesse Stetson was alive, this second will was merely ambulatory, and had no operation, and could have no operation until his death. While it was thus ambulatory, and before his death, the presumption is that he destroyed it, and if he destroyed it, the clause contained in it, which revoked all former wills, was canceled and revoked, as well as the balance of the will. It necessarily results that the former will of December 3, 1897, was revived when the subsequent will, containing the revoking clause, was canceled or destroyed. Upon this subject Redfield in his work on Wills (1 Redf. Wills, *328) says: "It has been held in some of the American courts that a subsequent will containing a clause of revocation, executed with due solemnity for the purpose of revoking an existing will, operates, *proprio vigore*, and instantaneously, as a revocation, and, consequently, that the destruction of the second will did not revive the former one. This doctrine has an air of plausibility from the fact that an instrument of revocation alone would unquestionably

have this effect so long as it was allowed to remain operative. But that would show a present purpose of becoming intestate, carried into effect as far as practicable before death. But the making of a will with a revocatory clause is very different. It is but substituting one will for another. And the revocatory clause is made dependent in some sense upon the subsequent will going into operation. And there is ordinarily no purpose of having the revocatory clause operate, except upon that condition. The whole instrument is, therefore, ambulatory, and when destroyed it all ceases to have any operation. And the same is true of the destruction of a will merely revocatory of former wills. By such destruction, the former wills, if in existence, become revived." *Peck's Appeal*, 50 Conn. 566, 47 Am. Rep. 685.

In *Flintham v. Bradford*, 10 Pa. 90, the supreme court of Pennsylvania says: "All wills are in their nature inchoate and ambulatory until testator's death, at which time, and not before, the testament becomes operative and complete. The will of 1824 was an inchoate intention, mutable and inconstant, and by the wilful and deliberate act of cancellation on the part of the testator it became as if it never had been. The prior will of 1821, being preserved by the testator entire, and without intentional or apparent blemish, became the will for the time being, which would be consummated at testator's death, unless before that time he manifested a change of intention according to the rules of law." So, in the case at bar, the second will, alleged to have been made by Jesse Stetson, was inchoate and ambulatory until his death; and, as he is presumed to have destroyed it for the reasons already stated, "it became as if it never had been." The prior will of December 3, 1897, having been preserved by him entire and without intentional or apparent blemish, has become his will. At common law, where the later of two inconsistent wills was revoked by the testator in his lifetime, the earlier will became thereby revived, "and, unless afterwards revoked by some subsequent act, came into operation on his decease, whether the later will contained an express clause of revocation or not." 29 Am. & Eng. Enc. Law, p. 288. In *Harwood v. Goodright*, 1 Cowp. 92, Lord Mansfield said: "If a testator makes one will, and does not destroy it, though he makes another at any time virtually or expressly revoking the former, if he afterwards destroy the revocation, the first will is still in force and good." 29 Am. & Eng. Enc. Law, p. 289, note 3. In *Goodright v. Glazier*, 4 Burr. 2513, Lord Mansfield said: "Here the intention of the testator is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will; if he does not suffer it to do so, it is not his will. Here he had two. He has canceled the second. It has no effect, no operation. It is as no will at all, being canceled before his death. But the former, which was never canceled, stands as his will." In the same case Mr. Justice Yates concurred with 61 L. R. A.

Lord Mansfield, and said: "A will has no operation till the death of the testator. This second will never operated. It was only intentional. The testator changed his intention, and canceled it. If, by making the second, the testator intended to revoke the former, yet that revocation was itself revocable; and he has revoked it." In *Schouler on Wills*, 3d ed. § 413, it is said: "The English common-law tribunals laid down a rule, under Lord Mansfield's lead, which has been thought more inflexible than that favored by ecclesiastical courts, viz., to the effect that, if a testator keeps his first will undestroyed and uncanceled, makes a second will virtually or expressly revoking it, and then destroys or cancels the second will only, thus repealing his revocation, the first will thereupon revives and continues in force." "In the ecclesiastical courts it was held that the revocation of the later will raised no presumption in favor of the revival of the earlier will, but that the question depended upon the intention of the testator, as shown by the peculiar facts and circumstances of the case, and was open to decision either way." 29 Am. & Eng. Enc. Law, pp. 288, 289. But "by the common law the first will is presumed to be restored to its active energy by the canceling of the second." *Taylor v. Taylor*, 2 Nott & M'C. 483. The common-law rule best harmonizes with the course of legislation and judicial decisions in this state, for the reason that the common law of England, so far as the same is applicable and of a general nature, is considered as of full force in this state, where it is not repealed by legislative authority. *Hurd's Rev. Stat.* 1899, p. 399. The rule above stated, as adopted by the ecclesiastical courts, is derived from the civil, and not the common, law. *Taylor v. Taylor*, 2 Nott & M'C. 483. In *Randall v. Beatty*, 31 N. J. Eq. 643, where a testatrix executed several wills, all of which she destroyed, except one executed in 1870, and where, by a will made in 1873, she expressly revoked all former wills, but afterwards canceled the will of 1873, and where, after her death, the will of 1870 was found carefully preserved among her effects, it was held that the cancellation of the will of 1873 revived that of 1870; the court saying: "The rule on the subject of the revival of a prior will by the revocation of a later one containing words of revocation was, up to 1838 (when by the enactment of a statute—1 Vict. chap. 20—the question was put at rest), different in the courts of common law and the ecclesiastical courts in England, the former holding that the revocation of the later will of itself worked a revival (Jarman, Wills, 122, 123), while the latter held that whether there was a revival or not was a question of intention. *Ustick v. Barden*, 2 Add. Eccl. Rep. 116. The will of 1870 was never canceled. . . . The will of 1870 was, at her death, found among her effects, in an envelope, with a copy of her deceased husband's will. It was entirely in her own handwriting. The law declares the manner in which a will is to be revoked. It must be by burning, canceling, tearing or

obliterating it by the testator, or in his presence and by his direction and consent, or by a writing executed with the same formalities as a will. No proof of declarations of revocation made by the testator will avail. . . . The will of 1870 is produced uncanceled. It is admitted that there is no revocatory will or writing extant, but it is alleged that all such instruments subsequently made by the testatrix have been canceled. The execution of the will of 1873 was not attended or followed by the cancelation of the will of 1870. Notwithstanding the revocatory clause in the will of 1873, the will of 1870 was retained by the testatrix uncanceled up to the day of her death. The fact that she so kept the will is the most cogent evidence of her intention that it should be revived by the cancelation of the will of 1873. . . . The true rule on the subject is that, where one will is revoked by another, the revocation is testamentary, and the revocation of the latter will revives the former." In *Lawson v. Morrison*, 2 Dall. 289, 1 L. ed. 384, 1 Am. Dec. 288, it was said: "It has been often determined that a will revoked by a subsequent will, but not canceled, was re-established by the cancelation of the subsequent will."

Our conclusion is that, inasmuch as the later will executed by the testator, Jesse Stetson, must be presumed to have been destroyed by him in his lifetime, this loss or destruction has operated as a revival of the former will of December 3, 1897, although the later will contained a revocatory clause. For this reason the court below committed no error in dismissing the bill of the complainants.

Some other points are made by the appellees. One is that a court of chancery has no jurisdiction to admit a will to probate or establish it. Certainly, if this could be considered a proceeding to establish or admit to probate the second will alleged to have been made by Jesse Stetson, a court of chancery would have no jurisdiction in the matter. In *Wild v. Sweetney*, 84 Ill. 213, this court held that a court of chancery has no jurisdiction to admit a will to probate; that being conferred upon the county court. It is furthermore claimed on the part of the appellees that, if the appellants were justified in setting up the second will as a revocation of the first, they should have attempted to do so when the will of December 3, 1897, was offered for probate, the appellants having had notice of the application to probate the former will, in accordance with the provisions of § 21 of the statute of wills, adopted in 1897 (Hurd's Rev. Stat. 1899, p. 1750). We deem it unnecessary, however, to discuss the question of jurisdiction, or the question whether the appellants here are estopped from their present contention by reason of their failure to set up the revocation when the original will was offered for probate in the county court. If the evidence establishes all that the appellants claim in regard to the existence of the second will and its contents, its presumed loss or destruction operated to revive the will of December 3, 1897, and therefore the consideration of the other questions is unnecessary and immaterial.

The decree of the Circuit Court is affirmed.

KANSAS SUPREME COURT.

STATE of Kansas *ex rel.* Anna YILEK,
Plff. in Err.,
v.

Jacob JEHLIK.

(.....Kan.....)

*1. An unmarried woman, who is an imbecile, and incompetent to testify, cannot institute and prosecute a proceeding in bastardy.

2. After judgment had been rendered in a bastardy proceeding, and at the same term of court, it was competent for the court to set aside the judgment on its own motion, having ascertained that the complainant was mentally incapacitated, and that the court was without jurisdiction.

(February 7, 1903.)

ERROR to the District Court for Republic County to review a judgment in favor of

*Headnotes by JOHNSTON, J.

NOTE.—For the question of the validity of a judgment against a lunatic, see *note* to *Spurlock v. Noe* (Ky.) 39 L. R. A. 775.
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defendant in a bastardy proceeding. *Affirmed.*

Statement by **Johnston**, Ch. J.:

This was a bastardy proceeding, brought by Annie Yilek, an imbecile, against Jacob Jehlik, who was mentally unsound, and under guardianship. Her name was attached to a complaint charging him with being the father of her bastard child, on which the warrant was issued. He was arrested, and brought before the magistrate, where a hearing was had, and a decision made that defendant was the father of the child. The proceedings and papers were certified to the district court, where a trial was had, resulting in a finding that the defendant was the father of the bastard child. After the return of the verdict and the discharge of the jury, judgment was rendered against the defendant, and upon the same day the court set aside the verdict and judgment, and dismissed the cause. The reasons for the rulings of the court are stated in the following-written opinion:

"In this case, the State of Kansas, on rela-

tion of Anna Yilek, v. Jacob Jehlik, the jury having found that the defendant is the father of the relatrix's child, and the court, having rendered a formal judgment on the verdict, now, of its own motion, vacates the said verdict and judgment, and sets them aside; and the reasons for the court's action are these: Until yesterday, when this trial began, the court had no knowledge or intimation that the relatrix was an imbecile. At a former term of this court the question of the court's jurisdiction was raised by the defendant on the ground that the defendant was an imbecile, and under guardianship. The court overruled the objection, and is still of the opinion that, but for the imbecility of the relatrix, which has developed on this trial, the court would have jurisdiction of the litigation. It sees no reason for changing its views expressed in the opinion handed down on the decision of that question at the former term; but, when the relatrix was placed on the witness stand in this trial, she showed conclusively to the court's mind that she was an imbecile, and did not understand the nature of an oath, and its binding obligation to speak the truth in court, and that she did not have intelligence enough to be a witness in any court. And it is apparent that such condition of mind on the part of the relatrix is one that existed at the time she swore to the complaint as the foundation of this proceeding, and has existed ever since. The foundation of this proceeding was a warrant based upon a complaint which the law requires to be sworn to by the mother of the child. She alone can make such complaint. No other person can make such a complaint under the law of Kansas. The law requires her evidence to be taken on the trial before the justice of the peace, and reduced to writing; that it shall be read carefully over to her; and that she sign it. Now, the relatrix being an imbecile, as described, the court is thoroughly of the opinion that the complaint was an absolute nullity, and, being an absolute nullity, the warrant was also null and void, and that this court has no jurisdiction in this case; and for that reason the verdict and judgment are set aside, and the case is dismissed, at the cost of plaintiff."

Messrs. John C. Hogan and W. T. Dillon, for plaintiff in error:

There is no apparent reason why the verification of the pleading in this case should be jurisdictional which would not apply with the same force to any other civil action.

22 Enc. Pl. & Pr. p. 1051; 17 Am. & Eng. Enc. Law, p. 1069; *Re Miller*, 32 Neb. 480, 49 N. W. 427; *Re Chesquasset Lumber Co.* 112 Fed. 56; *Jones v. People*, 53 Ill. 366.

After an appearance and answer to a charge of bastardy in the county court, no exception can be taken to the insufficiency of the warrant.

Schooler v. Com. Litt. Sel. Cas. 88; *Milner v. Com.* 1 Bibb, 404; *Prince v. Gundaway*, 157 Mass. 417, 32 N. E. 653; *Duhamell v. Ducette*, 118 Mass. 569; *Wilson v. Pike County Ct. Judge*, 18 Ala. 757.

Any appearance which raises questions in-
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volving the merits of the case is a general appearance, and waives all questions of irregularity or want of service.

Meiwell v. Kirkpatrick, 29 Kan. 683; *Kaw Life Assn. v. Lemke*, 40 Kan. 142, 19 Pac. 337.

The general guardian of a lunatic has the power to make a general appearance for his ward, and thereby confer jurisdiction upon the court.

Burdette v. Corgan, 26 Kan. 102; 9 Enc. Pl. & Pr. p. 938; *McAlister v. Lancaster County Bank*, 15 Neb. 295, 18 N. W. 57; *Western Lumber Co. v. Phillips*, 94 Cal. 54, 29 Pac. 328; *Ankeny v. Blackiston*, 7 Or. 407; *Symmes v. Major*, 21 Ind. 443; *Robinson v. Swift*, 3 Vt. 283.

Mr. B. T. Bullen, for defendant in error:

The statute provides that when any unmarried woman, who has been delivered of, or is pregnant with, a bastard child, shall make a complaint thereof in writing under oath, before any justice of the peace, charging any person with being the father of such child, such justice shall by his warrant cause such person to be arrested and brought before him.

Kan. Gen. Stat. 1901, chap. 47, § 1.

How can an action in bastardy be brought and maintained without a "complaint thereof in writing under oath?"

Where a form of procedure is provided by statute, and the manner of doing a particular act or thing is pointed out, it precludes the doing of it in any other manner or form.

Shattuck v. Chandler, 40 Kan. 520, 20 Pac. 225; *Re Lee*, 41 Kan. 321, 21 Pac. 282; *Shawnee County v. Carter*, 2 Kan. 130.

Where a statute gives a right or a remedy which did not exist at common law, and provides a specific method of enforcing it, the mode of procedure provided by the statute must be pursued strictly.

23 Am. & Eng. Enc. Law, p. 402; *Dudley v. Mayhew*, 3 N. Y. 9; *Re Lee*, 41 Kan. 321, 21 Pac. 282.

A person incapacitated to such an extent that he is unable to understand the subject in reference to which he is called as a witness is incompetent.

McKelvey, Ev. § 205; *Stephen's Digest of Ev.* p. 166; 1 Greenl. Ev. 13th ed. § 365.

The guardian of an imbecile defendant has no right to waive jurisdictional defects for his ward.

Hardship is not one of the considerations in bastardy proceedings to such extent as to apply the law beyond its scope.

Blush v. State, 4 Kan. App. 145, 46 Pac. 185; *Willets v. Jeffries*, 5 Kan. 470.

The action must be prosecuted strictly under the bastardy act, or not at all, as we have no other statute giving the right, and at common law the father is not liable.

3 Am. & Eng. Enc. Law, 2d ed. p. 889; *Harlett v. Wilson*, 30 Ind. 240.

The complaint must be properly sworn to by a competent person, and not by an idiot; and when a complaint is sworn to by a person wholly incompetent, the trial court has a right to set aside its proceedings upon its own motion after ascertaining such fact, al-

though the fact be not ascertained by the court or by the defendant until late in the proceeding and trial.

State v. Gallup, 1 Kan. App. 618, 42 Pac. 406; *Garnett v. Guynn*, 7 Kan. App. 414, 53 Pac. 275; *State v. Gleason*, 32 Kan. 245, 4 Pac. 363; 15 Enc. Pl. & Pr. pp. 205, 207; *Volmerstadt v. Jacobs*, 61 Iowa, 372, 16 N. W. 217; *Boals v. Shules*, 29 Iowa, 507; *Smith v. Perkins*, 124 Mo. 50, 27 S. W. 574.

Johnston, Ch. J., delivered the opinion of the court:

The controlling question presented here is, May an unmarried woman, who is an imbecile, and incompetent to testify, institute a bastardy proceeding? The proceeding is purely statutory, and, being somewhat penal in its character and procedure, the statutory requirements must be strictly followed. The common law adds nothing to the right of action, and the only methods of enforcing it are those prescribed or warranted by the statute conferring the right. The general provisions of the Civil and Criminal Codes cannot be applied, except so far as the bastardy statute itself makes them applicable. So it has been held that no one but an unmarried woman can become the prosecuting witness in such prosecution, and no one can institute the proceeding except the mother of the bastard child; nor is there any provision allowing the prosecuting witness to be represented by guardian or next friend. Although brought in the name of the state upon a complaint, and the initial process is a warrant upon which the defendant is arrested, and although the county attorney is required to assist, still the prosecuting witness controls the prosecution, the settlement, and the dismissal of the proceedings. The county attorney has no authority to originate the process. His consent to a settlement is not necessary, and he cannot prevent an entry of satisfaction and dismissal by her. *Willetts v. Jeffries*, 5 Kan. 470; *Gleason v. McPherson County*, 30 Kan. 53, 492, 1 Pac. 384, 2 Pac. 644; *State ex rel. Church v. Young*, 32 Kan. 292, 4 Pac. 309; *Re Wheeler* 34 Kan. 96, 8 Pac. 276; *Re Lee*, 41 Kan. 318, 21 Pac. 282; *Re Parker*, 44 Kan. 279, 24 Pac. 338; *Moore v. State*, 47 Kan. 772, 17 L. R. A. 714, 28 Pac. 1072; *State ex rel. Bales v. Baker*, 65 Kan. 117, 69 Pac. 170. Since she alone can originate, control, and terminate the proceedings, is it possible that one without intelligence or understanding of its purpose and effect can do so? The statute, it is true, provides that "any unmarried woman," etc., may institute an action, and such terms, without qualification, are broad enough to include idiots and lunatics. There 61 L. R. A.

is language, however, employed in the same connection, which clearly implies that only rational beings were within the contemplation of the legislature. As already indicated, she only can begin the prosecution, and that she is to do by making a written complaint on oath. Only those who understand the binding force of an oath and are capable of giving testimony are within the spirit and intent of the act. If complaint was made by anyone other than the mother, the justice would certainly acquire no jurisdiction, and shall the oath of one bereft of reason be made the basis of a warrant and an arrest? The statute designates her as the prosecuting witness, and provides that her testimony shall be reduced to writing, read carefully to her, and by her be signed, after which it is to be transmitted to the district court, with the other papers in the case, as a basis for the proceeding in that court. These provisions contemplate that the complainant shall be a competent witness, and the Code provides that persons who are of unsound mind are incompetent to testify. Civil Code, § 323. Again, the statutory provision that she may dismiss the proceedings when she shall enter an admission on the record that provision for the maintenance of the child has been made to her satisfaction so clearly requires an exercise of intelligence and judgment that there can be no doubt as to the legislative intent. Having no mind or understanding, there was, in fact, no complainant. The arrest and prosecution of a person on the initiative of one mentally irresponsible is beyond reason; and since the incapacity of the complainant is conceded, and no one but the mother can institute the proceeding, no jurisdiction was acquired, and hence the proceeding was null and void. It may seem to be a hardship that the statutory remedy does not reach exceptional cases like this one, but it is not the only remedy available for such an injury; and, even if it were, the court would not be justified in extending the remedy beyond the terms and the spirit of the statute conferring it. The incapacity of the complainant was not discovered until the trial, and, while the judgment had been rendered, it was competent for the court to set it aside, and dismiss the proceeding. It was done during the term and on the day that judgment was rendered; and, having ascertained that there was an absence of jurisdiction, it was not only the right, but the duty, of the court to set aside the judgment and discharge the defendant.

The judgment of the District Court will be affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

NEW YORK LIFE INSURANCE COMPANY, *Appt.*,

v.

N. L. CURRY *et al.*

(.....Ky.....)

A contract by which an insurance company loaning money on the security of a paid-up policy issued by it may, at its option, require a surrender of the policy for its cash value upon default in payment of the loan or interest thereon, is void.

(March 11, 1903.)

A PPEAL by defendant from a judgment of the Circuit Court for Mercer County in favor of plaintiffs in an action brought to compel the reinstatement of a life insurance policy and the payment of the amount alleged to be due thereon. *Affirmed.*

The facts are stated in the opinion.

Messrs. Willis & Willis and Humphrey, Burnett, & Humphrey for appellant.

Messrs. Gaither & Vanarsdall, for appellees:

The provisions contained in the agreement have no binding force with reference to a loan on a policy, but relate exclusively to the payment of premiums, and are only enforceable where there is a failure to pay premiums.

Mutual L. Ins. Co. v. Jarboe, 102 Ky. 80, 39 L. R. A. 504, 42 S. W. 1097; *Northwest-ern Mut. L. Ins. Co. v. Fort*, 82 Ky. 269.

O'Rear, J., delivered the opinion of the court:

George J. Anderson was the holder of a paid-up policy of insurance upon his life for \$630, issued by the appellant, and payable upon the death of the insured to his estate. Anderson borrowed \$130 from appellant, and executed to it a writing, called a "loan agreement," by which he pledged to appellant the policy to secure the repayment of the loan. Interest on the loan was payable on August 1st of each year (that being the anniversary of the insurance), so long as the principal was owing. The loan agreement contained the following: "It is agreed that interest at the rate of five (5) per cent per annum shall be paid upon said loan at the anniversary of the insurance next succeeding, and annually thereafter, at the office of said party of the first part. It is agreed that, although it is not intended that said party of the first part shall demand payment of said loan until the 1st day of August, 1909, on which date said loan shall become and be due and payable, or until the death of the party whose life is insured under said policy, said party of the first part reserves the right to demand repayment provided said interest is not duly paid." It is further provided as follows: "It is agreed that, in the event of the

default of any payment of said interest or of said loan, or of any premium on said policy, for thirty days after they shall respectively become due, said policy shall be deemed to be, and shall be, in effect, at the option of said party of the first part, surrendered to said party of the first part at the customary cash surrender value then allowed by said party of the first part for the surrender of policies of this class, said party of the first part in that case being liable to said party of the second part for the return of the balance only of said cash surrender value after deducting said loan and interest and any expenses incurred thereon." And further: "It is agreed that said party of the second part has deposited said policy and its accumulations with said party of the first part as collateral security for said loan, on the terms and conditions of this agreement, and covenants and agrees to and with said party of the first part to abide by and perform, all and singular, the stipulations and agreement contained in this agreement." And further: "It is agreed that all the conditions, limitations, and requirements of said policy, except as herein expressly modified, remain in full force."

On the 1st of August, 1899, when the interest on the \$130 loan became due and payable according to the terms of the contract, it was not paid; nor was it paid for more than thirty days thereafter; nor was it offered to be paid until nearly eight months after its maturity. Appellant then refused to receive it and reinstate the insurance (which it had canceled as forfeited because of the nonpayment of interest as provided in the agreement above copied), unless the insured would furnish a certificate of his then good health. That he did not do, and, possibly, could not have done. As a matter of fact, appellant admits that the "accumulations" hypothecated with this policy as collateral to its loan of \$130 were, when included in the "cash surrender value then allowed" by appellant on this class of policies, some \$12.47 more than the principal and interest owing appellant when the default occurred. Before the interest above named became due, Anderson had assigned the policy for value to appellees, his creditors, of which appellant had notice at the time. Being apprised of the appellant's claim of the forfeiture of the policy, appellees tendered the interest and principal of Anderson's loan, and offered to redeem the policy for their benefit as assignees and creditors. Being refused, this suit was brought to compel appellant to reinstate the policy, or to pay its value above the amount of appellant's debt and interest, to appellees. That excess of value was alleged to be \$300. Appellant, by answer, relied on the surrender and cancellation of the policy under the contract and conditions above stated. The circuit court sustained a demurrer to the answer, and adjudged that upon the payment to appellant of the \$130 and interest that it reinstate the policy.

NOTE.—As to the validity of life insurance to secure loan made by the insurer, see *note* to *Union Cent. L. Ins. Co. v. Hilliard* (Ohio) 53 L. R. A. 462.
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This appeal involves the validity of the clause of the above agreement providing for the surrender, or practically for the forfeiture, of the policy, if the interest on the loan was not promptly paid when due. By the terms of this writing, if the loan, or its interest, was not repaid when due under the loan agreement, the policy was to be "surrendered" to the insurer "at the customary cash surrender value then allowed by said party for the surrender of policies of this class." That is, pure and simple, a provision for the forfeiture of the policy upon such terms as the payee of the note may require, and at its option. The difference between this and the ordinary unqualified forfeiture lies alone in the extent of the forfeiture. It operates as an enforced conversion without further notice to, or consent of, the borrower, of his collateral, if he fails to promptly pay the interest upon his debt.

The contract of insurance between appellant and Anderson had been fully executed so far as Anderson was concerned. He had paid all that he was required to pay to be entitled to receive from appellant the full sum stipulated to be paid—\$630—at his death. The \$130 was borrowed from appellant since that completion of the contract.

The courts have uniformly held, in favor of the insurer, that agreements for the forfeiture of the policy when premiums were not paid when due are valid, and their enforcement is upheld. This is said to be because "on the prompt payment of the premiums depends the mutuality of the contract and the ability of the insurance company to meet its obligations." But both the reason and the rule are restricted to the matter of premiums alone. Forfeitures are disfavored in law. When they are mere penalties for the nonpayment of borrowed money, they are not allowed. They lead to, and themselves are, unconscionable oppressions of the unfortunate.

The question in this case, in collateral form, has been before this court several times.

In *St. Louis Mut. L. Ins. Co. v. Grigsby*, 10 Bush, 310, a policy provided that if the interest upon premium notes given by the insured was not promptly paid when due it should work a forfeiture of the policy, including all that had been paid on it. Said the court (per Lindsay, J.): "We are satisfied, from the nature of the contract, that the forfeiture was intended as a penalty, to secure, not the ultimate, but the prompt, payment of the interest to become due; and, as the default is only in time, and as the company can be given all that it stipulated to receive, a case is presented in which relief can and ought to be afforded."

In *Montgomery v. Phenix Mut. L. Ins. Co.* 14 Bush, 51, the question was whether a failure to surrender the old policy and to demand a paid-up policy for the lesser sum, in case of default after paying a certain number of premiums, forfeited the insurer's rights. This court (per Cofer, J.) held that time was not of the essence of the undertaking; that the clause for a forfeiture was

repugnant to the policy of the law, and was contradistinguished from conditions precedent. The court quoted approvingly the following section from Story's Equity, § 1314: "Wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the nonperformance. In every such case the true test by which to ascertain whether relief can be had in equity is to consider whether compensation can be made or not."

In *Northwestern Mut. L. Ins. Co. v. Fort*, 82 Ky. 269, the question was whether the failure of the insured to pay promptly the interest on certain premium notes voided the policy under a provision which declared, "which interest shall be paid annually or the policy be forfeited." The court (per Lewis, J.) held: "Here the default, if any has occurred, is not of the substance of the contract, but in time of the payment of interest, and the company can be given all that it stipulated to receive. On the other hand, to forfeit the whole policy on account of default in time of payment of the interest, which formed but a small part of the consideration, and which the company is fully secured in the ultimate payment of, if not already paid, would impose upon the assured the entire loss of the premiums actually paid. A forfeiture under such circumstances would be extremely oppressive, and, if provided for in a contract between individuals concerning any ordinary business transaction, be held as in the nature of a penalty."

The later case of *Mutual L. Ins. Co. v. Jarboe*, 102 Ky. 80, 39 L. R. A. 504, 42 S. W. 1097, was quite similar to *Montgomery v. Phenix Mut. L. Ins. Co.* 14 Bush, 51. It was there reasserted (per Cofer, J.): "Time is not generally of the essence of contracts. (Story, Eq. § 776.) It may be so when the contract is executory on both sides, or when the nature of the transaction or the stipulation of the parties shows it was so intended by them. But when the defendant has received the entire consideration for performance on his part, and has no other defense except that the plaintiff did not come within the stipulated time to demand performance, we are not acquainted with any authority or legal principle upon which such a defense can be upheld in a court of equity."

Also, see *Manhattan L. Ins. Co. v. Patterson*, 22 Ky. L. Rep. 1282, 53 L. R. A. 378, 60 S. W. 383; *Washington L. Ins. Co. v. Miles*, 23 Ky. L. Rep. 1705, 66 S. W. 740.

In all of these cases the failure relied on as a forfeiture was connected with the existence of the original contract of insurance. It was not always easy to distinguish between the legal principles governing the right to provide for forfeiture because of nonpayment of premium notes and the nonpayment of interest on premium notes. The evident aim of the insurers was to bring the interest upon the notes within the prin-

ciples governing the notes themselves. The court, however, noted a distinction, and applied it.

In the case at bar there is no perceivable reason why the insurance company lending the money is, or can be, in a different position from any other lender of the money had the policy been assigned to the latter as collateral, and a default in payment of the interest had occurred. If it loans money on its policies held by its policy holders, its rights as lender are exactly what they would be if, instead of the policies, the borrower pledged stocks, bonds, or policies in other companies, or gave a chattel or real estate mortgage to secure the loan. There is nothing in appellant's business, or charter rights, so far as we are advised, which entitles it to privileges when loaning its money not enjoyed generally by banks, trust companies, and other corporations and individuals.

We are of opinion that the provision in the loan agreement for a surrender or forfeiture of the policy upon the nonpayment of the interest upon the loan is void.

The judgment of the Circuit Court is therefore affirmed.

Petition for rehearing denied June 20, 1903.

W. D. REED *et al.*, Appts.,

v.

A. L. SCHMIDT, Trustee, etc., *et al.*

(.....Ky.....)

1. Withdrawal of bonds, the owner of which has borne his share of the expenses of protecting the common interests, from a syndicate agreement to purchase at the foreclosure sale for the protection of the bondholders the railroad by which the bonds were issued, to which they were committed by the agent of their owner, cannot be made by the agent without the owner's consent, or required by other members of the syndicate.
2. A trustee for holders of bonds secured by a railroad mortgage cannot create a pool for the purpose of buying in property for the exclusive benefit of a favored and chosen number of bondholders, but all must be given a fair opportunity to share on equal terms.
3. Holders of bonds secured by a mortgage on a railroad, which is bought in at foreclosure sale for the benefit of the bondholders, who offer within a reasonable time to bear their proportion of the expenses necessary to carry the sale into effect, are entitled to share in the benefit of the purchase, under a statute providing for the purchase of such property for the benefit of security holders, and entitling all holders of the same class of securities to equal privileges in any such purchase with other holders of the same class.
4. Where property bought at a foreclosure sale for the benefit of security holders has been resold, holders of se-

NOTE.—As to relations and rights of syndicate members, see *Baltimore Trust & Guarantee Co. v. Hambleton* (Md.) 40 L. R. A. 216, and *note*.
61 L. R. A.

curities who were entitled to the benefit of the pool, but were excluded therefrom, are entitled to an accounting of the proceeds after deducting what they should have contributed to the expenses.

(March 5, 1903.)

A PPEAL by interveners from a judgment of the Circuit Court for Shelby County dismissing a petition filed in a proceeding for the foreclosure of a railroad mortgage for the purpose of sharing in the benefit of the sale. *Reversed.*

The facts are stated in the opinion.

Messrs. J. C. Beckham & Son, with *Mr. William W. Thum*, for appellants:

By contract, these appellants became and remained parties to the pooling agreement.

Bank of Newbury v. Sinclair, 60 N. H. 101, 49 Am. Rep. 307; *United States School Furniture Co. v. Owensboro Bd. of Edu.* 18 Ky. L. Rep. 948, 38 S. W. 864; *Southern P. Co. v. Duncan*, 16 Ky. L. Rep. 119; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. 453; *Greenly v. Brooks*, 13 Ky. L. Rep. 207; *Hill v. Nation Trust Co.* 108 Pa. 1, 56 Am. Rep. 189; *James v. Crosthwait*, 97 Ga. 673, 36 L. R. A. 631, 25 S. E. 754; *Schimmelpennich v. Bayard*, 1 Pet. 265, 7 L. ed. 138; *Russ v. Telfener*, 57 Fed. 973; *Gano v. Finnell*, 13 B. Mon. 390; *Megibben v. Shauchan*, 9 Ky. L. Rep. 368; 2 Herman, Estoppel, §§ 765, 767, 794, 906, 908; *Hayes v. Caulfield*, 5 Q. B. 81; *McMullen v. Ritchie*, 64 Fed. 253; *Glidden & J. Varnish Co. v. Interstate Nat. Bank*, 16 C. C. A. 534, 32 U. S. App. 654, 69 Fed. 912; *Catholic Bishop v. Troup*, 61 Ill. App. 641; *Allen v. Sykes*, 5 J. J. Marsh. 614; *Morrison v. Taylor*, 6 T. B. Mon. 85; *Hambleton v. Rhind*, 84 Md. 450, sub nom. *Baltimore Trust & Guarantee Co. v. Hambleton*, 40 L. R. A. 216, 36 Atl. 597.

A person is conclusively presumed to have had notice, actual or constructive, of all the doings of his agent within the actual or apparent scope of the agency, and to be bound thereby.

Andrews v. Robertson, 111 Wis. 334, 54 L. R. A. 673, 87 N. W. 190.

P. B. Reed could neither scratch out his own bonds, nor the bonds of others, after the parties had signed, and the attempted change and erasure did not alter the contract.

Cornell v. Utica, I. & E. R. Co. 61 How. Pr. 184; *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. 576; *Sage v. Central R. Co.* 99 U. S. 334, 25 L. ed. 394; *Jackson v. Ludeling*, 21 Wall. 616, 22 L. ed. 492.

A. L. Schmidt had been for years, and was then, the trustee for the bondholders. Unquestionably any pool which he forms to buy the road is one to which his beneficiaries can be admitted. A trustee cannot act contrary to the interests of the *cestuis que trust* about a matter concerning his trust as intimately and directly as this.

Cook, Corp. § 885; *People ex rel. Plugger v. Overysel Twp. Board*, 11 Mich. 222; *Tisdale v. Tisdale*, 2 Sneed, 596, 64 Am. Dec. 775; *Elliott, Railroads*, §§ 529, 535.

Where a bondholder or stockholder has ap-

plied to come into the syndicate or reorganization, as such steps to preserve and make available the rights of bondholders are called, and has complied with the requirements laid down in the form, he may insist on being admitted, unless he has been guilty of laches. Such arrangements are favored in law.

3 Cook, Corp. §§ 883-890, p. 521; *Marie v. Garrison*, 83 N. Y. 14; *Jackson v. Ludeling*, 21 Wall. 616, 22 L. ed. 492; *Wetmore v. St. Paul & P. R. Co.* 1 McCrary, 466, 3 Fed. 177; *Bound v. South Carolina R. Co.* 23 C. C. A. 636, 42 U. S. App. 353, 78 Fed. 54; *Kennedy v. McCloskey*, 170 Pa. 354, 33 Atl. 117; *Kelly v. Browning*, 113 Ala. 420, 21 So. 928; *Benedict v. Moore*, 76 Fed. 472; *Re Hill's Waterfall Estate & Gold Min. Co.* [1898] 1 Ch. 947; *Dexter v. Ross*, 85 Mich. 370, 48 N. W. 530; *Terbell v. Lee*, 40 Fed. 40; *Carey v. Houston & T. C. R. Co.* 45 Fed. 438.

Appellants also share in the purchase under Ky. Stat. § 771.

Messrs. Willis & Willis, for appellees:

There is no question of law involved in this case. It is only a question of fact, and that is, Were appellants, at the time of the sale, members of the association of partnership, or pool, or combination, which bought the property, through its or their representative?

O'Rear, J., delivered the opinion of the court:

The Cumberland & Ohio Railroad Company (Northern Division) issued bonds in 1879 to the amount of \$250,000, and executed a mortgage on its railroad and franchises, etc., to Joshua F. Speed, trustee, to secure their payment and interest. After the death of Speed, appellee A. L. Schmidt was substituted, under the provisions of the mortgage, as trustee for the bondholders. The Cumberland & Ohio Railroad Company (N. D.), contemporaneously with the execution of the mortgage named, entered into a contract with the Louisville, Cincinnati, & Lexington Railroad Company, by which the latter leased the properties of the former for a term of thirty years, agreeing to provide, out of the rentals and otherwise, a sinking fund for the payment of the mortgage debt and interest. This lease and contract were assigned by the Louisville, Cincinnati, & Lexington Railroad Company to the Louisville & Nashville Railroad Company. Default was made for several years in the payment of interest coupons by the Cumberland & Ohio Railroad Company (N. D.), and a suit was brought in the circuit court of Shelby county by certain bondholders to enforce the mortgage lien. The result was a decree for the sale of the railroad property and franchises free of all liens. This sale came on to be made by the court's commissioner on the 12th day of March, 1900. The trustee under the provisions of the mortgage, A. L. Schmidt, had been engaged in numerous and extensive litigations for about twelve years on behalf of the bondholders against the Louisville & Nashville Railroad Company and others. It appeared at times

as if the lessor road was bankrupt, and that it could pay little or nothing on its bonded indebtedness. This was so evident that the bonds depreciated in market value till they had become practically unsalable. During that time the trustee had called upon bondholders for funds to enable him to prosecute and defend the various suits affecting their lien. Certain ones, including Mrs. Jane M. Reed, Miss E. T. Reed, and those whose names appeared upon the reorganization pool contract hereinafter named, contributed as called upon, enabling the trustee to make the contests leading up to, if not bringing about, the condition of the decretal sale on March 12, 1900. Before that time, however, both Mrs. Jane M. Reed and Miss Reed had died, and the bonds previously owned by them had been distributed to their devisees and heirs, and had been sold at executor's sales, so that on and before March 10, 1900, appellants W. D. Reed, J. D. Reed, and S. S. Reed (who were sons of Mrs. Jane M. Reed, and brothers of Miss E. T. Reed) became the owners, each of 3 of those bonds, of the denomination of \$1,000 each. That for which the bondholders had been waging a wearisome fight for and against for many years was come to its final test. Upon its issue depended whether they would receive anything, and, if anything, what amount, to reimburse them for their original and subsequent investments. It was understood among those who had been conducting and backing this matter that the only tangible method of protecting their interests finally was to form a purchasing syndicate of bondholders, who could and would, by co-operation and conjoint effort, either buy in the road at the sale, and by its operation and resale make themselves whole on their investments, or by their bidding force another to pay for it such a price that the bondholders would receive upon their debts against the road its full value at the time of the sale. In view of the character of the property, it was not probable that any one of the bondholders could or would feel justified in alone buying the property, or that he could even become an acceptable bidder thereon. It is customary, and, indeed, it may be said that it is nearly always necessary, that some such arrangement be made and allowed, or the sales of such properties at auction would be impracticable. The parties A. L. Schmidt and others agreed to organize such a buying pool in this instance. P. Booker Reed, a brother of appellants, appears to have been one of the prime movers in this enterprise. He was a bondholder to the extent of 20½ bonds. An agreement was prepared upon the following form, and industriously circulated among the bondholders for their agreement to its terms, and for their signatures: "This writing witnesseth, that whereas, the Cumberland & Ohio Railroad (Northern Division), with all its property, rights, etc., is about to be sold under decree of the Shelby circuit court, in action of Germania Safety Vault & Trust Company, assignee, etc., against said railroad company, enforcing the lien under a mortgage made for the

benefit of the holders of bonds of said road: Now, in order to protect our interests in the premises we, the undersigned holders of the bonds of said road, do hereby constitute and appoint _____ as our agent, and as such do hereby authorize and empower them at any sale of said railroad under aforesaid decree to bid on said railroad and property, and buy it in for us at a price not exceeding _____ dollars and each of us to be bound only for our *pro rata* of the price, to be ascertained by our proportion of the bonds held by the undersigned; and we will also pay a like *pro rata* of like costs or expenses of said agent incurred in perfecting this transaction; and, as the terms of sale require a cash deposit of \$2,500 by the purchaser, each of us agree to put into the hands of said agent \$20 per bond held by us, to be applied for that purpose, or so much thereof as may be necessary." P. Booker Reed and A. L. Schmidt were the principal actors in soliciting these subscriptions. Appellants received notice through Schmidt of the plan to form the syndicate. They at once took steps to avail themselves of the privilege, and say that they applied to Schmidt to be permitted to sign the paper, and were by him told to leave their bonds with J. W. Nichols, of the Southern National Bank; that he could sign for them. Appellants accordingly left their 9 bonds with Nichols, and paid to him \$180 (\$20 a share upon each bond), as required by the pooling agreement. Nichols then on the following day, March 10, 1900, signed the agreement thus: "J. W. Nichols and F. N. Lewis, 12" (meaning that Nichols and Lewis represented and subscribed 12 of the bonds of the issue to form the pool). As a matter of fact, Nichols and Lewis owned but 3 of the bonds; the other 9 being owned by appellants. It is claimed that the paper was signed in this manner at the instance of A. L. Schmidt, because P. Booker Reed had violently opposed appellants' being admitted into the syndicate. That appellants authorized an adequate subscription by Nichols, and paid the assessment required by the pooling contract, is not denied, nor is it that Nichols intended to subscribe for them, and on their behalf, to the extent of 9 bonds, in making the subscription that he did. On Sunday evening, March 11, 1900, P. Booker Reed learned that Nichols' subscription represented appellants' bonds. He at once became violently angry and indignant, and in a most dictatorial manner required of Nichols that appellants' subscription should be revoked, or "scratched off," under threat that he would withdraw from the syndicate, and form another. All of this was because of a family quarrel between P. Booker Reed and his brothers, the appellants, and entirely disconnected, it seems, from the merits of this suit. Nichols thereupon, late that Sunday evening, informed appellants that he would, on the following morning, because of their brother's violent hostility and threats, cancel the subscription made by him. Appel-

lants promptly and emphatically forbade his doing or attempting to do anything of the kind, expressly informing him that the extent of his agency for them in the matter was to subscribe for them to the proposition, and not to revoke a subscription which they had authorized. They followed this up with formal written notices to the same effect to P. Booker Reed and other principal promoters of the purchasing syndicate, including Nichols, which were delivered late Sunday night. The sale was the following day at about 11 o'clock A. M., at Shelbyville, some 25 miles from Louisville. Schmidt and the Reeds and the most numerous of the others signing the agreement resided at Louisville when the occurrence first stated had taken place. To get to Shelbyville in time for the sale it was necessary to leave Louisville about 7 o'clock in the morning. At about 7:45 o'clock of Monday morning, March 12, 1900, Nichols, at the instance of P. Booker Reed, and in the presence of appellee Schmidt, and with the concurrence of others of appellees (but not in the presence of appellants), erased the word "12" from his subscription, and wrote "3" in its stead, and received from P. Booker Reed his check covering the payment of \$180, above alluded to, and which was on the next day tendered to appellants, but rejected. At the sale P. Booker Reed, as agent for the syndicate of bondholders, parties to the agreement, bought in the railroad property for \$25,001. At once appellants begun steps to have themselves recognized as members of the syndicate by intervening in the foreclosure suit. The sale was approved, and the report confirmed. Appellants offered to pay into court any further assessment necessary under the pooling arrangement to finish paying for the property and expenses incident to the purchase, etc. All of this was bitterly resisted by P. Booker Reed on behalf of the syndicate. On final hearing the circuit court dismissed appellants' intervening petition; hence this appeal.

Appellees seem to stake their case upon the proposition that one has the right to select his partners, and, at any rate, that a court of equity will not compel one to enter into an unwilling copartnership with others in whom he has not confidence, and with whom his personal relations are such as to make their co-operation impossible. It is not necessary to gainsay either proposition, if it could be done. But it seems to us that the situation of these parties is far beyond the point assumed by appellees. Have they not already embarked into a joint enterprise, in one sense in the nature of a partnership, by which the rights of appellants have attached, and cannot now be ignored or destroyed by the others? This is true, in our opinion, whether we come to the conclusion that appellants became parties to the pooling arrangement by the act of Nichols, their agent, or whether it be rested upon an earlier right of possible equal dignity; that is, their rights, as members of a class of

bondholders, having equal equities against the property, and against whose interest the trustee and a majority of the bondholders of the same class had no right to discriminate. It seems to be assumed that P. Booker Reed, as one of the moving spirits of this scheme, had the legal right to control the matter of whom should be let into it; and that, if his personal dislike or hostility was sufficient cause for him, or even if without cause, he might reject any applicant for membership into the syndicate, no matter what his equities. But this is an erroneous assumption. It undertakes to settle these property questions upon the basis of personal feeling, instead of legal rights. These bonds for years helped to bear the burden of the common fight for the benefit of all. Their owners contributed from time to time, certainly with the clearly implied, if not the expressed, understanding that they were to share, or at least be offered an opportunity to share, in the result. When the pooling agreement was signed by Nichols as agent for appellants, with the assent of Schmidt, they became members in fact. P. Booker Reed had not the right to require their names to be withdrawn, nor had Nichols the right to withdraw them. Independent of their contract right as members of the syndicate, appellants, as holders of a part of these bonds, were beneficiaries of all reasonable efforts by their trustee to realize the very best results. Appellee Schmidt, known by all his associates to be trustee for all the bondholders under the mortgage, could not create a pool for buying in the mortgaged property at the least possible price for the exclusive benefit of a favored and chosen number of the bondholders, himself included. All should have been afforded a fair opportunity to share on equal terms. A purposeful failure to offer, or denial of, such privilege was a fraud upon the excluded bondholders. *Cook, Corp.* § 888; *Jackson v. Ludeling*, 21 Wall. 610, 22 L. ed. 492; *Wetmore v. St. Paul & P. R. Co.* 1 McCrary, 487, 3 Fed. 177; *Cox v. Stokes*, 156 N. Y. 491, 51 N. E. 320.

From the enormities of the properties involved, and of the sums necessary to buy them in at decretal or foreclosure sales, the courts have favored combinations of those interested in the property as bondholders or stockholders, organized to buy in the properties, for the reason that by this means only are bidders assured, and the best interests of those having claims upon the property protected. *Terbell v. Lee*, 40 Fed. 40; *Carey v. Houston & T. C. R. Co.* 45 Fed. 438; *Cook, Corp.* § 886, and authorities there cited. But the courts have borne in mind all the time the rights and interests of all who are so interested, and they have not allowed some to use this privilege of the law to oppress the weaker of those holding equal equities. *Jenkins v. Frink*, 30 Cal. 594, 89 Am. Dec. 134; *Cox v. Stokes*, 156 N. Y. 491, 51 N. E. 320. This has given rise to legisla-

tive cognizance of the subject. In this state, since 1896, a somewhat elaborate and careful plan for the reorganization of insolvent railroad companies sold out under foreclosure or insolvency proceedings has been provided by Ky. Stat. § 771a, and its various subsections. Unless a reorganization plan is first submitted to and approved by the court decreeing the sale of the corporate properties, it is provided: "At any such sale, or at any sale which shall be hereafter made, of any railroad or bridge under any decree of sale, the purchaser or purchasers shall be required to pay the amount of the bid in cash: Provided, however, that if the property shall be purchased by or in behalf of holders of any class of securities issued by the said company, the purchaser or purchasers shall be required to pay in money or securities, immediately, such amount only as the court may deem sufficient to provide against a noncompliance with the bid; and the purchaser or purchasers shall thereafter be entitled, within such time as may be fixed by the court, to pay the amount of the bid by the payment of such money as may be necessary, and by the surrender of securities in proportion as such securities shall be entitled to receive the purchase money; and all holders of the same class of securities shall be entitled to have and enjoy equal rights in any such purchases with other holders of the same class." We are of opinion that under this section, even without a previous agreement with the members of the pool, appellants, if offering within a reasonable time to bear their proportion of the expenses and assessments necessary to carry the sale into effect, were entitled to join in the purchase, and to share the profits. Having made such offer before the confirmation of the sale, and repeated it before the property was conveyed to the corporation formed by the syndicate, appellants should have been admitted.

It is suggested in the record that the property has since been sold, and passed into the hands of independent owners. If appellants had been admitted as members of the syndicate, it would necessarily have been upon terms that they abide the judgment of the authorities of the corporation organized by the membership to own and operate the property. And if this corporation has in fact and in good faith sold the property and conveyed it, appellants are entitled to an accounting, after deducting what they would have been compelled to pay into the pool, on the basis charged other members, and interest thereon from the time same should have been paid, and those necessary costs and expenses incurred in perfecting the enterprise and making the sale. The net proceeds should be then distributed upon the basis of the total number of shares of stock in the pool, including appellants'.

Judgment reversed, and cause remanded for judgment and proceedings consistent with this opinion.

LOUISIANA SUPREME COURT.

Anna M. LEWIS *et al.*
v.

D. H. HOLMES, *Appt.*

(109 La. 1030.)

- *1. Damages are recoverable for deprivation of intellectual enjoyment and for mental suffering, resulting from the breach of a contract.
2. In computing such damages for the breach of the contract of a fashionable milliner to furnish the dresses for the trousseau of a bride of wealth and high social standing, the court will take into consideration, not alone the disappointment of the bride in not having the dresses in time for the wedding, and her mortification and humiliation in going to her husband unprovided with a suitable trousseau, but also the fact that entertainments had been planned in her honor on her wedding tour, and at her arrival at the home of her husband, which entertainments she would have to forego for want of the dresses.
3. When both the husband and the wife are parties plaintiff to the suit, and the claim sued on belongs to one or the other, the defendant is without interest to urge that the claim belongs to one of the spouses in particular, and that the suit should have been brought distinctively in the name of the owner of the claim.

(March 2, 1903.)

A PPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiffs in an action brought to recover damages for breach of contract. *Affirmed.*

The facts are stated in the opinion.

Messrs. McCloskey & Benedict, for appellant:

A mother cannot sustain a cause of action for the use of her daughter, where it is alleged that the damages were suffered by the daughter after her marriage.

Cooper v. Cappel, 29 La. Ann. 213; *Holzab v. New Orleans & C. R. Co.* 38 La. Ann. 185, 58 Am. Rep. 177; *Dyas v. Dinkgrave*, 15 La. Ann. 502, 77 Am. Dec. 196.

A plaintiff cannot, by supplemental petition, through change in phraseology and punctuation, make a new party plaintiff, where the latter was not such originally.

Curacel v. Coulon, 2 Mart. (La.) 143; *Hayes v. Dugas*, 51 La. Ann. 447, 25 So. 121; *Cooper v. Cappel*, 29 La. Ann. 213.

No matter where the damages to the wife arise, if sued for here, it is a property right,

*Headnotes by PROVOSTY, J.

NOTE.—As to right to recover damages for mental anguish caused by breach of contract of railroad company, see, in this series, *Wilcox v. Richmond & D. R. Co.* (C. C. App. 4th C.) 17 L. R. A. 804.

As to right to recover damages for shame and mortification or mental anguish caused by ejection of passenger, see *Texas & P. R. Co. v. James* (Tex.) 15 L. R. A. 347; *Sloane v. South-61 L. R. A.*

and governed, so far as the remedy is concerned, by the *lex fori*.

Stanton v. Harvey, 44 La. Ann. 511, 11 So. 778; *Story*, Conf. L. § 637; *Dicey*, Conf. L. rule 188, p. 711; *La. Civil Code*, art. 2400.

Where a party merely fails to do within the time what he contracted to do, such failure constitutes a passive breach of contract, for which damages are due only from the time such party is put in default.

La. Civil Code, arts. 1932, 1933.

Such putting in default is a prerequisite to recovery of damages, and must be alleged and proved.

La. Civil Code, art. 1912; *Livingston v. Scully*, 38 La. Ann. 781; *Defee v. Covington*, 37 La. Ann. 659; *Gobet v. Municipality No. One*, 11 La. Ann. 300.

Defendant acted in utmost good faith, and the damages claimed were not contemplated; and, if damages arose through misunderstanding, plaintiffs did not attempt to minimize such damages, nor place defendant in a position where he could do so.

Armistead v. Shreveport & R. River Valley R. Co. 108 La. 171, 32 So. 456.

Mental anguish and suffering, unattended by any injury to person, property, health, or reputation, resulting from simple actionable negligence, cannot be a sufficient basis for an action for the recovery of damages.

9 Cent. Dig. § 453, col. 375.

Messrs. John Wagner and Benjamin Rice Forman, for appellees:

Damages may be assessed without calculating the pecuniary loss or deprivation of pecuniary gain to the parties, where the contract has for its object the gratification of some intellectual enjoyment, whether in religion or taste, or some convenience, or other legal gratification; although these were not appreciated in money by the parties, yet damages are due for their breach.

La. Civil Code, art. 1928, ¶ 3; *Tissot v. Great Western Teleg. & Teleph. Co.* 39 La. Ann. 996, 3 So. 261.

The contract having been made by the widowed mother for the use and benefit of her minor daughter, the latter, on coming of age, or being emancipated by marriage, may sue for its breach.

La. Civil Code, art. 1890 (1884) art. 1902 (1896); *La. Civil Prac.* art. 35; *New Orleans v. Bailey*, 5 Mart. (La.) 372; *Holmes v. Holmes*, 9 La. 350.

When the thing to be given or done by contract was of such a nature that it could only be given or done within a certain time which has elapsed, or under certain circumstances which no longer exist, the debtor

ern California R. Co. (Cal.) 32 L. R. A. 193; and *Mabry v. City Electric R. Co.* (Ga.) 59 L. R. A. 590.

As to right to recover damages for mental anguish caused by breach of contract of telegraph company, see *Western U. Teleg. Co. v. Crocker* (Ala.) 59 L. R. A. 398, and cases in footnote thereto.

need not be put in legal delay to entitle the creditor to damages. The letters and telegrams demanding the dresses are a sufficient putting in default.

Spurrier v. Sheldon, 6 La. 182; *Loddell v. Parkcr*, 3 La. 331; *Morton v. Pollard*, 9 La. 176; *Nicholson v. Deobry*, 14 La. Ann. 81; *Cable v. Leeds*, 6 La. Ann. 293.

Provosty, J., delivered the opinion of the court:

On the 6th of April, Mrs. Anna Lewis, living at Yoakum, Texas, telegraphed to D. H. Holmes, the most fashionable millinery establishment of the city of New Orleans, as follows:

"Can you make me five dresses by the seventeenth? Answer quick." And D. H. Holmes answered: "Yes, can make dresses by seventeenth, as wanted."

Mrs. Lewis immediately shipped to D. H. Holmes, by express, the materials for the dresses, which had been bought from the D. H. Holmes establishment a few days before. On the 8th of April she wrote to D. H. Holmes, explaining that the dresses were for her daughter, who was to be married on the 19th, and that the dresses would have to be at Yoakum by the 17th, and insisting that D. H. Holmes let her hear from them at once. On the 12th she telegraphed to D. H. Holmes: "Wire me in regard to dresses at once." On the 13th D. H. Holmes telegraphed to her: "Will ship wedding dress to-morrow, balance on the 19th." On the same day she telegraphed to D. H. Holmes: "Daughter leaves 19th. Must have dresses before. Ship immediately. High water may delay arrival." On the same day she telegraphed to the firm of Hoen & Duth, in New Orleans, her friends: "See Holmes. Hurry up my work. Lula leaves 19th. Must have dresses immediately." D. H. Holmes answered by mail to the effect that they could not ship the dresses before the 19th, but that, if Mrs. Lewis preferred, they could ship them to the bride's destination. On the 14th D. H. Holmes shipped the wedding dress. It reached Yoakum on the 16th. The young lady was to marry a man of wealth and of high social standing, and she herself belonged to the same high social rank. On her wedding tour she was to visit the city of Mexico, and other cities, where entertainments in her honor were planned, and the dresses had been ordered in provision of these functions. Coming from the leading millinery establishment of the leading city of the South, the dress should have been a thing of beauty, delightful to a young bride to wear. It proved to be 4 inches too short in front, and, to use the words of the young lady: "It was just like wearing a short rainy-day skirt, with an immense train behind." At this discovery the expectant bride was overcome by disappointment and chagrin. She had to be held up while her mother and two friends undertook to rectify the garment, and she took to her bed. What could be done was done, but the gown continued to be 1 inch too short in 61 L. R. A.

front, and the bride was as named to wear it, though forced by necessity to do so.

Mrs. Lewis telegraphed at once to D. H. Holmes: "Skirt four inches short. Length should be forty-three inches. See to others." The next morning (the 17th) she telegraphed: "Do not ship other dresses until further notice." But on the evening of the same day she telegraphed: "Send dresses to Yoakum not later than 19th, without fail." On the next day (the 18th) D. H. Holmes mailed the following letter:

New Orleans, April 18th, 189-.

Mrs. A. M. Lewis,

Yoakum, Texas.

Dear Madam:—

Through your telegram of recent date we learned to our surprise that the dress was found four inches too short. We followed measurements furnished by yourself in making it forty-two inches, hence we do not feel ourselves responsible for the mistake. As the telegram states the skirt is four inches too short we will require for the other dresses forty-six inches. The quantity of material furnished will not make the dresses and the definite instructions which were expected have not been received, so we have stopped work until we hear from you more definitely concerning them.

We inclose bill of telegrams, as we are not responsible for the payment of same.

Respectfully,
D. H. Holmes.

On the 25th Mrs. Lewis wrote to D. H. Holmes, telling him that if the dresses were not forthcoming they would be left on his hands; and on the 28th D. H. Holmes returned the dress goods as they had been sent to them, without their having been even unfolded.

The bride, it seems, was counting absolutely upon having the dresses, and found herself entirely unprovided for the entertainments incident to her wedding tour and to her arrival at the home of her husband in Louisville, Kentucky. For want of suitable dresses, she had to forego these entertainments, and to decline all invitations in the several cities she visited, and in fact to cut short her bridal tour; all to her great chagrin and mortification and humiliation. This suit is brought to recover damages for the breach of the contract to make and deliver the dresses.

The only excuse offered by D. H. Holmes for not having fulfilled the contract is that contained in the letter of the 18th, transcribed above, namely, that, as the wedding dress was 42 inches, and was 4 inches too short, the other dresses would have had to be made 46 inches, and that there was not enough material to make them of that length; in other words, that the telegram misled him. But the fact is that what misled him was his own erroneous impression that the wedding dress had been made 42 inches, when it had been made only 38 inches. His plain duty, under the circumstances, was to use the telegraph for obtain-

ing further information. Besides, the telegram was received by him on the 16th, by which date the dresses should have been about ready for shipment, whereas the scissors had not yet gone into their materials. We think the contract was violated, and that the only question must be with reference to the amount of damages.

The law governing the matter of damages in cases of this kind is found in article 1928 of the Civil Code, as follows: "When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By bad faith in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it for some motive of interest or ill will."

Although the general rule is that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain, to the party. When the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach. A contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.

In the assessment of damages under this rule, as well as in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnify the creditor, whenever the contract has been broken by the fault, negligence, fraud, or bad faith of the debtor.

No damages are demanded in connection with the wedding dress, the claim being predicated exclusively upon the failure to furnish the four other dresses. In computing the damages the allowance must be restricted to what may reasonably be held to have been within the contemplation of the parties in entering into the contract. The contract was to furnish the dresses in time for the wedding on the 19th. D. H. Holmes must be held to have known that, if the dresses were not finished by that day, the bride would be keenly disappointed. Also that the bride would need the dresses for the festivities incident to her wedding and immediately following, for which it is customary for brides to provide themselves with a trousseau.

In gauging this disappointment of the bride the surrounding circumstances must, as a matter of course, be considered. And one of these is the fact that entertainments were planned, and that for want of the

dresses these entertainments would have to be given up; and another is her humiliation in going to her husband unprovided with a suitable trousseau. We do not think that the amount of \$575, fixed by the district judge, is excessive.

With the demand for damages plaintiffs have coupled a demand that D. H. Holmes be condemned to receive back the wedding dress and return the \$78, the price thereof. Such as the dress was, it was accepted and worn. The proposition to return it, and get back the price, is therefore without merit.

Defendant excepted that he was not put in default, and that the petition does not allege that he was. The contract was one which, from its nature, could not be usefully fulfilled after the date fixed for its fulfillment. Putting in default was, therefore, under express provision of article 1933, Civ. Code, unnecessary. But, if it was necessary, defendant was put in default by the telegram.

The exception that the suit is not brought in the name of the proper plaintiff is without merit. The husband's joining in the suit was a sufficient authorization of the wife. *Laves v. Chinn*, 4 Mart. N. S. 388; *Dunn v. Woodward*, 11 La. Ann. 265; *Evans v. De L'Isle*, 24 La. Ann. 248; *Payne's Succession*, 25 La. Ann. 202; *Jumonville v. Sharp*, 27 La. Ann. 461. The contrary of this has never been held, and was not held in the case of *Hayes v. Dugas*, 51 La. Ann. 447, 25 So. 121. There the husband had not joined in the suit, but his presence in this suit had been sought to be supplied by an allegation on the part of the wife in her petition that her husband joined her in the suit. This allegation made by the wife was held not to be an authorization by the husband. As a matter of course, it was not. It was the mere *ipse dixit* of the wife, and not the act of the husband. In the instant case the husband himself joins in the suit, and it would be strange if the act did not amount to an authorization to the wife to bring the suit.

Both the husband and wife are parties to the suit, and the judgment will be *res judicata* as to both. Under these circumstances, we cannot see what concern defendant has with the question of whether the damage occurred before or after the marriage, or in Louisiana, or in Texas, or in Kentucky, or fell into the community of acquets and gains or not, or whether the wife or the husband was the proper person to stand in judgment in the suit. The exception of want of proper party plaintiff was, therefore, properly overruled.

There being sufficient evidence without the testimony of the wife or of the husband, or, indeed, of both, the question of the competency of these witnesses to testify need not be considered.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

Petition for rehearing denied March 30, 1903.

OHIO SUPREME COURT.

Noah JOHNSON, *Plff. in Err.*,

v.

STATE of Ohio.

(66 Ohio St. 59.)

*In a prosecution for manslaughter, wherein the state relies for conviction on the ground that the deceased was killed unintentionally while the slayer was in the commission of an unlawful act, it must be shown that the alleged unlawful act is prohibited by law; and it is not sufficient to establish that such act, so engaged in, was a crime at common law, or one of gross and culpable negligence.

(March 18, 1902.)

*Headnote by the COURT.

NOTE.—*Negligent homicide.*

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I. Scope.

This note is intended to cover homicide resulting from some negligent act consisting of a breach of duty owed by one person to another or to the public, not constituting a crime or misdemeanor, as distinguished from homicide in the perpetration of, or attempt to perpetrate, some act made a crime or misdemeanor by positive law, including, however, homicide resulting from negligent acts and breaches of duty which have been made criminal by law because of the serious consequences liable to flow from them. Homicide resulting from acts inherently criminal, or which are made criminal by law because of their moral turpitude, and not because of the negligence or breach of duty and their results, is reserved for the subject of another note. The homicide here dealt with, however, is homicide as a branch of the criminal law, and all cases as to negligent homicide as 61 L. R. A.

ERROR to the Circuit Court for Scioto County to review a judgment affirming a judgment of the Court of Common Pleas convicting defendant of manslaughter. Reversed.

Statement by Price, J.:

The plaintiff in error was indicted for the crime of manslaughter, in unlawfully killing one Emory Barrows on the 25th day of May in the year 1901. On the trial of the case under this indictment the defendant was convicted on the following, as the conceded facts: "That the defendant, Noah Johnson, who is a young man about twenty-three years of age, and an expert bicycle rider, in the county of Scioto and state of Ohio, on the 25th day of May, 1901, as it was growing dusk in

a ground for damages or reimbursement are excluded.

II. General rules.

The general rule is that where one, by his negligence, contributes to the death of another, he is criminally responsible therefor. *Reg. v. Swindall*, 2 Car. & K. 230, 2 Cox C. C. 141; *Tessymond's Case*, 1 Lewin C. C. 169; *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333; *Chrystal v. Com.* 9 Bush, 669; *State v. O'Brien*, 32 N. J. L. 169; *State v. Justus*, 11 Or. 178, 50 Am. Rep. 470, 8 Pac. 337; *State v. Brown*, *Houst. Crim. Rep.* (Del.) 539.

And that every act of gross negligence, even in the performance of what is lawful, and every negligent omission of a legal duty, whereby death ensues, is indictable either as murder or manslaughter. *State v. Vance*, 17 Iowa, 138; *Reg. v. Whitehead*, 3 Car. & K. 202; *White v. State*, 84 Ala. 421, 4 So. 598; *Fitzgerald v. State*, 112 Ala. 34, 20 So. 966.

There may be a criminal responsibility for the grossly negligent performance of a lawful act, resulting in the death of another. *Thomas v. People*, 2 Colo. App. 513, 31 Pac. 349.

Manslaughter is the unlawful killing of another without malice, either express or implied, and without premeditation, or where one, in doing an unlawful act in a felonious manner, tending to great bodily harm, undesignedly kills another; or in doing a lawful act without caution or requisite skill. *State v. Brown*, *Houst. Crim. Rep.* (Del.) 539.

And when a person does an act lawful in itself, but in an unlawful manner and without due caution and circumspection, it may be misadventure, manslaughter, or murder, according to the circumstances under which the original act was done. *Bias v. United States* (Ind. Terr.) 53 S. W. 471.

Though there is no malice or evil design either in fact or in law, yet, if death ensues from a merely unfortunate, though lawful, act, done in an improper or negligent manner, the offender is guilty of manslaughter. *State v. Brown*, *Houst. Crim. Rep.* (Del.) 539.

If a person does a thing which in itself is dangerous, and without taking proper precaution to prevent danger arising therefrom, and the death of a person is the result, it is a criminal act against the person killed. *Reg. v. Salmon*, 14 Cox C. C. 494, L. R. 6 Q. B. Div. 70, 43 L. T. N. S. 573, 29 Week. Rep. 246, 23 Alb. L. J. 273, 50 L. J. M. C. N. S. 25, 45 J. P. 270, 29 Moak, Eng. Rep. 503.

the evening, rode a bicycle, known as a 'racing machine,' noiselessly down the main street of a village containing about 1,200 inhabitants, and over one of its most prominent street crossings, at a speed of about 20 miles per hour. That the evening was fair and many people were walking up and down said street, and over its crossings. The defendant was leaning forward, and over his bicycle, the handle bars being dropped, and was in the position commonly used in riding in bicycle races. There was no bell attached to his bicycle, no alarm was given by defendant, and he could have seen ahead of him. While riding over the aforesaid street crossing at said rate of speed, the defendant collided with Emory L. Barrows, who was at the time walking, at the usual and customary place, from one corner of said crossing over the street upon which said de-

fendant was riding, to another corner, the force of which collision lifted said Emory L. Barrows from the ground, hurled him a distance of about 15 feet through the air, and fractured and crushed his skull in several places, thereby causing his death. The decedent and the defendant saw each other an instant before the collision, and each tried to avoid it. The defendant did not intend to, and did not purposely, collide with the decedent, and there never was any personal feeling existing between them whatever." Exception was taken by the defendant to the following portion of the charge of the court to the jury, bearing on the legal effect of the facts stated: "An act lawful in itself when properly performed may be performed so improperly (that is, so recklessly and wantonly) as to render it unlawful, and in such case, if the death of another result directly

Everyone placed in a situation where his acts may affect the safety of others must guard against the risk to them arising from his acts, and a failure to do so, resulting in death of another, amounts to homicide. *Re Paton*, 2 Broun. Justic. 525; *Re Rowbotham*, 2 Irvine, Justic. 89, cited in 3 L. R. A. 645, note.

And where death is the direct and immediate result of the omission of a party to perform a plain duty imposed upon him by law or contract, he is guilty of a felonious homicide. *United States v. Knowles*, 4 Sawy. 517, Fed. Cas. No. 15,540; *Territory v. Manton*, 8 Mont. 95, 19 Pac. 387.

And it is immaterial whether the action be of the mind or the body, and whether it operates solely or concurrently with other things, and whether it is consented to by the person on whom it operates or not. *Territory v. Manton*, 8 Mont. 95, 19 Pac. 387.

And if several parties enter into a joint undertaking, imposing upon each a personal duty with respect to its performance, and upon all alike, and, by the neglect or omission of such duty, a casualty occurs resulting in the death of a third party, an indictment will lie against all for the killing. *Ainsworth v. United States*, 1 App. D. C. 518.

A person doing an act lawful in itself, from which death results to another, however, is not criminally answerable therefor, unless he is guilty of negligence in the manner of doing it. *Blalock v. State*, 40 Tex. Crim. Rep. 154, 49 S. W. 100.

Criminality cannot be affirmed of every lawful act carelessly performed, and resulting, because of such carelessness, in the death of another; to make such act criminal the carelessness must be gross, implying an indifference to consequences. *Fitzgerald v. State*, 112 Ala. 34, 20 So. 966; *Gore's Case*, 9 Coke, 81a.

And to render one responsible for the fatal consequences of an omission of duty, the duty omitted must be one which the party is bound to perform by law or contract, and not one the performance of which depends simply upon his humanity or his sense of justice or propriety; and death must have been the immediate and direct consequence of the omission. *United States v. Knowles*, 4 Sawy. 517, Fed. Cas. No. 15,540; *Thomas v. People*, 2 Colo. App. 513, 31 Pac. 349.

To fasten criminal responsibility upon a person for criminal negligence, causing the death of another, it is indispensable to demonstrate that he omitted to do something which he ought to have done, or that he did that which he should not have committed, in such a grossly negligent way that the law would impute to him 61 L. R. A.

the criminal intent, which is the essential ingredient of crime. *Thomas v. People*, 2 Colo. App. 513, 31 Pac. 349.

And where a person is accused because of his neglect to do a particular thing, by reason of which the death of another is caused, the duty must be a plain one, requiring no discussion to establish its obligatory force, concerning which there is a general consensus of opinion. *Ibid*.

Where doubt exists as to what conduct should be pursued in a particular case, and intelligent men differ as to the proper action to be had, the law does not impute guilt to anyone if, from the omission to adopt one course instead of another, fatal consequences follow. *United States v. Knowles*, 4 Sawy. 517, Fed. Cas. No. 15,540.

And the duty must have been one connected with life, so that the ordinary consequences of neglecting it would be death. *Reg. v. Pocock*, 17 Q. B. 34, 5 Cox C. C. 172.

So, to render a person liable criminally for neglect of duty, there must be such a degree of culpability as to amount to gross negligence on his part. *Reg. v. Finney*, 12 Cox C. C. 625; *Reg. v. Elliott*, 16 Cox C. C. 710.

Or it must amount to recklessly negligent conduct. *Reg. v. Elliott*, 16 Cox C. C. 710.

And the degree of care to be expected from a person, the want of which would be gross negligence and would render the person guilty of criminal responsibility for a homicide caused thereby, must of necessity have some relation to the subject and the consequences. *Ibid*.

And it has been held that the mere omission of a person to do his whole duty would not be sufficient to charge him with manslaughter for a death occasioned thereby; there must have been some personal and affirmative act on his part. *Rex v. Green*, 7 Car. & P. 156.

But see *State v. Vance*, 17 Iowa, 138; *Reg. v. Whitehead*, 3 Car. & K. 202; *United States v. Knowles*, 4 Sawy. 517, Fed. Cas. No. 15,540; *Territory v. Manton*, 8 Mont. 95, 19 Pac. 387, —*supra*; *Lewis v. State*, 72 Ga. 164, 53 Am. Rep. 835; *Reg. v. Hughes*, 26 L. J. M. C. N. S. 202, Dears. & B. C. C. 248, 7 Cox C. C. 301, 3 Jur. N. S. 698; *State v. Smith*, 65 Me. 257, —*infra*, III.; *Territory v. Manton*, 7 Mont. 162, 14 Pac. 639, *infra*, IV., e. 2.

But the fact that an accident happened through an honest misapprehension, by a person, of the surrounding circumstances, or by reason of a mistake in judgment, will not excuse him in a prosecution for causing death, where such misapprehension or mistake resulted from his negligence in failing to observe and obey any rule or precaution which it was his duty to

and proximately therefrom, it is manslaughter; the wanton recklessness or gross negligence in such a case supplying the place of direct criminal intent. But inferences of guilt are not to be drawn from remote causes, and the law does not hold a person criminally responsible for slight negligence, nor even for a mere failure to observe or to exercise ordinary care and diligence, but only for gross negligence, in the sense that I have above defined that term to you. In other words, to make it entirely plain to you, the carelessness or negligence with which an act must be done in order to render the death of another, resulting therefrom, criminal homicide or manslaughter, must be gross, and such as an ordinarily reasonable and prudent person (that is, a person of ordinary discretion and judgment) might, and reasonably ought to, foresee and anticipate

would endanger the lives and safety of others, and be likely to result in fatal injuries to others." A general exception was saved to the charge. A verdict of guilty was rendered, and the defendant was sentenced accordingly. He prosecuted error in the circuit court, where the judgment of the common pleas was affirmed, and he prosecutes error in this court to reverse the judgments of both the lower courts.

Mr. Thomas C. Beatty for plaintiff in error:

Mr. Henry Bannon, for defendant in error:

The definition of manslaughter, as contained in § 6811, Rev. Stat., and the common-law definition, are the same; therefore, that which was manslaughter at the common law is manslaughter under our statute.

obey and observe. *Com. v. Cook*, 8 Pa. Co. Ct. 486.

And a criminal intent on the part of a party who has carelessly caused the death of a human being need not be alleged or proved in order to constitute manslaughter in a prosecution therefor, where the death was the result of the neglect of a known duty to the deceased. *State v. Smith*, 63 Me. 257.

And the doctrine that ignorance of the law prevents the formation of intent to commit a homicide is an exception to the general rule, and has no application to a case in which criminal negligence is the main question in issue. *People v. Kilvington* (Cal.) 86 Pac. 13.

Ohio furnishes an exception to the above general rules owing to the adoption in that state of the doctrine that there are no common-law crimes, and that an act is not criminal unless made so by positive law. Under this doctrine it necessarily follows that, a homicide resulting from a negligent act not being an intentional killing, the person committing the act cannot be held criminally liable, either upon the theory that it was a homicide in the commission of an unlawful act, or otherwise, unless the act in question had been expressly prohibited or made criminal by the statutory law of the state. See *JOHNSON V. STATE*.

III. *Distinction between different degrees of the crime.*

The general rule is that one who causes death by his negligence is responsible, whether he is at the time engaged in legal or illegal business. If the business be in its character felonious then he is guilty of murder; if legal, and homicide results from negligence in the discharge of it, it is manslaughter. *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333; *Chrystal v. Com.* 9 Bush, 669; *State v. Justus*, 11 Or. 178, 50 Am. Rep. 470, 8 Pac. 337.

And that where death ensues in consequence of a willful omission of duty it constitutes murder; and where it ensues in consequence of the negligent omission of a duty it is manslaughter. *Lewis v. State*, 72 Ga. 164, 53 Am. Rep. 835; *Reg. v. Hughes*, 26 L. J. M. C. N. S. 202, 7 Cox C. C. 301, *Dears. & B. C. C.* 248, 3 Jur. N. S. 696.

And one who, though in pursuit of his lawful and common occupation, sees danger probably arising to others from his acts, and still persists in such acts without giving warning of the danger to the persons endangered thereby, from which death ensues, is guilty of murder. *Lee v. State*, 1 Coldw. 62.

But the naked neglect and omission of a
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known duty, when it causes or hastens the death of a human being, constitutes manslaughter. *State v. Smith*, 65 Me. 257.

And one who causes the death of another through recklessness and carelessness is guilty of manslaughter. *State v. Hardie*, 47 Iowa, 647, 29 Am. Rep. 496; *State v. Shelledy*, 8 Iowa, 477; *State v. O'Brien*, 32 N. J. L. 169.

If a party is guilty of negligence, and death results, the party guilty of negligence is also guilty of manslaughter. *Tessymond's Case*, 1 Lewin C. C. 169.

Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that he is guilty of culpable negligence and ought to be punished, and a death is caused thereby. *Reg. v. Doherty*, 16 Cox C. C. 306.

But to this rule there is an exception,—where an act, careless in itself, is committed with fatal results, under circumstances or at a place from which it might be reasonably inferred that no injury could happen from the carelessness. *Chrystal v. Com.* 9 Bush, 669; *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333; *State v. Justus*, 11 Or. 178, 50 Am. Rep. 470, 8 Pac. 337.

IV. *Application of rules to particular classes of negligence.*

a. *In the use of ways and streets.*

It is the duty of every man who drives horses attached to a carriage to drive them with such care and caution as to prevent, so far as it is within his power, any accident or injury therefrom. *Rex v. Walker*, 1 Car. & P. 320.

And the degree of care and caution required to avoid danger by one driving horses drawing a carriage, so as to avoid liability for a negligent homicide in killing the person riding in the carriage, is that which a man of ordinary prudence would have used under like circumstances. *Morris v. State*, 35 Tex. Crim. Rep. 313, 33 S. W. 539.

Thus, a man who takes another into a trap or carriage with the intention of giving him a ride is bound to exercise reasonable care, both in regard to the safety of the man under his charge, and in regard to the safety of the persons whom he may meet on the road; and, if the carriage is overturned by his culpable negligence in driving, and the death of the person with him is caused thereby, he is guilty of manslaughter. *Reg. v. Jones*, 11 Cox C. C. 644, 22 L. T. N. S. 217.

The crime of manslaughter, under the common law, may be classified as follows: (1) Voluntary: An intentional killing in hot blood; (2) involuntary: (a) death resulting unintentionally from an unlawful act; (b) death resulting from an act otherwise lawful, negligently performed.

4 Bl. Com. 191; 1 Hawk. P. C. 89; *Sutcliffe v. State*, 18 Ohio, 476, 51 Am. Dec. 459.

Up to the time of the Code of 1877 our statutory definition of manslaughter, and that of the common law, were the same. What change did the enactment of 1877 make in that statute?

In *Williams v. State*, 35 Ohio St. 175, the court says: "We see in this change of language no purpose to change the law in any particular."

See also *Mitchell v. State*, 42 Ohio St. 383.

And if the drivers of two omnibuses race with each other, and a passenger in one of them is killed through the upsetting of the omnibus, on account of the driver being unable to check the speed of his horses in time, the driver is guilty of manslaughter. *Rex v. Timmins*, 7 Car. & P. 499.

Horse racing along a public road is unlawful, and where one runs his horse at an unusual speed along a public highway at night, and his horse runs against the mule of another, thereby causing the death of the owner of the mule, the act is manslaughter in the second degree, regardless of the question whether the running is furious, reckless, or grossly negligent. *Thompson v. State*, 131 Ala. 18, 31 So. 725.

And where a person driving horses drawing a carriage in which another is riding drives them at a rapid and dangerous rate of speed, and the person riding in the carriage falls or is thrown out and killed, it is immaterial, in a prosecution for the homicide for such killing, whether his being thrown out is without any fault on his part, but simply on account of the speed of the driving; or whether, in an attempt to get out of said vehicle, he is violently thrown therefrom. *Morris v. State*, 35 Tex. Crim. Rep. 313, 33 S. W. 539.

And if persons having the control and management of a team of horses attached to a vehicle, in which they are riding, knowing of the danger of collision and the probable consequences, recklessly and negligently, or wantonly and wilfully, permit such horses to run and collide with the vehicle of another, without using such means as are reasonably at their command to prevent such collision, whereby the driver of the other vehicle is killed,—they should be held penally responsible for the result of their negligence or wilful omission of duty. *Belk v. People*, 125 Ill. 584, 17 N. E. 744.

So, where a person employed to drive a horse drawing a cart sat inside, instead of attending at the horse's head, he was negligent; and where, while he was sitting there, the cart went over a child and killed it, death having been caused by his negligence, he is guilty of manslaughter. *Knight's Case*, 1 Lewin C. C. 168.

And where streets are unusually crowded because of a public procession the driver of a conveyance is required to be particularly cautious, and is criminally answerable for any accident resulting in death caused by driving at a rate of speed not warranted by the surroundings, or without precautions rendered necessary thereby. *Reg. v. Murray*, 5 Cox C. C. 509.

Thus, if one, while driving in a cart at an unusually rapid pace, drives over another, and 61 L. R. A.

The term "unlawful act," as contained in the definition of manslaughter, includes not only an act made unlawful by statute, but an act, otherwise lawful, performed in a grossly negligent manner.

Stewart v. State, 1 Ohio St. 66; *Marts v. State*, 26 Ohio St. 162; *Erwin v. State*, 29 Ohio St. 186, 23 Am. Rep. 733; 4 Bl. Com. 191; 2 Bishop, Crim. Law, § 178.

To collide with another wantonly and recklessly, in a grossly negligent manner, although unintentionally, is an assault and battery. Manslaughter is simply assault and battery where death results from the injury, so the act of plaintiff in error was this crime.

Wharton, Crim. Law, 10th ed. § 608a; *Smith v. Com.* 100 Pa. 324; *Com. v. Hawkins*, 157 Mass. 551, 32 N. E. 862.

Every act of gross negligence whereby

from the rapidity of the driving, or from any other cause, the person cannot get out of the way in time, the driver is guilty of manslaughter though he calls to the deceased to get out of the way, and he might do so if he were not drunk. *Rex v. Walker*, 1 Car. & P. 320.

And where two persons are driving together, each at a dangerous pace, and one of the carts runs over a man and kills him, then, whether the injury is done by the one driving in the first or second cart, both are guilty of manslaughter; and it is no ground of defense that the death is partly caused by negligence of deceased himself, or that he is either deaf or drunk at the time. *Reg. v. Swindall*, 2 Car. & K. 230, 2 Cox C. C. 141.

And one who, while intoxicated, drives his team of horses through the principal street of a town in a reckless manner, and at a great and unusual rate of speed, and drives over and fatally injures a woman attempting to cross the street, is guilty of involuntary manslaughter, defined by Cal. Penal Code, § 192, to be a killing of a human being without malice in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection. *People v. Pearne*, 118 Cal. 154, 50 Pac. 376.

And in such case the charge should rest on the commission of an act done without due caution and circumspection, and not upon the commission of an unlawful act, in driving at a greater rate of speed than that allowed by an ordinance of the county. *Ibid.*

And the fact that the driver in such case was intoxicated, need not be given to the jury on the trial, since if he had thus killed her when not under the influence of liquor, his crime would have been manslaughter, and it would be at least equally criminal and heinous where committed by him when drunk. *Ibid.*

So, a near-sighted man having the care of a cart, who set on the bottom of it on some sacks, and drove, at lamplight, along a public highway at a rate of 8 or 10 miles an hour, and ran over a foot passenger and killed him, is guilty of such carelessness as would make it amount to the crime of manslaughter. *Rex v. Grout*, 6 Car. & P. 629.

And where two persons are racing with horses along a highway, and riding in an improper and furious way, and the leader rides by a person in the highway without doing any mischief, but the follower rides against the horse of such person, whereby the person is thrown and killed, it is manslaughter in the

death ensues is indictable, either as murder or manslaughter.

1 Wharton, Crim. Law, §§ 305, 354, 355; 3 Greenl. Ev. §§ 128, 129; Carlton, Homicide, pp. 285-290; 9 Am. & Eng. Enc. Law, p. 588; 4 Bl. Com. 191; *Com. v. Pierce*, 138 Mass. 165, 52 Am. Rep. 264, Harris, Crim. Law, pp. 140-142.

Death resulting from an act otherwise lawful, negligently performed, is not excusable homicide.

If the act causing death was dangerous and likely to produce great bodily harm, a presumption of malice arises, and the crime is murder in the second degree; if the death was caused by an act negligently performed,—that is, with a failure to observe ordinary care and prudence,—it is manslaughter.

Wharton, Crim. Law, §§ 354, 355.

Where the proof shows the death was oc-

leader as well as in the follower. *Rex v. Martin*, 6 Car. & P. 396.

And negligence is the gist of the offense when a man killed a woman by driving a horse attached to a cab over her in a public street; and, where the defense in a prosecution for manslaughter therefor is that he used due and proper care in driving, the burden of proving negligence does not lie on the Crown; but, the fact of the killing being proved, it is cast upon the prisoner to show that he did use due and proper care in driving. *Queen v. Cavendish*, 1r. Rep. 8 C. L. 178.

But when two coaches, totally independent of each other, are proceeding in the ordinary way along a road, one after the other, and the driver of the first is guilty of negligence causing the death of a person, the driver of the second, who has not the same means of pulling up, may not be responsible. *Reg. v. Swindall*, 2 Car. & K. 230, 2 Cox C. C. 141.

And if an accident happens through some chance, which a driver using reasonable care and diligence cannot foresee or avoid, he cannot be held criminally liable for a homicide resulting therefrom. *Reg. v. Murray*, 5 Cox C. C. 509.

And one who was driving in a cart along a public highway without reins, but not furiously or rapidly, is not guilty of manslaughter for the killing of a child which ran across the road before the cart, death resulting from the wheel of the cart passing over it, unless he could have saved the life of the child if he had been driving with reins. *Reg. v. Dalloway*, 2 Cox C. C. 273.

b. In the management of railways, locomotives, etc.

The above-given general rules apply with full force to homicide resulting from the negligent management of railways, locomotives, and other like dangerous agencies.

Thus, the act of a switch tender in neglecting his duty to adjust, and keep adjusted, the switches of a railroad at a certain point, whereby a passenger train is derailed and persons are killed, amounts to gross, culpable, or criminal negligence, rendering him guilty of manslaughter. *State v. O'Brien*, 82 N. J. L. 169.

And, in order to make out the offense of manslaughter in such case, it is not necessary that it should appear that his act was wilful or of purpose. *Ibid.*

And where a train of cars was stopped in a dangerous place, and another train was following, and the stop was for such a cause that the train could not be readily started, and the persons who were on the train were exposed to

casualty by an act of negligence, an indictment drawn in accordance with § 7217, Rev. Stat., is sufficient.

Wolf v. State, 19 Ohio St. 248; *Williams v. State*, 35 Ohio St. 175.

Price, J., delivered the opinion of the court:

If the conceded facts are sufficient, and the charge of the trial court sound law to govern the jury in deciding on such facts, the plaintiff in error may have been properly punished for very reprehensible conduct. That part of the charge contained in the statement of the case, as well as a subsequent paragraph which we will notice, was equivalent to directing a verdict of conviction, inasmuch as there was no dispute as to the facts. There was a verdict of conviction and a sentence upon the verdict, which the

serious danger, and the latter train ran into the former causing the death of a passenger,—a brakeman who failed to signal the second train is not excused from criminal liability for the homicide caused by his criminal negligence because it arose from his obedience to instructions of an official superior. *People v. Melius*, 1 N. Y. Crim. Rep. 39.

And an averment in an indictment for manslaughter, by neglect to give a proper signal to denote the obstruction of a line of railway, whereby a collision took place and a passenger was killed, that it was the duty of the accused to signal such obstruction, and that there was an obstruction but he neglected to signal, is a sufficient description of the offense; it is not necessary to allege that, if there was an obstruction, and he saw it, it was his duty to signal it, and that there was an obstruction which, but for neglect, he might have seen. *Reg. v. Pargeter*, 3 Cox C. C. 181.

So, Pa. act of assembly, March 22d, 1865. (P. L. 30), declaring that, if any person or persons in the service or employ of a railroad company, or other transportation company, shall refuse or neglect to obey any rule or regulation of such company, or, by reason of negligence or wilful misconduct, shall fail to observe any precaution or rule, which it is his duty to obey and observe, and injury or death to any person or persons shall thereby result, such person or persons so offending shall be deemed guilty of a misdemeanor, defines two classes of offenses: First, a neglect or refusal to observe a rule or regulation of the railroad company; and second, a failure, by reason of negligence or wilful misconduct, to observe any precaution or rule which it is the duty of the engineer or other employee to obey and observe, injury or death thereby resulting; and in either case the negligence, whether wilful or not, constitutes the offense, and the omission to observe the rule or regulation is negligence, whether intentional or not. *Com. v. Cook*, 8 Pa. Co. Ct. 486.

And the employees of a railroad are punishable by indictment, under that act, for the negligent and careless management of a railroad train, in violation of prescribed acts and regulations, resulting in death. *Com. v. Hamilton*, 26 Phila. Leg. Int. 68.

And an indictment against a railway engineer charging that he carelessly and negligently ran his locomotive engine into a passenger car standing upon the railroad, thereby causing the destruction of said car and the death of a person who was a passenger thereon, sufficiently charges involuntary manslaughter, under Ind. Rev. Stat. 1881, § 1908, providing that whoever

circuit court sustained, and thereby must have held that the charge correctly stated the law of the case. The importance of what is presented as an apparently new doctrine in this state, as well as respect for the opinions of both the lower courts, has been sufficient reason for giving the questions involved a careful consideration.

The indictment for manslaughter in this case is in the short form authorized by § 7217 of the Revised Statutes, and it charges that "Noah Johnson . . . on the 25th day of May in the year of our Lord 1901, in the county of Scioto, did unlawfully kill one Emory Barrows then and there being, contrary to the form of the statute," etc. Prior to the codification of the criminal statutes, manslaughter was thus defined: That if any person shall unlawfully kill another without malice, either upon a sudden quarrel, or, un-

intentionally, while the slayer is in the commission of some unlawful act every such person shall be deemed guilty of manslaughter, and on conviction thereof, be punished, etc. 1 Swan & C. Stat. (Ohio) 403. The statute on the subject now is § 6811, Rev. Stat., which reads, "Whoever unlawfully kills another, except as provided in the last three sections, is guilty of manslaughter, and shall be imprisoned," etc. The preceding sections define murder in the first and second degrees. But the present § 6811 is not different in substance and meaning from the original section above quoted, and, to ascertain the elements of the crime of manslaughter, we look to the original as it stood before codification or revision. Therefore, to convict of manslaughter, it is incumbent upon the state to establish that the killing was done "either upon a sudden quarrel, or,

unlawfully kills any human being without malice, express or implied, or voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter. State v. Dorsey, 118 Ind. 167, 20 N. E. 777.

A railway engineer, however, who, while running an engine, runs over and kills a woman, is doing a lawful act in running the engine; and if it was done with due care and caution he cannot be held guilty of manslaughter; but he would be guilty if he was careless. Com. v. Kuhn, 1 Pittsb. 13.

And to hold a conductor of a special excursion train guilty of manslaughter of a passenger who was killed by reason of the conductor directing the train to be separated on an incline, whereby a portion of it ran backwards and collided with another train, he must be found guilty of gross negligence or recklessly negligent conduct; a mere intellectual defect or mistake in judgment, without wilful disobedience as to traffic regulations, would create no liability. Reg. v. Elliott, 16 Cox C. C. 710.

If the conductor in such case merely miscalculated the power of the brake and the other means used to hold the train in its situation, there would be no crime; but there would be a crime if, by wilful confidence in his own opinion, which was contrary to all reason and experience, he acted so as to cause the accident. *Ibid.*

And if there were a clear and positive rule forbidding the dividing of a train upon an incline, that would be a strong element in the question of negligence in a prosecution against the conductor of a special excursion train for so dividing the train, whereby a part of it ran down the incline and collided with another train, and would itself justify a verdict of guilty. *Ibid.*

But an engine driver and fireman of a railway train are not liable for manslaughter in killing several persons, while traveling in a preceding train, by running their train into it, where it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules and regulations, and altered the signal for danger so as to make it mean "Proceed with caution," instead of "Stop," and the trains were started by superior officers at irregular intervals, and that when they saw the preceding train they did their best to stop without avail, if they honestly believed they were observing the rules, and the rules were not obviously illegal. Reg. v. Trainor, 4 Fost. & F. 105.

So, an engineer in charge of engines using oil for fuel, charged with manslaughter in neglig-

ently leaving the boilers unattended, whereby an explosion is alleged to have occurred, and death resulted, who from past experience, and from knowledge of the boilers, and the flow of oil, and of the burner, had reason to believe, and in fact did believe, that it was consistent with safety to be absent from the boiler room the length of time he was so absent, at the time of the explosion,—is not, in law, guilty of criminal negligence by reason of such absence. People v. Thompson, 122 Mich. 411, 81 N. W. 344.

It would be competent, however, in the prosecution in such a case, to show the effect of the use of oil as fuel as bearing upon the question of whether his absence from the boiler room was negligence. *Ibid.*

And evidence of experiments made to ascertain within what time a given pressure of steam could be raised in a boiler by the use of oil as fuel is competent, in such case, in support of opinion evidence bearing upon the question of whether the absence of the engineer from the boiler room was negligence. *Ibid.*

So, if, in a prosecution against a railway conductor for manslaughter, in which he was charged with negligence and omission of duty, whereby another train was thrown from the track and a passenger thereon was killed, the indictment charges, in substance, that, well knowing the rules of the railroad and his duty in that regard, and what signals should be given when an engine or train from the outward track crosses the inward track, and also well knowing that a particular train was then due and about to arrive on the inward track, he neglected to give the required signal, the specific averment of knowledge that the other train was due, as well as of knowledge of the rules and his duty, is made an essential and material portion of the description of the acts and conduct of the defendant, going to constitute the negligence charged; and, in the absence of any evidence to support it, a conviction cannot be maintained. Com. v. Hartwell, 128 Mass. 415, 35 Am. Rep. 391.

And an instruction, in a prosecution for manslaughter in killing another by suddenly stopping a moving handcar without warning, thereby throwing him from and in front of the car, causing it to run over him, that, if the jury believe from the evidence that the defendant did not know the result of stopping the car suddenly, although he may have stepped on the brake in jumping from the car, he would not be guilty, is rightly refused; since, under it, it would have been the duty of the jury to acquit, though they found the defendant stepped on the brake knowingly and intentionally, and that

unintentionally while the slayer is [was] in the commission of some unlawful act." It is clear that, from the facts and the instructions given the jury, Barrows was not killed by Johnson in a quarrel, nor was the killing intentional. Hence the latter clause of the definition of the crime is the one to which our investigation should be confined. The state was required to show that, while the killing was unintentional, it was done by Johnson while he was in the commission of some unlawful act; and the question arises whether the negligent act or acts of the slayer, though no breach of any law, may be sufficient to constitute the unlawful act designated in the statute. Or, is the state required to show that he was in the commission of an act prohibited by law? At the time of this homicide there was even no ordinance of the village of Scioto regulating

the speed or manner of riding bicycles upon its streets. None appears in the record, and we therefore assume there was no such ordinance. And it is not claimed that there was any statute then in force on that subject. What, then, is the proper construction of the clause "while in commission of some unlawful act?" The construction which prevailed in the lower courts is found again in a portion of the charge which we quote as the final admonition to the jury: "Now, gentlemen, apply these principles to the case, and determine from the evidence introduced upon the trial whether the defendant, Noah Johnson, at the time he struck and killed the decedent, Emory Barrows, was riding his bicycle with gross negligence, and was it such as an ordinarily reasonable and prudent person might, and reasonably ought to, have foreseen would endanger the lives and safety

he knew the effect of stepping on the brake would be to stop the car suddenly. *White v. State*, 84 Ala. 421, 4 So. 598.

c. In navigation and the management of vessels.

1. Generally.

Persons navigating public waters improperly, either by too much speed, or by negligent conduct, are as much liable criminally if death ensues therefrom as those who cause it on the public highway, either by furious driving or by negligent conduct. *Reg. v. Taylor*, 9 Car. & P. 672.

Thus, a pilot having direction of a foreign vessel, whose orders are misunderstood by the foreign sailors, in consequence of which a boat is run down and a life is lost, is guilty of manslaughter if his failure to make his orders understood by the foreign sailors is negligence. *Queen v. Spence*, 1 Cox C. C. 352.

So, where a person falls overboard from a ship at sea, whether a passenger or seaman, and is not killed by the fall, the commander is bound, both by law and by contract, to do everything, consistent with the safety of the ship and of the passengers and crew, necessary to rescue the person overboard, and for that purpose to stop the vessel, lower the boats, and throw him such buoys and other articles as can be readily obtained; and any neglect to make such efforts would be criminal, and, if followed by the death of the person overboard, when by making them he might have been saved, the commander is guilty of manslaughter. *United States v. Knowles*, 4 Sawy. 517, Fed. Cas. No. 15,540.

And an allegation, in an indictment against a captain of a vessel for a homicide alleged to be due to the dangerous and unguarded condition of the deck of his vessel, that the absence of a rail left a portion of the deck unguarded, and that, by reason of such absence, a passenger stepped upon the unguarded part of the deck and fell into the water and was drowned; and that it was by inattention and negligence of the accused to his duties as captain that the rail was suffered to be absent,—is properly stated, and not subject to the objection that there is no sufficient averment that it was the duty of the captain to see that the rail was in place. *United States v. Beacham*, 29 Fed. 284.

And where thirteen individuals, children and grown persons, embarked in a boat, besides two watermen, and by the swell of a steamer in motion the boat was carried against the bows of another steamer lying alongside the landing place, and as soon as it struck one of the water-

men called to the passengers to sit still, but instead of doing so they all jumped up and tried to lay hold of the steamer, in consequence of which the boat was overturned and lives were lost,—it is a question for the jury, in a prosecution against the watermen, whether the death was caused, either by gross negligence of the accused in the management of the boat, or in taking on board in the first instance a greater number of passengers than it was safely capable of carrying. *Queen v. Williamson*, 1 Cox C. C. 97.

But the act of the master of a vessel, in failing and omitting to stop it or to lower the boats or make any attempt to rescue a sailor, who had fallen off the yardarm of the main mast of the ship in furling a sail, whereby he was drowned, would not warrant a conviction for any greater offense than manslaughter. *United States v. Knowles*, 4 Sawy. 517, Fed. Cas. No. 15,540.

And if an accident happened in the navigation of a public stream made by law a highway, to the person or property or life of another, the individual who caused the injury indirectly will not be held liable criminally if it occurred from events or circumstances over which he had no control, or if he exercised all the care in the management of his craft that skill, caution, and prudence would seem to dictate while pursuing a lawful calling in a prudent and careful manner; but the conduct of one charged with a crime which happened under such circumstances should be rigidly scrutinized. *Com. v. Bilderback*, 2 Pars. Sel. Eq. Cas. 447.

Thus, where a person fell overboard from a ship at sea, the commander of the ship cannot be held liable for manslaughter in failing to stop the ship or lower the boats or do anything to assist him, where it appears that he was killed by the fall. *United States v. Knowles*, 4 Sawy. 517, Fed. Cas. No. 15,540.

And to make a captain of a steam vessel guilty of manslaughter in causing a person to be drowned by running down a boat occupied by such person, some act done by the captain must be shown. The mere fact that the boat run down was not seen, is not sufficient; but, if there was sufficient light, and the captain was either at the helm or any other station to command, and did that which caused the injury, he is guilty of manslaughter. *Rex v. Green*, 7 Car. & P. 156.

And where the captain of a steamboat placed a man forward to keep a lookout, and when the accident in question happened, about half an hour afterwards, the captain and pilot were

of others, and be likely to produce fatal injuries, and was such killing the direct, natural, and proximate result of such negligence? If the evidence satisfies you beyond a reasonable doubt of all these matters, then your verdict should be that the defendant is guilty of manslaughter, as he stands charged in the indictment; otherwise you should acquit him." In this language the trial court told the jury that, if the defendant's conduct in the manner of riding the bicycle—its speed without signal of a bell—was, in their judgment, grossly negligent, it was an unlawful act, and they might find that in such conduct he was committing an unlawful act, and, if it resulted in the death of Barrows, the rider was guilty of manslaughter. And it was left to the jury, and they were directed, to determine from the evidence whether or not the acts done were grossly

negligent, and regardless of the life and safety of another; if so, to convict.

We have no common-law crimes in this state. We think such has been the uniform understanding of the bar, and the opinion of both the judicial and legislative departments of our commonwealth. Before the trial of this case there was but one other case brought to our attention where the proposition has been called in question. *Weller v. State*, 19 Ohio C. C. R. 166. But this court has settled the commonly accepted rule in more than one case. In *Sutcliffe v. State*, 18 Ohio, 469, 477, 51 Am. Dec. 459, Justice Avery, speaking for the court, says: "There is no common-law crime in this state, and we therefore look always to the statute to ascertain what is the offense of the prisoner, and what is to be his punishment. . . ." Again on same page: "What is affirmed in

on the bridge between the paddle boxes, and the night was dark and rainy, and the steamer had a light at each end of the topsail yard, and it appeared that the man sent forward to keep a lookout left his station, and the steamer ran down a smack, and a person therein was killed,—the captain and pilot are not responsible for the felony. It is the fault of the person who ought to have been on lookout, but who disobeyed orders; though the rule would be different if the captain had called him away. *Rex v. Allen*, 7 Car. & P. 153.

Nor is the fact that valves, etc., of a steamer were out of order sufficient to establish guilt, in a prosecution against the master and engineer thereof for manslaughter by culpable negligence, for the death of three persons in charge of the steamer, caused by an explosion on board. *Reg. v. Gregory*, 2 Fost. & F. 153.

And the act of a person on board a ship, who was quarrelling with a person in a boat alongside the ship, of giving the boat a shove to get rid of the person with whom he was quarrelling, whereupon the latter, being intoxicated, lost his balance and fell into the water and was drowned, does not amount to manslaughter. *Rex v. Waters*, 6 Car. & P. 328.

2. Under particular statutes.

While the question as to what cases fall within statutes prohibiting particular negligent acts, and prescribing punishment for homicide resulting from such acts, is one of statutory construction, the general rules above given seem to apply on the question as to what constitutes negligence under such statutes.

Thus, negligence within the meaning of the act of Congress (U. S. Rev. Stat. § 5344, U. S. Comp. Stat. 1901, p. 3629), declaring that persons employed on any steamboat or vessel, by whose negligence, etc., the life of any person is destroyed, shall be deemed guilty of manslaughter, is the violation of some rule which is made to govern and control in the discharge of some duty. *United States v. Keller*, 19 Fed. 633.

And the pilot of a vessel which collided with another, causing death, is guilty of manslaughter under that act, where it appears that the collision resulted from his omission to perform some duty, or from an absence of proper care, attention, or skill on his part. *Ibid.*

And it is the duty of a captain of a steamboat which has collided with another craft to ascertain the extent of injury to his boat with reasonable promptitude, and, upon discovering that she will sink, to run her ashore without unnecessary loss of time; and if from indecision or neglect he fails to do so, and the death

of passengers or others results, he is responsible therefor under that act. *United States v. Warner*, 4 McLean, 463, Fed. Cas. No. 16,643.

So, officers of a steamboat may be held liable for manslaughter under that act, where the injury was caused by making too large fires or raising too much steam, or by not properly regulating the fires or the amount of steam. *The Henry Clay*, Fed. Cas. No. 6,375.

And where, in a prosecution under that act, it appeared that there was an unusual pressure of steam, and that weights were hung on the safety valve; and that the engineer sat in a chair reading, and made no reply to a suggestion that the boat was running more rapidly than usual, and steam was not let off or permitted to escape, either at stopping places or elsewhere; and that the boat at a stopping place ran aground, which caused her to careen, thus throwing the water in the boilers to the lower side; and that the fires were continued and no steam was let off; and that, when the wheel made a few strokes of backwater, which drew the boat from the ground, it assumed a level position, thus throwing the water back upon the hot boiler plates, when an explosion instantly followed causing a death,—it is a question for the jury whether the engineer was not bound to ascertain the quantity of water in the boilers, and whether it was not his duty to let off steam whenever the boat stopped,—especially when the steam was high; and if in this respect he was found to be negligent, a verdict should be rendered against him. *United States v. Taylor*, 5 McLean, 242, Fed. Cas. No. 16,441.

And the omission to raise the safety valve on the engine of a steamboat when the vessel stops at a dock, in conformity with a statutory provision which does not charge the engineer with this duty, but is imperative in charging the master to see that the safety valve is raised when the boat stops, is a direct violation of the law by the master, and is an act of misconduct, inattention, or negligence in him within the meaning of that act. *United States v. Farnham*, 2 Blatchf. 528, Fed. Cas. No. 15,071.

And the omission of a captain to give orders for the raising of the safety valve of the engine when the boat stops, though not declared by and of itself a crime, if it causes the death of a person on the boat, is competent evidence of misconduct or negligence on his part, which is made criminal by that act. *Ibid.*

So, an allegation in a prosecution against the master of a vessel for the homicide of a passenger who fell overboard at a place where the deck was unguarded, based on U. S. Rev.

this statute of manslaughter of the character which this count was intended to reach, except that the slayer must be in the commission at the time of some unlawful act?" Also on page 477, 18 Ohio, and on page 459, 51 Am. Dec.: "It is claimed for the plaintiff in error that there is no allegation in the count of the unlawful act designated in the statute. It was necessary to allege in the indictment that the person was engaged in the commission of some unlawful act. And this allegation, it appears to the court, is distinctly made in that part of the indictment which charges the prisoner with an assault upon the person killed, and unlawfully discharging and shooting off at him a loaded gun. This sufficiently describes an unlawful act. . . ." As before stated, our statute now provides for a shorter form of indictment, but it does not dispense with the

ingredients of manslaughter as defined in the former statute. In *Smith v. State*, 12 Ohio St. 466, 469, 80 Am. Dec. 355, this court says: "It must be borne in mind that we have no common-law offenses in this state. No act or omission, however hurtful or immoral in its tendencies, is punishable as a crime in Ohio unless such act or omission is specially enjoined or prohibited by the statute law of the state. It is therefore idle to speculate upon the injurious consequences of permitting such conduct to go unpunished, or to regret that our Criminal Code has not the expansiveness of the common law." The same statement of the law was again made in *Mitchell v. State*, 42 Ohio St. 383, and other decisions of this court. We think the same rule abides in many, if not all, of the other states of the Union whose legislatures have made codes or systems of statutory

Stat. § 4477 (U. S. Comp. Stat. 1901, p. 3052), requiring passenger steamers during the night to keep a suitable number of watchmen on each deck to give alarm in case of accident, charging that the defendant, contrary to his duty as captain, did not, on the night of the day stated in the indictment, keep a suitable number of watchmen on the saloon deck of the steamer, by reason of which neglect no proper measures for the rescue of the passenger who fell overboard were taken, for want of which she was drowned,—sufficiently charges manslaughter as defined in U. S. Rev. Stat. § 5344 (U. S. Comp. Stat. 1901, p. 3629). *United States v. Beacham*, 29 Fed. 284.

The destruction of life, however, is the essence of the offense defined by that act, and it is not sufficient that the officer has been guilty of misconduct, negligence, and inattention; human life must have been destroyed, and the offender is guilty, not when the misconduct or negligence occurs, but when such conduct bears fruit by causing the death of a human being; and, where the negligence occurs in one jurisdiction and the death in another, the courts of the former jurisdiction cannot try the offender. *Re Doig*, 4 Fed. 193.

And to justify a verdict of guilty of manslaughter, under a count in an indictment charging that it was the duty of the defendants to keep a lookout and so steer and navigate the boat as to avoid collision; and that they neglected such duties, whereby a collision took place and the boat was sunk and the lives of designated persons were destroyed, the jury must be satisfied that the persons whose lives are averred to have been destroyed came to their death as a result of the collision. *United States v. Warner*, 4 McLean, 463, Fed. Cas. No. 16,643.

And the pilot of a vessel colliding with another, from which death resulted, is only responsible under that act for his own conduct, and not for the conduct of any other; and if the collision was the result of misconduct, negligence, and inattention to duty of others, and he in no wise contributed to it, no blame can attach to him. *United States v. Keller*, 19 Fed. 633.

And while a captain of a steamboat is charged with responsibility for the right performance of all duties which appertain to the command and management of the propelling power of the vessel, including those of the engineer in his special department and of the pilot in his, and he is criminally responsible for any negligence of any of the officers; if he procures competent persons for the performance of such duties, and gives them injunctions to per-

form them,—the law will not impute the killing to him, if they, without his knowledge, neglect the duties assigned to them, thereby causing death. *United States v. Farnham*, 2 Blatchf. 528, Fed. Cas. No. 15,071.

Nor should the officers of a steamboat, charged with neglect of duty whereby their boat came in collision with a schooner, be convicted of manslaughter under that act, because their boat was sunk and lives were destroyed, where it appears that the accident was the result of misconduct or unskillfulness in the person in charge of the schooner, or that the collision was, for any other cause, unavoidable. *United States v. Warner*, 4 McLean, 463, Fed. Cas. No. 16,643.

And where a collision took place between vessels through the alleged negligence and misconduct of the officers of one of the vessels, and the passengers thereon were told that they would be safe if they remained on the upper deck, and those who remained on the upper deck were saved; but, under the influence of alarm, some of them unnecessarily and indiscreetly left the boat when sinking, on floats, rafts, etc., and were drowned,—the loss of their lives is not so connected with, and such a necessary result of, the collision, that the officers can be held criminally responsible therefor under that act. *Ibid.*

A vessel not propelled in whole or in part by steam does not come within the terms of the act of Congress of July 7, 1838 (5 Stat. at L. 306, chap. 191, § 12), providing that every person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose negligence, misconduct, or inattention the life of any person or persons may be destroyed, shall be deemed guilty of manslaughter. *United States v. Holmes*, 104 Fed. 884.

But the act of Congress of February 28, 1871 (U. S. Rev. Stat. § 5344, U. S. Comp. Stat. 1901, p. 3629), amending the act of July 7, 1838 (5 Stat. at L. 306, chap. 191, § 12), by omitting the phrase contained in the former statute, "propelled in whole or in part by steam," was intended to extend the terms of the statute to include, not only vessels propelled in whole or in part by steam, but any steamboat or vessel on the navigable waters of the United States; and, under U. S. Rev. Stat. § 3 (U. S. Comp. Stat. 1901, p. 4), defining the word "vessel" to include every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water, sailing yachts would be included. *Ibid.*

And by misconduct, negligence, or inattention in the management of vessels, mentioned in such acts, making the destruction of life

crimes. It evidently is true of the Federal government, as settled by repeated decisions of the Supreme Court of the United States. *United States v. Worrall*, 2 Dall. 384, 1 L. ed. 426, Fed. Cas. No. 16,766; *United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249; and later cases in that court. When our legislature first enacted statutes upon the subject of homicide, and defining its different degrees, it did, as to manslaughter, what the statute suggests, —adopted almost literally the common-law definition. *Sutcliffe v. State*, 18 Ohio, 469, 51 Am. Dec. 459. But when this definition was borrowed and adopted by our legislature, it was adopted not in part, but as a whole, and the act committed when the unintentional killing occurs must be a violation of some prohibitory

law. The very word "unlawful," in criminal jurisprudence, means that, and nothing less. Surely the legislature did not intend to adopt part of the common-law description of the offense as a statutory provision, and leave the other part of the expansiveness of the common law. Yet that is practically the construction which the lower courts must have placed upon our statute against manslaughter. We assume that the facts show conduct grossly negligent in character. There was no malice and no quarrel between defendant and the deceased. The killing was unintentional. It was manslaughter nevertheless, if the slayer was then in commission of some unlawful act. The jury were told that if, in their judgment, the accused was guilty of gross negligence, and a disregard for the lives and safety of others, the state was entitled to a verdict of manslaughter.

thereby manslaughter in a person employed thereon, is meant the omission or commission of any act, the omission or commission of which might naturally lead to such consequences; and it is immaterial what may be the degree of the misconduct, whether slight or gross, if the proof shows that the destruction of life was the necessary or most probable result of it. *United States v. Farnham*, 2 Blatchf. 528, Fed. Cas. No. 15,071.

And everyone who assumes to perform certain duties as captain, pilot, or otherwise on board a vessel is made responsible thereby for any act done through ignorance or negligence, without reference to his fitness for such duty; he is guilty though the act which destroys life was done through ignorance. *United States v. Taylor*, 5 McLean, 242, Fed. Cas. 16,441.

And it is not necessary, under U. S. Rev. Stat. § 5344 (U. S. Comp. Stat. 1901, p. 3629), to find that the defendant was guilty of wilful or intentional misconduct, negligence, or inattention to duty; it is sufficient that he was guilty of a violation of the statute. *United States v. Keller*, 19 Fed. 633; *The Henry Clay*, Fed. Cas. No. 6,375; *United States v. Farnham*, 2 Blatchf. 528, Fed. Cas. 15,071; *Charge of Grand Jury*, 1 Newberry, Adm. 323, Fed. Cas. No. 18,253; *United States v. Warner*, 4 McLean, 463, Fed. Cas. No. 10,643.

Nor is it necessary, in a prosecution under that act, to charge and prove that the acts were done with criminal intent, or maliciously done or with the purpose to take the life of any person; it is sufficient merely to charge the inattention, negligence, or misconduct which resulted in the loss of human life. *United States v. Holmes*, 104 Fed. 884.

And an indictment for manslaughter, under U. S. Rev. Stat. § 5344 (U. S. Comp. Stat. 1901, p. 3629), following the words of the statute, is not sufficient; the pleader should describe some facts upon which the government relied to prove misconduct, negligence, or inattention to duties on the part of the defendant. *United States v. Holtzhauser*, 40 Fed. 76.

But a pilot cannot be convicted under U. S. Rev. Stat. § 5344 (U. S. Comp. Stat. 1901, p. 3629), making every owner, inspector, or other public officer through whose fraud, connivance, misconduct, or violation of law the life of any person is destroyed, guilty of manslaughter, for the killing of a person, alleged to be due to taking more passengers on board than permitted by the certificate of inspection; "the other public officer" referred to, being one who has something to do with regulating or limiting the number of passengers to be taken on board, over which the pilot has no authority. *Ibid.* 61 L. R. A.

And where the steward of a ship is charged with the manslaughter of several persons who perished in a fire which took place on board, the jury, to convict, must be satisfied that the act done was dangerous, having regard to the place or the contents of the place in which it was done, for, if not, it would not be an act tending to the immediate loss, destruction, or serious damage of the ship, within the meaning of the merchant's shipping act of 1854, § 239, making such an act a misdemeanor. *Reg. v. Gardner*, 1 Post. & F. 669.

But while a warrant charging that persons who had charge of a boat, for the purpose of excelling in speed another boat, and for increasing the speed of their boat, created an undue and unsafe quantity of steam, and in so doing made excessive fires without using ordinary prudence in their management, in consequence whereof the boat took fire and deaths ensued, is insufficient, under the statute providing that the killing of a human being without authority of law, when perpetrated by an act imminently dangerous to others, evincing a depraved mind regardless of human life, although without premeditated design to effect the death of any particular individual, is murder, for want of an allegation of an intention to do bodily harm, which is an essential element constituting the crime of murder,—it will warrant holding such persons for manslaughter in the first degree under 2 N. Y. Rev. Stat. 661, § 8, defining it to be the killing of a human being without the design to effect death by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to a felony. *People ex rel. McMahon v. Westchester County Sheriff*, 1 Park. Crim. Rep. 659.

And manslaughter committed within the territorial limits of a state by the misconduct or negligence of a pilot licensed under the Federal laws, in charge of a vessel which comes into collision with another vessel causing the death of a person, is punishable under both Federal and state laws; and the fact that it is made an offense against the United States by U. S. Rev. Stat. § 5344 (U. S. Comp. Stat. 1901, p. 3629), does not prevent its punishment under the state laws. *People v. Welch*, 141 N. Y. 266, 24 L. R. A. 117, 36 N. E. 328, Affirming 74 Hun, 474, 28 N. Y. Supp. 694.

And an indictment charging manslaughter under U. S. Rev. Stat. § 5344 (U. S. Comp. Stat. 1901, p. 3629), charging the master of a vessel with a violation of U. S. Rev. Stat. § 4465 (U. S. Comp. Stat. 1901, p. 3046), which is a public law, and which forbids the taking on

In considering this rather unusual, if not new, construction of the law, we must not forget a few elementary principles of the law of negligence. It (negligence) may consist of acts of omission as well as commission, and what may be mere ordinary negligence under one class of circumstances and conditions may become gross negligence under other conditions and circumstances. Negligence is the failure to exercise ordinary care. Gross negligence may consist in failure to exercise any or very slight care. There are other definitions, but these are sufficient now for our purpose. So we may truly say that negligence differs only in degree. With this, we cannot overlook what experience has taught for many years,—that what may seem ordinary negligence when contemplated by one mind may be regarded by another as very gross negligence. The in-

ferences drawn from the same facts by different minds may often greatly differ. Hence, when we look to the case as it appeared in the trial court, we see that, without any rule of conduct prescribed by statute to govern the case, the rule for the first time was to be established by the verdict of the jury and sentence of the court. Up to that time the behavior of the defendant had violated no law. It was for the jury to say, under the instructions given, whether the accused had been guilty of gross negligence. If so, although the killing was unintentional and free from malice, it was manslaughter. In England, the home of the common law, and where it attained its wonderful growth, and from which we have borrowed to a large extent, it became necessary and was permissible to build up, by the pen of law writers and adjudged cases, a system of criminal

board any steamer a greater number of passengers than is cited in the certificate of inspection, charging that the deceased came to her death by the defendant's disregard of that law, though perhaps not containing the technical fullness and verbosity sometimes found in indictments, is sufficiently clear and certain to inform the defendant of the nature of the accusation against him. *United States v. Holtzhauser*, 40 Fed. 76.

d. In practicing medicines, surgery, etc.

1. The English doctrine.

Criminal negligence may consist in the negligent use of medicines in the use of which care is required, and of the properties of which the person using them is ignorant. *Reg. v. Markuss*, 4 Fost. & F. 356.

Any person, whether licensed or unlicensed as a medical practitioner, who deals with the life or health of others, is bound to use competent skill and sufficient attention; and, if the patient dies for want of either, such person is guilty of manslaughter. *Rex v. Spiller*, 5 Car. & P. 333.

And a person undertaking to cure a disease, whether he has received a medical education or not, who is guilty of gross negligence in attending his patient after he has applied a remedy, or of gross negligence in the application of it, in consequence of either of which death ensues, is guilty of manslaughter. *Rex v. Long*, 4 Car. & P. 423.

A party not having a medical education has no right to hazard medicine of a dangerous tendency, when medical assistance can be had, and, if he does so, he does it at his own peril; and where such person takes it upon himself to administer medicine which may have a dangerous effect, and such medicine destroys the life of the person to whom it is administered, it is manslaughter in him, though he does not mean to cause death, but means to produce beneficial results. *Rex v. Simpson*, 1 Lewin C. C. 172; *Reg. v. Markuss*, 4 Fost. & F. 356; *Rex v. Webb*, 1 Moody & R. 405, 2 Lewin C. C. 196; *Reg. v. MacLeod*, 12 Cox C. C. 534; *Reg. v. Bull*, 2 Fost. & F. 201.

And one who administers a poison to another without knowledge or taking pains to find out what its effect would be, or, if knowing the effect, administers it without giving adequate and proper directions as to its use, is guilty of culpable negligence, and liable for manslaughter if death results therefrom. *Reg. v. Chamberlain*, 10 Cox C. C. 486.

Thus, if a person deals out morphia or some

other poison, and it is administered without proper care, skill, and caution, and without knowledge of its nature, and death results, the person so dealing it out is guilty of manslaughter. *Reg. v. MacLeod*, 12 Cox C. C. 534.

And where, a child being ill, the mother sent her son to a chemist for paregoric, and the chemist's apprentice delivered a vial with a paregoric label on it, but with laudanum in it, and it was given to the child, who was nine years old, and its death was caused thereby,—it is sufficient to hold the chemist for manslaughter. *Tessymond's Case*, 1 Lewin C. C. 169.

But a mistake upon the part of a chemist in putting poisonous liniment into a medicine bottle instead of a liniment bottle, in consequence of which the liniment was taken internally by his customer, who was killed, does not amount to such criminal negligence as would warrant his conviction for manslaughter, where the chemist was put out of his ordinary course of conduct by the customer sending bottles of his own. *Reg. v. Noakes*, 4 Fost. & F. 920.

And where an irregular and apparently unskilled practitioner administered colchicum to a person laboring under a disease of the heart, which tends to depress and weaken the heart's action and render a heart already enfeebled less able to keep up the circulation, thus tending to produce exhaustion, and death resulted, it should be left to the jury, in a prosecution for manslaughter, to say whether, on the evidence, such death resulted from natural causes, or whether it was caused by the medicine thus prescribed. *Reg. v. Markuss*, 4 Fost. & F. 356.

So, one who uses dangerous applications is bound to exercise skill in their use, and the application by an ignorant person of corrosive sublimate to a cancer on another person, which causes death, is evidence for the jury, on a prosecution for manslaughter, on the question as to whether under all the circumstances, the person applying it acted with criminal inattention and carelessness. *Reg. v. Crook*, 1 Fost. & F. 521.

And where the death of a patient is occasioned by the application, by a medical practitioner, of a lotion to the skin, evidence may be given, in a prosecution for manslaughter, against him, of the effect of the lotion when applied to other patients. *Rex v. Long*, 4 Car. & P. 398.

And an allegation in an indictment against a person, acting as a medical practitioner, charging that the death of a person was caused by a plaster made and applied by the accused, is sufficiently proved by showing that three plasters were applied, two of them by accused, and

jurisprudence, and enforce it until Parliament would occupy the ground and supplant it. But that country, while so doing was under no written constitution, and *ex post facto* or retroactive laws might be laid down by the courts or enacted by Parliament. Not so in this country, where we have a written constitution prohibiting retroactive and *ex post facto* legislation. Weeks or months after the negligent acts involved in this case, we have the rule of conduct of the defendant passed upon and defined by a verdict upon the all-important and indispensable element of manslaughter based on the facts of the case. It is retroactive in its effect. An act of the legislature attempting to so operate would be promptly held unconstitutional. Can we sustain a construction of our statute against manslaughter which will have the same effect? In our judgment, the unlawful act, the commission of which gives color and character to the unintentional kill-

ing, is an act prohibited by law, and that such is the natural meaning of the term or clause when used in the parlance of criminal jurisprudence.

Another observation is appropriate here. The uncertainty of the common law. Some principles which are deemed common law in Ohio are not so regarded in other states, and what some of them regard as common law we do not recognize as such in Ohio. Therefore the wisdom of enacting a system of penal laws at the beginning of our statehood, and of improving and expanding it as fast as conditions of society required. The growth of such legislation is itself against the holdings of the lower courts. What acts or omissions in early years were harmless, owing to the sparsity of population and character of property and business then owned and conducted, afterwards, as population increased, and business relations became diversified, became injurious to others; and

that the third was made from materials furnished by him. *Rex v. Spiller*, 5 Car. & P. 333.

So, a person practising medicine is not justified in making use of instruments in themselves dangerous unless he does so with a proper degree of skill and caution; and where he does so and causes the death of a person by want of skill and caution, he is guilty of manslaughter. *Reg. v. Spilling*, 2 Moody & R. 107.

And the question for the jury in a prosecution against one who causes the death of another by surgical treatment is whether deceased died from the effects of the operation performed on him by accused, and whether the treatment pursued by the accused in the case of the deceased was marked by negligence, unskillfulness, and ignorance. *Reg. v. Whitehead*, 3 Car. & K. 202.

If, however, a party having a competent degree of skill and knowledge as a physician makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby rendered guilty of manslaughter. *Rex v. Webb*, 1 Moody & R. 405, 2 Lewin C. C. 196.

And if a person bona fide and honestly exercising his best skill to cure a patient performs an operation which causes the patient's death, he is not guilty of manslaughter; and it makes no difference whether he be a regular surgeon or not, or whether he had a regular medical education or not; though a person not legally qualified to practise as a surgeon may be liable for penalties. *Rex v. VanButchell*, 3 Car. & P. 629.

A person acting as a medical practitioner, whether licensed or unlicensed, is not criminally responsible for the death of a patient occasioned by his treatment, unless his conduct is characterized by gross ignorance of his art, or gross and scandalous inattention to his patient's safety. *Rex v. Long*, 4 Car. & P. 398.

In the above case, a distinction was drawn between it and a case therein cited, in which a person assuming to act as a medical practitioner was a blacksmith, and was drunk, and was so ignorant of the proper steps that he totally neglected what was absolutely necessary.

Within this rule, in a prosecution on an indictment against a physician for administering poison by mistake, in order to sustain the burden of showing that the giving of poison was the result of criminal negligence on the part of the accused, it is not enough to show that, in dispensing his own drugs, he

supplied a mixture containing a large quantity of poison; it must be made to appear that there was such gross and culpable negligence as would tend to show an evil mind. *Reg. v. Spencer*, 10 Cox C. C. 525.

And where it appears that the cork was found broken and half out of a bottle containing prussic acid, so that it was impossible to say how much of the poison might have escaped, or that the liquid might have dropped faster than the accused supposed it would, the giving of an overdose is not such culpable negligence as would make the person giving it criminally responsible. *Reg. v. Bull*, 2 Fost. & F. 201.

And where it appears that medicine was prescribed for a young child, and that the mother took the advice of the person prescribing it, and that the child got much better, and that she then left off giving the medicine, when it died, a favorable view of the conduct of the accused should be recommended. *Reg. v. Crick*, 1 Fost. & F. 519.

And evidence, in a prosecution for manslaughter by reason of gross negligence and ignorance in surgical treatment, as to former cases treated by the accused, cannot be gone into either by one side or the other, though witnesses may be asked their opinion as to the scientific skill of the accused. *Reg. v. Whitehead*, 3 Car. & K. 202.

The question, in a prosecution against a person assuming to act as a medical practitioner, who is alleged to have caused the death of a patient by criminal negligence, is whether, with reference to the remedy he used and the conduct he displayed, he acted with a due degree of caution; or, on the other hand, Did he act with gross and improper rashness and want of caution? *Rex v. Long*, 4 Car. & P. 423.

It is not a crime to administer medicine, but it is a crime to administer it so carelessly and rashly as to produce death. *Reg. v. Crick*, 1 Fost. & F. 519.

So, gross want of care, and gross and culpable want of skill, in one acting as a midwife, from which the death of a patient results, render such person guilty of manslaughter. *Rex v. Ferguson*, 1 Lewin C. C. 181.

And a person practising midwifery, who, being called upon to attend a case, but being grossly ignorant of the art which he professed, and unable to procure a delivery with safety to the woman and the child, as might have been done by a person of ordinary skill, broke and compressed the skull of the infant during the process of delivery, thereby causing its death

in other respects the good order of society and the protection of life and property demanded and received appropriate legislation. That department of our state government has kept pace with the wrongs, the vices, and immoralities of our social and industrial life. It has gone farther when occasion demanded, and has made criminal many acts and omissions which before belonged to the field of negligence, as witness many provisions regarding the management of railroads, factories, and mines, and other branches of business where labor is employed. Many acts or omissions to act which before were subject to the charge of negligence are made penal by statute. And a consideration of this course of legislation demonstrates that there is no longer a necessity to turn to the common law to find what act or acts it is unlawful to commit.

If the contention of the state in this case is tenable, it is not difficult to see how the

criminal dockets in our courts will soon be flooded. The gross negligence of one may unintentionally cause the death of many. If such negligence is the commission of an unlawful act, the killing of each of the slain becomes a separate crime of manslaughter. And so it would proceed, and the cases multiply according to the judgment of men as to when the acts of others are or are not grossly negligent. The position is untenable, and we decide that the judgments of the Common Pleas and Circuit Courts are erroneous and must be reversed; and the facts of this case being conceded, as stated herein, the plaintiff in error is discharged.

Reversed.

Burket, Davis, and Shauck, JJ., concur.

Rehearing denied.

immediately after it was born, is guilty of manslaughter; and the indictment, therefore, is not subject to objection that it could not be manslaughter because of the child being *in ventre sa mère* at the time the wound was given. *Rex v. Senior*, 1 Moody C. C. 346, 1 Lewin C. C. 183, note.

But a person in the habit of acting as a man midwife, though not a regular *accoucheur* who tore away a part of the prolapsus uterus of one of his patients supposing it to be the placenta, and, in doing so, tore an artery, by reason of which the patient died, is not indictable for manslaughter, unless he was guilty of criminal misconduct arising either from gross ignorance or the most criminal inattention. *Rex v. Williamson*, 3 Car. & P. 635.

2. The rule in the United States.

The rule has been laid down by some of the American courts that, to constitute manslaughter, the killing must have been the consequence of some unlawful act, and that, if a person prescribes for or gives medicine to another, acting with an honest intention and expectation of curing him by his treatment, although death, unexpected by him, is the consequence, he is not guilty of manslaughter. *State v. Schulz*, 55 Iowa, 628, 39 Am. Rep. 187, 8 N. W. 469; *Com. v. Thompson*, 6 Mass. 134.

And this rule was applied notwithstanding the fact that he was ignorant. *Com. v. Thompson*, 6 Mass. 134.

And it has been held that, if a person assumes to act as a physician, however ignorant of medical science, and prescribes with an honest intention of curing the patient, but, through ignorance of the quality of the medicines prescribed or the nature of the disease, or both, the patient dies in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of either murder or manslaughter. *Rice v. State*, 8 Mo. 561; *Robbins v. State*, 8 Ohio St. 138.

And that, to render a person causing the death of another by administering poison guilty of manslaughter when he was ignorant of the poisonous character of the drug he was administering, it must appear that he was giving the drug with a wicked or evil purpose. *Caywood v. Com.* 7 Ky. L. Rep. 224.

And that a practising physician and surgeon, who examines a female patient with a view to learn whether she is pregnant, with an instrument commonly employed for that purpose, and

who, without evil intent or culpable negligence, inadvertently inflicts a wound which results in her death, is not guilty either of murder or manslaughter. *State v. Reynolds*, 42 Kan. 320, 22 Pac. 410.

In *Rice v. State*, 8 Mo. 561, however, the rule was laid down that, if a person, assuming to act as a physician, prescribes for another, but, through ignorance of the quality of the medicine prescribed, or the nature of the disease, or both, the patient dies in consequence of the treatment; if the party prescribing has so much knowledge of the fatal prescription that it may be reasonably presumed that he administers the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure,—he is guilty of manslaughter at least, although he might not intend any bodily harm to the patient.

And in *Com. v. Pierce*, 138 Mass. 165, 52 Am. Rep. 264, it was held that an actual good intent, and the expectation of good results, by a physician in his treatment of a patient, as a result of which the patient died, are not an absolute justification of his acts however foolhardy they may have been if judged by an external standard. If his act was the result of foolhardy presumption or gross negligence, he is as responsible for the result as though he had done unlawful acts for independent reasons; but the actual condition of the individual's mind with regard to the consequences must be taken into consideration, as distinguished from mere knowledge of present or past circumstances, from which someone or everybody else might be led to anticipate or apprehend such circumstances from the acts done.

In the above case, *Com. v. Thompson*, 6 Mass. 134, *supra*, was criticized; the court saying that the language was ambiguous, and, if it means that the killing must be the consequence of an act which is unlawful for independent reasons, apart from its likelihood to kill, it is wrong; and that that case meant to follow the statements of Lord Hale.—1 P. C. 429; and that it was thought that the court fell into the mistake of taking Lord Hale too literally. And it was held in the former case that where a man who publicly practised as a physician was called to attend a sick woman, and caused her, though with her consent, to be kept in flannels saturated with kerosene for about three days, by reason of which she died, and it appeared that the treatment was applied as the result of foolhardy presumption or gross negligence, he is guilty of manslaughter. His act in such case

is regarded as an assault upon her, and, therefore, an unlawful act, notwithstanding her consent.

And an allegation in the indictment that kerosene is of a dangerous tendency is superfluous in such case. *Ibid.*

And an instruction in a prosecution against a physician for manslaughter in causing the death of a woman in an attempt to procure an abortion upon her, that, when a physician undertakes to attend a sick person, the law imposes upon him the duty of directing sanitary conditions surrounding the patient, of prescribing the proper medicines and the means and manner of taking, and whatever other appliances and operations are necessary to the restoration of health, does not undertake to define the degree of care and skill required, and is a proper statement of the law, and not subject to the objection that it virtually tells the jury that any negligent or improper treatment of the deceased, if found to exist, would be sufficient to convict the accused, while the law is that a physician is not criminally liable unless he is guilty of gross want of skill or attention. *State v. Power*, 24 Wash. 34, 63 Pac. 1112.

And where, in a prosecution for homicide, a witness on the part of the state had, in effect, testified that a designated doctor had been a customer at his store, that he had very often filled prescriptions for him, and that he was a good, careful physician; and the issue is whether poison was administered to the deceased through the negligence of the physician or unintentionally by the accused,—the accused is entitled, upon cross-examination, to show to the jury that the dealings with the doctor which the witness had referred to in chief did not justify the professional character for care and skill that the witness had given him. *Dresback v. State*, 38 Ohio St. 365.

But a druggist cannot be held liable for manslaughter in the fourth degree, under the Missouri statutes, in carelessly and negligently filling a prescription with a deadly poison, whereby a person was killed, where it is not alleged that anyone asked him to compound the prescription, and it does not appear what were the ingredients thereof, or by whom the prescription was made. *State v. Smith*, 66 Mo. 92.

The rule would seem to be that laid down in *State v. Hardister*, 38 Ark. 605, 42 Am. Rep. 5, that a mere mistake of judgment by a physician in the selection and application of remedies and appliances does not render him criminally liable for the results; but he is so for the results of gross ignorance of the art he assumes to practise or of gross ignorance in the selection or application of remedies, and for gross negligence with reference thereto; and an indictment in a prosecution against a physician for manslaughter for causing the death of a patient, charging that he feloniously and without due caution and circumspection, and by malpractice in the use of remedies and appliances described, and by abandonment, caused the death of the patient, is sufficient.

And that where poison is knowingly administered with the intention of mischief to accomplish some unlawful purpose, and death ensues, it is murder though death was not intended; but a homicide committed by poison heedlessly or negligently administered for no unlawful purpose will amount to, at most, but manslaughter. *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131.

And consent is a defense in a prosecution for homicide where death results from a surgical operation, only where the operation was performed with due care and skill; it is no excuse for recklessness or want of skill. *State v. Gile*, 8 Wash. 12, 35 Pac. 417.

61 L. R. A.

e. In failure of duty to dependents.

1. Parent and child.

If a party does any act with regard to a human being, helpless and unable to provide for himself or herself, which must necessarily lead to death, the crime amounts to murder. And if such party does any act which might lead to its death, and which does so, but the circumstances are not such that the party must have been aware that the death would result, and the unlawful act is not such as to imply a malicious mind, it would be manslaughter, and not murder. *Reg. v. Walters*, Car. & M. 164.

Thus, a parent who negligently withholds food and other necessities from his child, having the means to supply such necessities, in consequence of which the child dies, is guilty of manslaughter; and if such withholding is wilful, the act is murder. *Reg. v. Conde*, 10 Cox C. C. 547; *Rex v. Friend*, Russ. & R. C. C. 20; *Rex v. Squire*, cited in 3 Russell on Crimes, 8th ed. p. 13; *Pallis v. State*, 123 Ala. 12, 26 So. 339.

And a parent, though he supplies sufficient food and clothing to another for the use of his child, when such other wilfully withholds it from the child, and he knows that it is so withheld, and fails to interfere, and the child dies for want of such food and clothing,—is guilty of manslaughter. *Reg. v. Bubb*, 4 Cox C. C. 455.

But an indictment against a woman for manslaughter in neglecting to supply an infant of tender years with sufficient food is bad, where it does not state that she was the mother of the child, or that she owed it any duty to supply it with food. *Reg. v. Edwards*, 8 Car. & P. 611.

And to render criminal the neglect of parents and others having charge of children or other dependents, by reason of which death results, there must be capacity, means, and ability to provide, support, and care for or to prevent the threatened harm, as well as the legal duty to provide and act; and if there are no such capacity, means, and ability the omission to perform the legal duty is not criminal. *State v. Noakes*, 70 Vt. 247, 40 Atl. 249.

Thus, a married woman cannot be convicted of the murder of her illegitimate child, three years old, by omitting to supply it with proper food, unless it is shown that her husband supplied her with food to give to the child, and that she wilfully neglected to give it. *Rex v. Saunders*, 7 Car. & P. 277.

And a grandmother of an infant whose mother was dead, who took charge of it, though not bound by law to take care of it, who, having fallen into bad circumstances, her furniture having been seized, and she having been obliged to be out all day collecting rags and bones, placed the child in charge of a boy nine years old with instructions to look after it, leaving food with which to feed it, will not be held guilty of manslaughter, the child having died of starvation, under the circumstances; her fault consisting merely of omitting to send the child to the parish authorities. *Reg. v. Nicholls*, 13 Cox C. C. 75.

And a verdict of guilty in a prosecution against a mother for homicide for unlawfully and wilfully neglecting and refusing to supply sufficient food for her infant child, based upon the theory that, had she applied to the guardians for relief she would have received it, cannot be sustained; it is not enough that she could have obtained food on application to the guardians, or the union. *Reg. v. Rugg*, 12 Cox C. C. 16, 24 L. T. N. S. 192; *Reg. v. Chandler*, 6 Cox C. C. 519.

It has been held, however, that a married woman having a child which she is unable to support and care for, and who wilfully neglects to apply for assistance provided by the poor laws, by reason of which the child dies, is guilty of manslaughter, though she has a husband who has the means of supporting his family and neglects to do so, and the want of food is the result of such neglect; but that, in order to constitute the criminal offense, distinct proof of a continued abstaining from applying for relief for four or five days together is necessary. *Reg. v. Mabbett*, 5 Cox C. C. 839.

So, where a parent having charge of an infant of tender years abandons and exposes it to the inclemency of the weather, such parent is guilty of an assault, and, if the exposure or neglect results in death, it is manslaughter, if the act is one of mere carelessness wherein danger to life does not materially appear; and it is murder if the exposure or neglect is of a dangerous kind. *Pailla v. State*, 123 Ala. 12, 26 So. 339; *Gibson v. Com.* 106 Ky. 380, 50 S. W. 532; *Reg. v. Walters*, Car. & M. 164.

And the rule is the same though the child is illegitimate, the law imposing upon a mother the duty of protecting and caring for her offspring, though illegitimate. *Gibson v. Com.* 106 Ky. 380, 50 S. W. 532.

If the child is left at a door or any other place where it is liable to be found or taken care of, and the child dies, it is manslaughter only; but if it is left in a remote place where it is not liable to be found, and death ensues, it is murder. *Ibid.*

And where, either before or after the birth of a child, the mother made up her mind that the child should die, and it was born alive, and, with the intent that it should die, she left it exposed, and it did die in consequence thereof, she would be guilty of murder; and if she made up her mind to conceal the birth, and did attempt to conceal it by methods which would probably end in the death of the child, and they did so end, she would also be guilty of murder, though she did not intend murder. *Reg. v. Handley*, 13 Cox C. C. 79.

And where a woman leaves her young child, recently born, upon the roadside, the road being a much-frequented one, and the child was heard to cry by a wagoner passing along the road, who, instead of rendering it assistance, went on and reported the circumstance, after which the child was found dead,—it is for the jury, in a prosecution against the mother for the homicide, to consider whether the accused left the child in such a situation as to be reasonably presumed she must have been aware the child would die, or whether there were circumstances that would make it likely that the child would be found by someone else and its life preserved; the offense being murder on the one hand, or manslaughter on the other. *Reg. v. Walters*, Car. & M. 164.

And an indictment charging that a mother unlawfully, feloniously, and with specific intent to kill and murder her child, put it in an outhouse and there deserted it and left it exposed to the weather without clothing, covering, or shelter, from which the child died, is not subject to objection that it did not show that she was in duty bound to protect the child, and that it does not charge that the child was unable to help itself. *State v. Behm*, 72 Iowa, 533, 34 N. W. 319.

But an allegation in a coroner's inquisition that accused secreted and left and deserted her new-born child, and that it died, is insufficient to charge murder, in the absence of an allegation that the desertion was for so long a time that death would be the probable result. *Queen v. Pinhorn*, 1 Cox C. C. 70. 61 L. R. A.

So, a woman who, without malice, but unlawfully, wilfully, and feloniously, casts her illegitimate child into an open lot, without sufficient shelter or clothing to protect it from the inclemency of the weather, with the hope that it will be rescued or taken care of by some other person, is guilty of voluntary manslaughter, where, by reason of the exposure, it freezes to death. *Gibson v. Com.* 106 Ky. 380, 50 S. W. 532.

And a mother who permitted a new-born child to fall into a closet, where it was smothered in the soil, is guilty of manslaughter if she had the power of procuring such assistance as might have saved the child's life, and she neglected to do so. *Reg. v. Middleship*, 5 Cox C. C. 275.

And if a woman determined that no one but herself should be present at the birth of her child, though without intending permanent concealment, but only for the purpose of hiding her shame for a time, and with that intent delivered herself; in the eye of the law she invested herself with responsibility, from the moment of the birth, for the care and charge of a helpless creature; and if, after assuming such a care and charge, she allowed the child to die from negligence, she is guilty of manslaughter. *Reg. v. Handley*, 13 Cox C. C. 79.

So, parents, though they may themselves believe in a faith cure, and be of a peculiar religious order, are guilty of manslaughter in causing the death of a child, where they neglect to call a physician in a necessary case. *Reg. v. Cook*, 62 J. P. 712, 58 Alb. L. J. 232.

And conscientious or superstitious opinions upon the part of parents that it is wrong and irreligious to provide medical aid for their infant children in their custody is no excuse for not obeying 31 & 32 Vict. chap. 122, § 37, making such an omission an offense punishable summarily, so as to relieve the parent from criminal liability for manslaughter in case of the death of a child because of such omission. *Reg. v. Downes*, 13 Cox C. C. 111, L. R. 1 Q. B. Div. 25, 45 L. J. M. C. N. S. 8, 33 L. T. N. S. 675, 24 Week. Rep. 278.

The meaning of that act is, that if any parent intentionally, with the knowledge that medical aid is to be obtained, abstains from providing it when needed by a child, he is guilty of an offense; and, if the death of the child results from such omission, it is manslaughter, whether the omission proceeds from a good or a bad motive. *Ibid.*

But where a parent neglects to supply medical aid to his child who is suffering from a malignant disease, and the infant dies, the parent will not be held liable for manslaughter upon a mere vague statement of a skilled witness, that probably the life of the child might have been prolonged if medical assistance had been called in. *Reg. v. Morby*, 15 Cox C. C. 85, L. R. 8 Q. B. Div. 571, 46 L. T. N. S. 288, 51 L. J. M. C. N. S. 85, 30 Week. Rep. 613, 46 J. P. 422.

And in *Reg. v. Wagstaffe*, 10 Cox C. C. 530, it was held that a parent who refuses to call medical assistance for a sick child, though well able to do so, from a conscientious or religious conviction that God will heal the sick, and not from the intention to avoid the performance of the duty due from a parent to a child, in consequence of which the child dies, is not criminally responsible for the homicide. But see *Reg. v. Cook*, 62 J. P. 712, 58 Alb. L. J. 232; *Reg. v. Downes*, 13 Cox C. C. 111, L. R. 1 Q. B. Div. 8, 45 L. J. M. C. N. S. 8, 33 L. T. N. S. 675, 24 Week. Rep. 278, *supra*.

So, it is not sufficient, on a charge of manslaughter, to show that a parent had neglected to use all reasonable means of saving the life

of the child; it is also necessary to show that the neglect of the parent had the effect of shortening the child's life. Reg. v. Morby, 15 Cox C. C. 35, L. R. 8 Q. B. Div. 571, 46 L. T. N. S. 288, 51 L. J. M. C. N. S. 85, 30 Week. Rep. 613, 46 J. P. 422.

And a parent whose daughter was beyond the age under which a duty is cast by the statute upon the parent to maintain and support her, and who was entirely emancipated and had gone out for service, though occasionally returning to live with her mother and stepfather; who, upon such daughter being confined at her house, neglected to procure a midwife or other proper person to attend her, by reason of which she died,—is not guilty of manslaughter, no legal duty to do that for the omission of which accused was charged being made apparent. Reg. v. Shepherd, 9 Cox C. C. 123, Leigh & C. C. C. 147, 81 L. J. M. C. N. S. 102, 8 Jur. N. S. 418, 5 L. T. N. S. 687, 10 Week. Rep. 297.

But, one who undertakes the duty of supplying an infant with proper food and clothing, and who is furnished with the means of discharging that duty, who wilfully neglects to discharge such duty with the intention of causing the death of the child, or do it some grievous injury, in consequence of which the child dies, is guilty of murder. Reg. v. Bubb, 4 Cox C. C. 455; Lewis v. State, 72 Ga. 164, 53 Am. Rep. 835.

And this is true though there was no intent to kill. Lewis v. State, 72 Ga. 164, 53 Am. Rep. 835.

But where such killing is not malicious, such killing is manslaughter. Reg. v. Bubb, 4 Cox C. C. 455.

If an adult chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without wicked negligence; and, if he lets it die by wicked negligence, he is guilty of manslaughter; but the negligence must have been so great as to indicate a wicked heart in the sense of recklessness as to whether the creature died or not. Reg. v. Nicholls, 13 Cox C. C. 75.

And where a man who was a tramping sweep struck a boy traveling with him, twice with a heavy stick, and afterwards left him asleep by a small fire in a country lane, during the whole of a frosty night in January, and found him just alive on the next morning, and put him under some straw in a barn, where his body was found some months afterwards, the question for the jury on a prosecution for manslaughter therefor is, Did the death result from beatings administered by the accused; or did it result from exposure on the night in question, and was that exposure the result of criminal negligence on his part? or did the death result from the prisoner leaving the boy in the barn under the straw, ill if not dead? and, if it did result from any of such causes, or any two or more of them, he is guilty of manslaughter. Reg. v. Martin, 11 Cox C. C. 136.

And when a man is convicted of manslaughter of an infant female child on an indictment alleging the death to have been caused by exposure, whereby the child was frozen, since the death is attributable to an act of misfeasance, it will be implied on appeal, that the child was of such tender age and feebleness as to be unable to take care of herself. Reg. v. Waters, 1 Den. C. C. 356, 2 Car. & K. 864, Temp. & M. 57, 18 L. J. M. C. N. S. 53, 13 Jur. 130.

But an instruction in a prosecution against a man for manslaughter for the death of a child born to a girl living in his family, at or soon after childbirth, that, if he permitted the child to be born in his house, it was criminal negligence on his part not to have procured someone

to be present to assist the girl, is erroneous and improper in not taking into consideration the situation and attendant circumstances, and the ability of the accused to procure such assistance, and as tending to lead the jury to understand that, because accused did not turn the girl into the street when he discovered her condition, but permitted the child to be born in his house, it was a reckless disregard of his duty to the child not to procure someone to attend at its birth. State v. Noakes, 70 Vt. 247, 40 Atl. 249.

2. Husband and wife.

If a man wilfully abandons his wife to the destruction of the elements when he can save her, or criminally neglects to shelter her when he is able to do so, and leaves her to perish, he is as much a murderer as if he had assaulted her with a deadly weapon and inflicted upon her a mortal wound of which she died, though he does absolutely nothing, but merely fails to do that which he should. Territory v. Manton, 7 Mont. 162, 14 Pac. 639.

Thus, where a husband permitted his helpless wife to remain out in the cold during the night, whereby she was frozen to death, he standing wickedly by and letting her die when he had the power to prevent it, the gist of the offense is his passive inactivity when duty called upon him to protect her, and, though cold is charged to be the cause of her death, the volition which led him to refuse to aid her when the law imposed upon him the duty to protect her is transferred to the violence of the elements; and he is rendered responsible for the death which they immediately caused. Territory v. Manton, 8 Mont. 95, 19 Pac. 387.

And evidence in such a case that the accused had a hired man living with him, who was willing to help him, and that they could have brought her to the house, the snow being 2 to 5 feet deep, but that they did not do so until the next morning, when she was speechless, and died the next day, is sufficient to sustain a verdict for murder in the second degree; though she had been drinking, and was probably, for that reason, unable to reach the house herself. *Ibid.*

So, an indictment against a husband for the homicide of his wife, alleging the relation which he sustained to her, his duty to provide her necessities, her own incapacity, and his ability to do it; that he feloniously and wilfully neglected and refused to provide necessary clothing, shelter, and protection from the cold and inclemency of the weather from one named date to another, and her consequent sickness and death, and her manslaughter by him in the manner and by the means aforesaid,—is sufficient, either under the former practice requiring the manner and means by which the crime was accomplished to be set forth in detail, or under Me. Rev. Stat. chap. 134, § 7, by which said allegations are now unnecessary; and not subject to the objection that it contains no allegation that the condition of the wife and her necessities and the facts alleged as constituting the crime were known to the accused. State v. Smith, 65 Me. 257.

Such an allegation implies an averment that he knew the necessities of his wife. *Ibid.*

And, though, where a husband and wife had been separated by common consent, and he had agreed to allow her a stipulated sum per week, and such sum was regularly paid, he might ordinarily refuse to have anything to do with her, if she was ill and without shelter on a cold night, and he was notified of her condition, and refused her shelter, and she was found dead the next morning, if her death was caused

or accelerated by his conduct in refusing shelter, he is guilty of manslaughter. *Reg. v. Plummer*, 1 Car. & K. 600, 8 Jur. 921.

And the fact that the wife in such a case was suffering from a disease which would have shortly caused her death does not relieve him from liability therefor; it is immaterial whether the death of the deceased was actually caused by the act of the accused, or only accelerated by it. *Ibid.*

An indictment for murder, however, charging that a husband feloniously assaulted his wife, and violently and with malice aforethought removed and forced her to leave their dwelling house, whereby she came to her death, is not supported by proof that after she had been beaten and after her husband had gone to bed, she voluntarily left the house and unnecessarily remained out in the open air. *People v. Preslar*, 48 N. C. (8 Jones L.) 421.

And an indictment charging that the accused neglected, failed, and refused to procure medicine, care, or medical treatment for the deceased, and that she had blood poisoning and other diseases and sickness, but nowhere alleging that any of these were caused by his said neglect or refusal, or that she would have lived or would have lingered a moment longer if he had not done so, does not sufficiently charge manslaughter by culpable neglect, under Minn. Penal Code, § 6449, subd. 3; the mere facts that he was guilty of neglect, and that she died, are not sufficient. There should be a direct charge that his neglect caused the sickness and death, and the character of the sickness should be stated. *State v. Lowe*, 66 Minn. 296, 68 N. W. 1094.

3. Other relationships and relations.

The same general rules apply to all other relationships and relations, affected only by the extent of the duty owing by the one party to the other. The existence and extent of criminal liability are controlled by the existence and extent of legal duty of which there is an alleged violation.

Thus, there is no legal obligation on one brother to maintain another, so as to make the omission to do so indictable, though the other is an idiot and helpless and an inmate of the house of the former; and he is not indictable for the omission to supply the latter with proper food, warmth, etc. *Rex v. Smith*, 2 Car. & P. 449.

And a mistress is not guilty of manslaughter in feloniously causing the death of her servant by neglecting to supply proper and sufficient food and lodging to her, where bed, food, and lodging were provided, and the servant had the exercise of free will to choose to stay in the service, and she was not in a literal sense so helpless and enfeebled as to be a prisoner, and was not deprived of the exercise of her free will by threats or ill treatment. *Reg. v. Smith*, 10 Cox C. 82, Leigh & C. C. C. 607, 34 L. J. M. C. N. S. 153, 11 Jur. N. S. 695, 12 L. T. N. S. 608, 13 Week. Rep. 816.

And an indictment against a master for not providing sufficient food and sustenance for a servant, by reason of which the servant becomes sick and dies, must allege that the servant was of tender years, and under the dominion and control of the master. *Rex v. Ridley*, 2 Campb. 650.

But a master is guilty of manslaughter when he culpably neglects to supply proper and sufficient food and lodging to a servant who is reduced to such an enfeebled state of mind and body as to be entirely unable to take care of himself, and to be totally under the control of the master, and unable to withdraw himself from such control, where his death is caused or

accelerated thereby. *Reg. v. Smith*, 10 Cox C. 82, Leigh & C. C. C. 607, 34 L. J. M. C. N. S. 153, 11 Jur. N. S. 695, 12 L. T. N. S. 608, 13 Week. Rep. 816.

And a master is likewise guilty if he causes the death of an apprentice by premeditated negligence or harsh usage. *Rex v. Self*, 1 Leach C. L. 137, 1 East P. C. 226.

And where an indictment for manslaughter charges, in the first count, that deceased was the apprentice of the prisoner, and that it was the duty of the prisoner to provide him with proper nourishment, medicine, etc., but that he died from neglect, and charges in the second count that the deceased, being such apprentice, was killed by the prisoner by overwork and beating,—evidence that the prisoner told the witness that the deceased was his apprentice, without the production of any indenture, is sufficient proof of the allegation of apprenticeship in the second count, but not of that in the first. *Reg. v. Crompton*, Car. & M. 597.

But while a master is bound by general law to provide medical aid for his servant, the rule is different with respect to an apprentice; and, where the death of an apprentice is caused not by the act of the master in neglecting and refusing to provide him sufficient meat and drink, and forcing him to lie in an unwholesome room without proper bedding, and neglecting and refusing to supply him with proper and necessary apparel, but by failing to supply him with medicines when ill, the master is guilty of manslaughter. And under an indictment in such case in the absence of any charge to that effect in the indictment, the prisoner would be entitled to be acquitted. *Reg. v. Smith*, 8 Car. & P. 153.

And where a boy was bound as a parish apprentice to a man, and both the man and his wife used the boy in a most cruel and barbarous manner, the wife occasionally committing such cruelties in the absence of her husband, and the boy died of debility from want of proper food and nourishment, though the wife was equally guilty with the husband, she cannot be said to be guilty in law of not providing the apprentice with sufficient food and nourishment; though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully withheld it from him, then she would have been guilty. *Rex v. Squire*, cited in 1 Russell on Crimes, 6th ed. p. 151.

So, a master of a vessel, who, knowing that a seaman is in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or serious bodily injury, nevertheless compels him by force to do so, and the seaman falls from the mast and is drowned, is guilty of murder if the act is done with malice, and manslaughter, if there is no malice. *United States v. Freeman*, 4 Mason, 506, Fed. Cas. No. 15,162.

And in a case of manslaughter against the captain and mate of a vessel, in taking a course toward a seaman who was in ill health, but whom they alleged to be a skulker, which accelerated his death: the question, in determining whether it was a slight or aggravated case, is whether the phenomena of the disease were such as would excite the attention of reasonable and humane men; and in such a case, if the deceased was taken on board after he was discharged from a hospital, it is important to inquire whether he was sent on board by the surgeon of the hospital as a person in a fit state of health to perform the duties of a seaman. *Reg. v. Leggett*, 8 Car. & P. 191.

So, if one imprisons a man he must feed him, and an indictment for manslaughter, charging an imprisonment and a neglect to supply food, shows an obligation to maintain, and is good. *Reg. v. Edwards*, 8 Car. & P. 611.

And where the death of an aged, infirm woman is caused by confining her against her will, and not providing her with food and clothing, fuel and medicines, and other necessities, and not allowing her the enjoyment of the open air, in breach of an alleged duty, if the neglect is so willful and gross as to warrant the inference that the person confining her contemplates her death, he is guilty of murder; but if it is occasioned by his negligence, not contemplating death, it is manslaughter only. *Reg. v. Marriott*, 8 Car. & P. 425.

And where an elderly woman was incapable, through illness, of attending to her own wants, or obtaining assistance, and a niece of full age, living with her and supported by her, receiving and having access to articles of food during the time, failed to supply either food, or medical attendance, or nursing to her aunt, or to make her condition known, whereby her death was accelerated,—the niece is guilty of manslaughter, it being her duty, under the circumstances, to supply the wants of the deceased. *Reg. v. Instan*, 62 L. J. M. C. N. S. 86 [1893] 1 Q. B. 450, 41 Week. Rep. 368, 17 Cox C. C. 602, 57 J. P. 282, 5 Reports, 248, 68 L. T. N. S. 420.

And an overseer of the poor who had under his care a poor person belonging to his township, for whom he had neglected or refused to provide necessary food, whereby she was reduced to a state of extreme weakness, and afterwards, through want of such reasonable and necessary food, she died, may be held criminally responsible for such death. *Rex v. Booth*, 1 Russ. & R. C. C. 47, note.

And a relieving officer upon whom is imposed the duty to give prompt medical assistance, on application, to destitute persons, in cases of urgent necessity, cannot excuse himself from criminal liability for refusing such assistance, from which death results, on the ground that the applicant was employed at wages or other remuneration, when he was in fact destitute. *Reg. v. Curtis*, 15 Cox C. C. 746.

But the act of a deputy warden in taking a person against his consent and putting him into a room and keeping him there without necessities, by reason of which his death is occasioned, does not constitute murder. *Rex v. Hugins*, 2 Strange, 882, 2 Ld. Raym. 1574.

It has been held, however, that a nurse of an infant, knowing that laudanum is poison and likely to kill, who gives the infant enough of it to kill it, and the infant dies therefrom, is guilty of murder in the absence of anything to qualify the presumption of law that everyone intends the natural and ordinary consequences of his acts. *State v. Leak*, 61 N. C. (Phill. L.) 450.

But in *Ann v. State*, 11 Humph. 159, it was held that one who, without intent to effect mischief, administers laudanum to an infant with the intent to procure sleep, and, contrary to expectations, it causes death, the act having been done heedlessly and incautiously, is guilty of manslaughter only, and not murder.

1. In other miscellaneous matters.

The general rules above given, and their application in particular classes of cases, seem to control and obtain, also, in all other cases and classes of cases.

Thus, where it was the duty of a person to place a stage over the mouth of the shaft of a mine, and he neglected to perform it, and, in consequence of such neglect, a truck full of bricks fell into the shaft killing a person therein, he is guilty of manslaughter; it being possible to commit the crime of manslaughter by acts of omission as well as commission. *Reg. v. Hughes*, 7 Cox C. C. 301, 26 L. J. M. C. N. S. 202, Dears. & B. C. C. 248, 3 Jur. N. S. 696.

And persons who threw stones into a mine, 61 L. R. A.

breaking the scaffolding therein, in consequence of which a corf in which a person was descending into the mine struck a beam on which the scaffolding had been supported, and was overturned, and the person was precipitated into the mine, thereby losing his life, are guilty of manslaughter: where the stones were of a size and weight sufficient to knock away the scaffolding, and the probable consequence was that, if the beam only was left, the corf would strike against it, and would upset it and occasion death or injury, though the act was one of mere wantonness and sport. *Fenton's Case*, 1 Lewin C. C. 179.

So, a man, appointed to superintend a steam engine employed in a colliery for the purpose of raising coal from the mines, who leaves such engine in charge of an incompetent person known by him to be so, is guilty of manslaughter, when a death results from mismanagement by the incompetent person. *Reg. v. Lowe*, 4 Cox C. C. 449, 3 Car. & K. 123.

And one whose duty it is, as ground bailiff of a mine, to cause the mine to be properly ventilated by causing air headings to be put up where necessary, who omits to perform such duty, by reason of which an explosion of fire damp occurs by which a person is killed, is guilty of manslaughter, if by such omission he is guilty of a want of ordinary and reasonable precaution, and if it is his plain and ordinary duty to cause air headings to be made, and a man using diligence would have done it. *Reg. v. Haines*, 2 Car. & K. 368.

But an engineer having charge of an engine which was worked for the purpose of keeping up a supply of pure air in a mine, who neglected his duty so that the engine stopped, and the mine became charged with foul air because of such stopping, which foul air afterwards exploded and caused the death of a miner, cannot be convicted of manslaughter on an indictment which does not allege a duty resting on him which he had neglected to perform. *Reg. v. Barrett*, 2 Car. & K. 343.

So, an iron founder, employed by an oil man and dealer in marine stores to make some cannon to be used on a day of rejoicing, and afterwards to be put into a sailing boat, who, after one of them had burst and been returned to him in consequence of the bursting for repair, sent it back in so imperfect a state that on being fired it again burst, killing a person, is guilty of murder. *Rex v. Carr*, 8 Car. & P. 163, note.

And where a lad, though in frolic and without any intention to do any harm to anyone, took the trap stick out of the front part of a cart, in consequence of which it was upset and the cartman who was in it was thrown out and killed, the lad is guilty of manslaughter. *Rex v. Sullivan*, 7 Car. & P. 641.

And where a man turned upon a common, where there was a public footway, a dangerous horse knowing his propensities, and the death of a child was caused by being kicked by the horse, the negligence in thus turning the horse loose is culpable, and the killing is manslaughter, though the child was not on the footway, but near to it. *Reg. v. Dant*, 10 Cox C. C. 102, Leigh & C. C. C. 567, 34 L. J. M. C. N. S. 119, 11 Jur. N. S. 549, 12 L. T. N. S. 396, 13 Week. Rep. 663.

An indictment against four persons, however, charging that all four of them assumed the work of changing and altering the foundation and supporting walls, or piers, of a building, in order to introduce an electric-light plant,—and that, having so assumed and undertaken the work, the same being under their entire care, charge, control, management, and supervision, it thereupon became their duty to so conduct the performance of the work as not to endanger the stability of the floors of the build-

ing; but that they wilfully and feloniously neglected and omitted to so conduct the performance of a part of the work, whereby the floors fell and a person was killed,—is insufficient in the absence of anything to show what relation each of the defendants bore to the work of the building, or showing that there was, in legal contemplation, a common or like personal duty on the part of each. *Ainsworth v. United States*, 1 App. D. C. 518.

But an indictment, charging, in substance, that the prisoner, by culpable negligence, acts, and omissions in the selection and use of materials for the construction of a building which he was erecting, specifying such acts, occasioned the death of another by the falling of a wall upon him, properly charges manslaughter in the second degree, under N. Y. Penal Code, title 9, chap. 2, § 193, subd. 3, and is in substantial, if not literal, compliance with the New York Code of Criminal Procedure, § 285, neither time, place, nor circumstances being omitted; and a denial of a motion in the arrest of judgment therein is not error. *People v. Buddenstreck*, 103 N. Y. 487, 57 Am. Rep. 766, 9 N. E. 44.

And a piece of brick and mortar from the fallen wall of the alleged defective building is properly admitted in evidence in such case, as confirming the opinion of a competent witness as to the quality of the mortar, and to enable the jurors to understand the difference in effect between the mortar used by the defendant and that properly prepared. *Ibid*.

And an instruction in a prosecution for homicide by poisoning, given upon the theory that the poison in question must have been mixed with whiskey, with intent on the part of accused to commit suicide, and was negligently exposed in such a place and manner that it would be likely to be unconsciously or non-negligently taken by other persons, either as food or drink,—that the person leaving it would be liable for the consequences,—is proper and not objectionable, where the court also charged what such consequences would be,—that he would be guilty of manslaughter. *State v. Lindsey*, 19 Nev. 47, 5 Pac. 822.

It has been held, however, that where a private servant of the owner of a tramway crossing a public road was directed to watch it, and while he was absent from duty an accident occurred whereby a person was killed, this does not constitute such a breach of duty as will make him guilty of manslaughter, since, being a private servant of the owner, there is no public duty due from him to the public. *Reg. v. Smith*, 11 Cox C. C. 210.

And one who made a practice of keeping fireworks in his house for sale, manufacturing them there in part, is not criminally liable for manslaughter for the death of a person caused by the shooting of a rocket across the street setting fire to a house on the opposite side, caused by a negligent act of a servant; there being no connection between the unlawful act of keeping fireworks and the supposed negligence of the servant, which was the proximate cause of the death. *Reg. v. Bennett*, 8 Cox C. C. 74, Bell C. C. 1, 28 L. J. M. C. N. S. 27, 4 Jur. N. S. 1088, 7 Week. Rep. 40.

And where general orders are given by a major general pursuant to which an artilleryman, acting under the orders of a superior officer, discharges a gun in the ordinary and regular course of ball practice, but misses the mark and kills a man, the major general is not guilty of manslaughter. *Reg. v. Hutchinson*, 9 Cox C. C. 555.

But it is culpable, criminal negligence to point a gun at a human being without either knowing or taking some precaution to ascertain that it is not loaded; and when a gun is thus pointed,

and it goes off and kills the person at whom it is pointed, it is manslaughter in the fourth degree. *State v. Morrison*, 104 Mo. 638, 16 S. W. 492.

So, where there are three modes of slinging casks into place, one of which modes is safer than the others, a merchant slinging a cask by one of the less safe methods, which falls causing the death of two women who are passing under it, cannot be convicted of manslaughter, if the mode adopted is reasonably sufficient, though not the safest one. *Rigmaldon's Case*, 1 Lewin C. C. 180.

And one employed as a nurse for another, who afterwards died from Bright's disease of the kidneys, superinduced by the excessive use of alcoholic drink, cannot be held guilty of manslaughter, or other homicide, on the theory that the accused knew that the patient had such a passion for whiskey that his death would result from an unrestrained use of it, and gave it to him to drink, or placed it within his reach, either for the purpose of producing his death, or with such carelessness as to constitute criminal negligence, which would make him responsible for his death, in the absence of anything to show that he ever gave any whiskey to the deceased except in accordance with the directions of the attending physician, or was in any way instrumental in allowing him to obtain it. *People v. Anderson*, 131 Cal. 352, 63 Pac. 668.

And where it was the duty of an attendant in an insane asylum to let hot water into a bath while a patient was therein, and the patient was capable of understanding what was said to him and of getting out of the bath when told to do so, and the attention of the attendant was distracted by a question from a new attendant at an adjoining bath, and he turned on the hot water and told the occupant to get out, but he failed to do so and received burns which caused his death,—it cannot be regarded as gross negligence for which the attendant would be criminally responsible unless he intended to turn on the hot, instead of the cold, water. *Reg. v. Finney*, 12 Cox C. C. 625.

And a woman who knows she is about to be confined, and who wilfully abstains from taking the necessary precautions to preserve the life of the child after its birth, in consequence of which the child dies, is not guilty of manslaughter, but may be found guilty of concealing the birth of the child. *Reg. v. Knights*, 2 Fost. & F. 46.

So, a man who uses artificial means for the purpose of consummating an immoral act with a woman, and thereby inflicts a wound from which her death results, is guilty of manslaughter, if he is careless or negligent either in the manner of doing the act, or in the use of the instrument employed. *State v. Center*, 35 Vt. 378.

And if one prepares ratsbane to kill rats and mice or other vermin, and leaves it in certain places for that purpose with no evil intent, and another finds it and eats it and is killed thereby, it is not felony, but accident, since he who prepares the poison has no felonious intent. *Gore's Case*, 9 Coke, 81a (*dictum*).

And where a person took up a box from a refreshment stall on a pier and wantonly threw it into the sea, and at that instant a person bathing in the sea was passing and the box struck him and caused his death, the civil wrong against the refreshment stall keeper is not such an unlawful act as will render the killing of the bather manslaughter; since a civil wrong committed against another than the person killed ought not to be used as an incident in a criminal case. *Reg. v. Franklin*, 15 Cox C. C. 163.

In the above case *Fenton's Case*, 1 Lewin C.

C. 179, *supra*, was distinguished upon the facts, and said not to be binding upon the court on the facts of the case in hand.

V. Negligent homicide under Texas Code.

Under the Texas statute (Penal Code, arts. 579, 585) the doing of an unlawful act in a negligent manner, from which death results, though with no intention to kill, constitutes negligent homicide of the first degree. *Blalock v. State*, 40 Tex. Crim. Rep. 154, 49 S. W. 100.

And negligent homicide in the second degree, under Texas Penal Code, arts. 584, 587, 589, is where the homicide is committed in the prosecution of an unlawful act, and the unlawful act does not rise above the grade of a misdemeanor. *Robins v. State*, 9 Tex. App. 666; *Howard v. State*, 25 Tex. App. 686, 8 S. W. 929.

In a negligent homicide either of the first or second degree, under that act, there must be no apparent intention to kill. *Clark v. State*, 19 Tex. App. 493; *Aiken v. State*, 10 Tex. App. 610; *Howard v. State*, 25 Tex. App. 686, 8 S. W. 929.

And an instruction in a prosecution for homicide is not insufficient in that it did not submit the law of negligent homicide, where from the evidence the killing was deliberate. *Aiken v. State*, 10 Tex. App. 610.

And to constitute the offense there must have been an apparent danger of causing the death of the person killed, or some other person. *Howard v. State*, 25 Tex. App. 686, 8 S. W. 929.

So, Texas Penal Code, art. 590, providing that when one in the execution of, or in attempting to execute, an act made a felony by the penal law, shall kill another, though without apparent intention to kill, the offense cannot come within the definition of a negligent homicide, is not subject to the objection that it has not named the offense for which the party would have been guilty if he violated that article. *Richards v. State*, 35 Tex. Crim. Rep. 38, 30 S. W. 805.

And the act of a person in attempting to kill a certain person with malice aforethought, who in the attempt kills another, does not come within the definition of negligent homicide. *Richards v. State*, 30 Tex. Crim. Rep. 38, 30 S. W. 805; *McConnell v. State*, 13 Tex. App. 890.

And testimony on the one part tending to show a homicide with malice, and testimony on the other part tending to show a homicide committed in self defense against an attempt to rob, or the appearance of an attempt to rob, indicate, in both cases, an intentional killing; and in such case it is error, in a prosecution therefor, to submit the issue of a negligent homicide defined as a homicide committed by negligence of the party doing it, while in the performance of an unlawful act, there being no intention to kill. *Flynn v. State* (Tex. Crim. App.) 66 S. W. 551.

And evidence in a prosecution for homicide that the defendant attacked the deceased and struck him and pushed him some distance, and made an effort to draw his pistol, which caught in his coat, and then again pushed him some distance, when he again struck him and then again proceeded to push him, deceased making no resistance; and that afterwards a scuffle ensued, deceased then making the first resistance, and in some manner the two became separated, when the defendant drew his pistol and shot deceased,—does not show manslaughter or negligent homicide, and refusal to instruct as to manslaughter and negligent homicide is not error. *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591.

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So, no question of negligent homicide arises from a claim by the defense, in a prosecution for a killing, that he shot deceased unintentionally in an attempt to strike him with his pistol to avoid being himself shot by him. *Teel v. State* (Tex. Crim. App.) 73 S. W. 11.

And where one person shoots another, and the homicide springs out of the mere act of unlawfully carrying a pistol, it is not negligent homicide of the second degree predicated upon the doing of an unlawful act negligently. *Brittain v. State*, 36 Tex. Crim. Rep. 406, 37 S. W. 758.

If a man assaults his wife, however, not intending to kill her, but only to beat her, and in perpetrating this offense he accidentally kills his child, the offense comes within the definition of negligent homicide. *McConnell v. State*, 13 Tex. App. 390.

And where a husband and wife were riding in a carriage with their infant child, and the husband got out and went back to pick up his wife's hat, when she whipped up the horses and was rapidly driving off leaving him, and he fired his pistol, not to shoot at his wife or at his child, but at the horses, for the purpose of cutting one of them down, so as to compel them to stop, and hit and killed the child,—his crime is negligent homicide in the second degree under the provisions of Texas Penal Code. *McConnell v. State*, 22 Tex. App. 354, 58 Am. Rep. 648, 3 S. W. 690.

And when, in such case, the father and wife both testify that the child was killed by the upsetting of the carriage in which they were riding, and he defends upon that theory, he is entitled to an instruction to the jury as to negligent homicide in the first degree under the Texas Penal Code, whatever may be thought of the theory, in view of the fact that the child had a bullet hole through its head. *Ibid.*

So, where one person shoots at another not intending to hit him, but for the purpose of frightening him, at a time when the person shot at is doing nothing to endanger his life or person, but hits and kills him, the offense is not manslaughter, but is negligent homicide of the second degree, under Texas Penal Code, art. 592, subd. 3. *Reddick v. State* (Tex. Crim. App.) 47 S. W. 993.

And so is the offense of one who, without intent to kill, drew his pistol and waved it about, rudely displaying it, near a private residence, at a time when there was a gathering of people at such residence for the purpose of innocent amusement, in a manner calculated to disturb the people there assembled, when it was carelessly and negligently discharged, killing a man. *Brittain v. State*, 36 Tex. Crim. Rep. 406, 37 S. W. 758.

And where a person shot and killed another and at the time of the shooting there was no apparent intention on the part of the defendant to kill the deceased, and the deceased was at the time in open view of the person shooting, who, by the exercise of such care and caution as a man of ordinary prudence would use under like circumstances could have ascertained, before shooting, that he was shooting at a human being, and not a wild animal,—he is guilty of negligent homicide in the first degree. *Bertroug v. State*, 2 Tex. App. 160.

And where the evidence in a prosecution for homicide shows that there was a great deal of firing along the public road, the night of the homicide in question, by parties returning from a dance, and that the accused was one of them, and that he admits firing his pistol five or six times, and states that he may have shot the deceased accidentally,—if one of the bullets fired by him indicted the fatal wound it would raise the question of negligent homicide under the

statute, and a charge on negligent homicide should be given. *Morton v. State* (Tex. Crim. App.) 71 S. W. 281.

And an instruction in a prosecution for negligent homicide is not objectionable as being too restrictive, because it confines the accident to the negligence of the defendant alone in the use of a pistol, and does not combine his acts with the pistol with the act of the person killed in striking the pistol in a scuffle between them; where, if there was any negligence in the case, it was the negligence of the defendant in having and using the pistol as he did. *Warthan v. State* (Tex. Crim. App.) 55 S. W. 55.

So, proof in a prosecution for homicide that a large number of people were engaged in a Christmas frolic, and that one of the number, having a revolver, upon asking of the others, "Shall I turn her loose?" and, upon being told, "Turn her loose," fired several shots, one of which struck and killed a bystander, tends to establish the theory that the offense committed was that of negligent homicide in the second degree; and the law of negligent homicide in the second degree is a part of the law of the case, and failure of the court to give it to the jury is reversible error. *Curtis v. State*, 22 Tex. App. 227, 58 Am. Rep. 635, 3 S. W. 86.

And where, in a prosecution for homicide, it appears that the deceased was shot, and that the accused had a pistol, but no witnesses saw him discharge it, and no one saw the deceased shot, or knew it had been done until his dead body was found, and there was proof that a shot was heard in the vicinity at about the time the defendant passed out from the place where he was, in company with others, going near the place where the body was found, and returned again, the question of negligent homicide fairly and naturally arises to an extent sufficient to require of the court a suitable instruction on that grade of offenses; and there should be submitted to the jury for their determination, not only the question whether the defendant took the life of the deceased, but also the further question, the first being answered in the affirmative, whether or not the killing was done with malice, or, what amounts to the same thing, whether the killing was the result of negligence on the part of the defendant. *Elleston v. State*, 10 Tex. App. 361.

And where one of two girls, in a conflict with a man, held him while the other beat him with a stick, from which his death ensued, the stick not being necessarily a deadly weapon, but one calculated to inflict, and which did inflict, serious bodily injury, it is a question for the jury to determine whether the intention was to kill or merely to beat; and, if the jury find that it was not the purpose to take his life, it would be their duty, under an appropriate instruction, to find no higher grade of offense than negligent homicide; and they should be charged upon the law of negligent homicide in the second degree. *Robins v. State*, 9 Tex. App. 666.

So, evidence that a father and son had an altercation, and the father struck the son with an iron rod, when the son got an axe, and the father procured a pistol and fatally shot the son; and that the father shot when the son was advancing with the axe to scare him and prevent his causing him bodily harm, but without intending to hit him, together with contradictory evidence that the son had laid down the axe and was not advancing at the time, tends to show negligent homicide in the second degree, but does not warrant an instruction as to negligent homicide in the first degree. *Reddick v. State* (Tex. Crim. App.) 47 S. W. 993.

One who is found guilty of negligent homicide is, in effect, acquitted of all grades of culpable

homicide above that of negligent homicide; and, where the evidence shows that he is not guilty of that offense, the prosecution must be dismissed on appeal unless negligent homicide can be established. *Flynn v. State* (Tex. Crim. App.) 66 S. W. 551.

VI. Necessity that negligent act shall be personal.

To render a person guilty of manslaughter for the performance of a negligent act, causing death, the negligent act must have been his individual act. *Hilton's Case*, 2 Lewin C. C. 214. *Reg. v. Gray*, 4 Fost. & F. 1098; *Ainsworth v. United States*, 1 App. D. C. 518.

Thus, where a party having care of a steam engine stopped it and went away, and another party came and set it in motion, by reason of which a person was killed, the party who went away was not the one by whose negligence the death was caused, and is not, therefore, guilty of manslaughter. *Hilton's Case*, 2 Lewin C. C. 214.

So, brakemen upon a railway train who have no control of the engine, but merely perform their specific duties as brakemen, cannot be held responsible for the killing of a person resulting from a neglect of duty on the part of the engineer and fireman. *Anderson v. State*, 27 Tex. App. 177, 3 L. R. A. 644, 11 S. W. 33.

And a brakeman on a railway train is not guilty of negligent homicide in the performance of an unlawful act under Texas Penal Code, art. 579, where, while on an engine in motion, he omits to stop or signal the engineer to stop it after seeing a child on the track, and in consequence of such failure to act the child is killed; since it is the exclusive duty of the engineer and fireman to look out for obstructions and give signals of danger, and the brakeman has no legal duty in the premises. *Ibid.*

And where an accident occurred and the fireman on an engine was killed, and from all that appeared it was the duty of both the engine driver and the fireman, or of one of them, to keep the lookout required; and the fireman might have been keeping a lookout at the time he was killed, in which case it would have been his own neglect, and not that of the engine driver which caused his death,—the engine driver cannot be held guilty of manslaughter. *Reg. v. Gray*, 4 Fost. & F. 1098.

So, an engine driver's first duty is to attend to his engine, and where he is so engaged and has given instructions to the fireman to look out for signals, the latter, and not the driver, is responsible for negligence in failing to see signals, and thereby causing a death. *Reg. v. Birchall*, 4 Fost. & F. 1087.

Nor can a charge for manslaughter be maintained against the trustees of a road, that they had feloniously neglected and omitted to contract for the repair of the road, in violation of an act of Parliament, whereby the same became ruinous and mired, so that a cart in which deceased was riding ran into a hole and he was thrown out, sustaining injuries from which he afterwards died. *Reg. v. Pocock*, 17 Q. B. 34, 5 Cox C. C. 172.

And one who was simply a gang boss, and trusted with the naked execution of his principal's orders, and without any discretion with reference to any of the particulars of that execution, cannot be held responsible for the death of four men killed in a ditch dug along a cable railway structure for the purpose of repairing the structure, by the entire structure, from the cement bed to the surface, careening from its location to the further bank of the trench, which would not have happened if the ditch had been dug in shorter sections, and braced at

short and repeated intervals. *Thomas v. People*, 2 Colo. App. 513, 31 Pac. 349.

As to criminal liability for homicide resulting from negligent acts of a servant, agent, or person under orders of a superior, see *Rex v. Allen*, 7 Car. & P. 153, *supra*, IV, c. 1; *United States v. Farnham*, 2 Blatchf. 528, Fed. Cas. No. 15,071, *supra*, IV, c. 2; *Reg. v. Bennett*, 8 Cox C. C. 74, Bell C. C. 1, 28 L. J. M. C. N. S. 27, 4 Jur. N. S. 1088, 7 Week. Rep. 40; and *Reg. v. Hutchinson*, 9 Cox C. C. 555, *supra*, IV, f.

VII. Effect of negligence of others contributing.

It is no defense to one charged with manslaughter for contributing to the death of another by his negligence, that the death of the deceased was caused by the negligence of others as well as of himself; since, if the death of the deceased was caused partly by his negligence and partly by the negligence of others, they are all guilty of manslaughter. *State v. Shelledy*, 8 Iowa, 477; *Reg. v. Haines*, 2 Car. & K. 368; *Reg. v. Bengé*, 4 Fost. & F. 504.

It is immaterial that others, also, by their negligence contributed to cause a death, where the act of the accused was one of the primary causes. *Reg. v. Bengé*, 4 Fost. & F. 504.

And the act of an employee of a railway company, in taking up the rails of its road at a time when a train was about to arrive, and when it would be impossible to replace them in time to avoid accident, would be the primary cause of the accident, and would render such employee criminally responsible for an ensuing death, though the flagman and engine driver had also been guilty of negligence which had contributed to cause the catastrophe, and though the company had provided other precautions to avoid any impending catastrophe, and such precautions were not observed on this occasion. *Ibid.*

So, to render one responsible for the death of another, under Pa. act of assembly, March 22d, 1865, it is not necessary that the collision and death should be the result exclusively of the defendant's negligence; if his negligence concurred with the negligence of any other employee of the railroad company, and contributed in any measurable degree to the accident, he is, in the eye of the law, as guilty as if his own negligence had caused the collision; if he is negligent, the negligence of another contributing to the result will not excuse him. *Com. v. Cook*, Pa. Co. Ct. 486.

But while a prosecution for manslaughter may be maintained where the death in question was the result of the joint negligence of the accused and others, it must have been the direct result wholly or in part of his negligence, and his negligence must have been wholly or in part the proximate and efficient cause of the death; and this is not the case where the negligence of some other person has intervened between his act or omission and the fatal result. *Reg. v. Ledger*, 2 Fost. & F. 857; *Ainsworth v. United States*, 1 App. D. C. 518.

See also *Reg. v. Swindall*, 2 Car. & K. 230, 2 Cox C. C. 141, *supra*, IV, a; *Warthan v. State* (Tex. Crim. App.) 55 S. W. 55, *supra*, V.

VIII. Application of doctrine of contributory negligence.

The rule has been laid down that a man cannot be held criminally responsible for the death of another partly because of his negligence, where the contributory negligence of the person killed was such that he would not have been civilly liable in an action under the statute by the party injured, if the injury sustained had 61 L. R. A.

not caused death. *Reg. v. Birchall*, 4 Fost. & F. 1087.

And in *Reg. v. Jones*, 22 L. T. N. S. 217, 11 Cox C. C. 544, it was held that one who undertook to take another driving, and drove so unskillfully and negligently that the death of the other was caused, cannot be held guilty of manslaughter therefor, where the deceased interposed in the management of the horse so as to assist in bringing about the accident.

But in *Reg. v. Longbottom*, 3 Cox C. C. 439, it was held that an indictment for manslaughter will lie when death ensues from injuries inflicted by persons engaged in an illegal act, though the person killed may have contributed to his own death by his own negligence; the theory of the case being that there is no analogy between a civil case for pecuniary compensation to the injured person, and a criminal case for the punishment of the guilty; and that there can be no balance of blame in charges of felony.

And the same rule was held in *Reg. v. Swindall*, 2 Car. & K. 230, 2 Cox C. C. 141, and *Reg. v. Kew*, 12 Cox C. C. 355.

So, *Queen v. Williamson*, 1 Cox C. C. 97, holds that where thirteen individuals, children and grown persons, embarked in a boat with two watermen, and the swell of a steamer in motion carried the boat against the bows of another steamer, when one of the watermen called to the passengers to sit still, but, instead of doing so, they all jumped up and tried to lay hold of the steamer, in consequence of which the boat was upset; if the upsetting was due either to negligence, recklessness, or want of skill and proper caution on the part of the watermen, or to the overloading of the boat,—it is sufficient to warrant holding one of the watermen for manslaughter where one of the persons was drowned; and, if the circumstance of the passengers jumping up really caused the accident, the overloading of the boat was immediately productive of such result, so that the accused would be equally answerable in that case.

And *Belk v. People*, 125 Ill. 584, 17 N. E. 744, holds that the act of persons having the control and management of a team of horses attached to a vehicle, in which they were riding, knowing of the danger of collision and the probable consequences flowing therefrom, of recklessly and negligently, or wantonly and wilfully, permitting the horses to collide with the vehicle of another, without using such means as were reasonably at their command to prevent the collision, whereby such other was killed, will be regarded as the proximate cause of such death, so as to hold them penally responsible therefor, without reference to the question whether the driver of the team after which the deceased was riding was guilty of negligence in failing to control his team after the collision.

And in *Reg. v. Jones*, 11 Cox C. C. 544, 22 L. T. N. S. 217, it was held that, even if the doctrine of contributory negligence applies to criminal cases, yet there is no contributory negligence on the part of a person merely getting into a vehicle and allowing himself to be driven, although the driver be perceptibly drunk, which will relieve the driver from criminal liability for negligence causing the other's death.

See also *Rex v. Walker*, 1 Car. & P. 320, and *Reg. v. Swindall*, 2 Car. & K. 230, 2 Cox C. C. 141, *supra*, IV, a.

IX. Pleading and practice.

In charging a negligent homicide it would appear to be necessary to set forth in the indictment the facts constituting the negligence. All other questions as to pleading, practice, evi-

dence, etc., seem to be governed by the rules applicable to homicide generally.

Thus, where an offense was involuntary homicide, and involved no assault, but arose out of some negligence or fault from which death was a consequential result and perhaps not a speedy one, the ordinary forms of averment are deficient, and an indictment therefor must be framed upon the peculiar facts of the case. *People v. Olmstead*, 30 Mich. 431.

But an involuntary manslaughter consisting of a killing in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection, is always included in an indictment for murder, and may be found on a prosecution therefor. *People v. Pearne*, 118 Cal. 154, 50 Pac. 376.

So, where it appears that the killing of a person was occasioned by the negligence of another, expressions used by the other at the time, and very shortly afterwards within a few minutes, are a part of the *res gestæ*, and are admissible in evidence in a prosecution for the killing. *Morris v. State*, 35 Tex. Crim. Rep. 313, 33 S. W. 539.

And the fact that the accused, in a prosecution for manslaughter due to criminal negligence, alleged to have been previously guilty of similar acts of negligence, had been warned that danger would follow such acts, is competent as bearing upon the question of his recklessness. *People v. Thompson*, 122 Mich. 411, 81 N. W. 344.

And that persons other than the one named in the indictment had either been killed or injured by the negligence in question is not inadmissible in a prosecution for manslaughter, because of negligence causing death, since it is competent to show the effect of the negligence. *Ibid.*

But evidence as to the taking of some of the persons injured by the negligence of another to hospitals, and as to how long they were there, is not admissible in a prosecution for manslaughter in negligently killing one of such persons, since it would not help to determine whether he was criminally negligent or not; and where the result was disastrous, and calculated to create resentment against any person who might be thought responsible, and sympathy for those who suffered, it would be inadmissible as likely to create prejudice against the accused. *Ibid.*

And testimony covering a good many occasions, and extending over a long period of time, tending to show other similar acts of negligence, is inadmissible in a prosecution for manslaughter alleging criminal negligence causing death, for the purpose of showing the character of the accused for negligence, where he had described his act and the reasons therefor, and claimed that under the circumstances his act was not negligence. *Ibid.*

And where, through a long trial for negligent homicide, the judge and jury were under the impression that the negligence of the accused at the time of the killing might be presumed if he was shown to be negligent upon prior occasions, and it was not until just before the jury were sent out that they were told that testimony as to previous negligence was competent only as bearing upon the question whether his negligence at the time of the killing was wilful, and the statement was not clearly made,—the wrong done by the admission of such testimony accompanied by the erroneous reason assigned, will not be deemed to have been cured. *Ibid.*

So, it is not necessary in an instruction defining manslaughter resulting from culpable negligence to use the words "culpable negligence." 61 L. R. A.

On the contrary, it would be plainer and better to tell the jury what facts would amount to such negligence. *State v. Haines*, 160 Mo. 555, 61 S. W. 621.

And an instruction in a prosecution for homicide in shooting another, with reference to the rule of law if the shooting was not intentionally done, but was the result of negligence, sufficiently submits to the jury the point as to whether or not the killing was accidental. *State v. Emery*, 78 Mo. 77, 47 Am. Rep. 72.

But where, under the evidence in a prosecution for homicide, it is manifest that the case was one either of deliberate, premeditated murder in the first degree, or of accident constituting justifiable homicide, it is error to instruct the jury as to manslaughter in the fourth degree, committed by means of culpable negligence. *State v. Henson*, 106 Mo. 66, 16 S. W. 285.

And the judge in a prosecution for homicide should not limit the inquiry of the jury in the application of the facts to the crime of manslaughter, by declaring that manslaughter from an accidental, but negligent, killing of a human creature could not arise in the case, though it was a case in which a thief was caught by the owner in the act of stealing, and the owner was killed in an effort to regain the money and arrest the thief. *State v. Davis*, 53 S. C. 150, 31 S. E. 62.

In a prosecution for homicide alleged to have been caused by negligence, it is for the jury to inquire whether the accused exercised proper and ordinary caution. *Com. v. Bilderback*, 2 Pars. Sel. Eq. Cas. 447; *Queen v. Williamson*, 1 Cox C. C. 97.

The questions as to what is carelessness, and what is due care, in a prosecution for involuntary manslaughter, by killing another in doing an unlawful act or in doing a lawful act in an unlawful manner, are matters of fact for the jury. *Com. v. Kuhn*, 1 Pittsb. 13.

See also *Queen v. Cavendish*, Ir. Rep. 8 C. L. 78, *supra*, IV. a; *Reg. v. Pargeter*, 3 Cox C. C. 191; *People v. Thompson*, 122 Mich. 411, 81 N. W. 344; *Com. v. Hartwell*, 128 Mass. 415, 35 Am. Rep. 331, *supra*, IV. b; *United States v. Beacham*, 29 Fed. 284, *supra*, IV. c. 1; *United States v. Taylor*, 5 McLean, 242, Fed. Cas. No. 16,441; *People ex rel. McMahon v. Westchester County Sheriff*, 1 Park. Crim. Rep. 659, *supra*, IV. c. 2; *Reg. v. Markuss*, 4 Fost. & F. 356; *Rex v. Long*, 4 Car. & P. 398; *Rex v. Spiller*, 5 Car. & P. 333, *Reg. v. Whitehead*, 3 Car. & K. 202, *supra*, IV. d. 1; *Com. v. Pierce*, 138 Mass. 165, 52 Am. Rep. 264; *State v. Hardister*, 38 Ark. 605, 42 Am. Rep. 5, *supra*, IV. d. 2; *Reg. v. Edwards*, 8 Car. & P. 611; *Reg. v. Walters*, Car. & M. 164; *State v. Behm*, 72 Iowa, 533, 34 N. W. 319; *Queen v. Pinhorn*, 1 Cox C. C. 70; *Reg. v. Martin*, 11 Cox C. C. 136; *State v. Noakes*, 70 Vt. 247, 40 Atl. 249, *supra*, IV. e. 1; *Territory v. Manton*, 8 Mont. 95, 19 Pac. 387; *State v. Smith*, 65 Me. 257; *People v. Preslar*, 48 N. C. (3 Jones L.) 421; *State v. Lowe*, 66 Minn. 296, 68 N. W. 1094, *supra*, IV. e. 2; *Rex v. Ridley*, 2 Camb. 650; *Reg. v. Crumpton*, Car. & M. 597, *supra*, IV. e. 3; *People v. Buddensieck*, 103 N. Y. 487, 57 Am. Rep. 766, 9 N. E. 44; *State v. Lindsey*, 19 Nev. 47, 5 Pac. 822, *supra*, IV. f; *Glebel v. State*, 28 Tex. App. 151, 12 S. W. 591; *Warthan v. State* (Tex. Crim. App.) 55 S. W. 55; *Curtis v. State*, 22 Tex. App. 227, 58 Am. Rep. 635, 3 S. W. 80; *Elliston v. State*, 10 Tex. App. 361; and *Flynn v. State* (Tex. Crim. App.) 66 S. W. 551, *supra*, V.

X. Conclusion.

As a general rule, the negligent performance of a duty, or the negligent omission to perform

a duty, is regarded as an unlawful act; and, if it results in homicide, it is homicide in the commission of an unlawful act for which the perpetrator is criminally liable, though there was no criminal intent. Ohio, however, and perhaps some of the other states, furnish an exception to this rule resulting from the doctrine there adopted, that there are no common-law crimes. This leads to the holding that a negligent act, or a negligent performance or omission of a duty, is not an unlawful act, and a homicide resulting therefrom is not a homicide in the commission of an unlawful act, for which the perpetrator is criminally responsible; unless such negligent act, or performance, or omission of duty, has been made unlawful or prohibited by statutory law.

The mere fact that a person was negligent, and that a death resulted, however, is not sufficient to establish his criminal liability, under the general rule, for the homicide; the negligence must have been in the performance of, or in the omission to perform, some positive duty imposed upon him by law or by contract.

The degree of a negligent homicide for which one is criminally liable depends upon the character of the negligent act or omission. If the business in which he is engaged is felonious, or if the act or omission is wilful, and probably dangerous to the lives of others, the homicide would be murder; but if the business engaged in is legal, and the homicide results merely from negligence or carelessness in its performance, it is manslaughter.

These rules would appear to be applicable to

all kinds of breaches in performance and omissions to perform positive duties, and have been repeatedly applied to negligence in the use of ways and streets, and in the management of railways and locomotives and vessels, and to the negligent use of drugs and medicines and surgical instruments, and to negligent performance of, or omission to perform, the duty of caring for and maintaining and supporting, existing in the domestic and other relations, as well as to negligence in many other miscellaneous matters.

To render a person criminally liable for negligent homicide, however, the duty omitted or improperly performed must have been his personal duty, and the negligent act from which death resulted must have been his personal act, and not the act of another. But he is not excused because the negligence of someone else contributed to the result, where his act was one of the primary causes, and the negligence of the other did not intervene between his act and the result.

There is a conflict of opinion as to whether the doctrine of contributory negligence applies to relieve from criminal responsibility for negligent homicide, with an apparent majority of the cases in favor of its nonapplication; but the question would seem to be unsettled. And the only difference in pleading and practice in such cases from that in cases of ordinary homicide appears to be that the facts constituting the negligence complained of are required to be set forth in the indictment.

F. H. B.

MARYLAND COURT OF APPEALS.

INSURANCE COMPANY OF NORTH AMERICA, *Appt.*,

v.

Anna M. SCHALL *et al.*, Admsrs., etc., of
Thomas B. Schall, Deceased.

(96 Md. 225.)

1. **Failure to provide for an appeal from the order of removal** does not render void a statute providing that, when a plaintiff is entitled to some relief, but not in the court in which he has brought his action, the cause may, in the discretion of the court, be removed to the proper tribunal, where such amendments may be made as may be necessary to a hearing of the case according to its practice.
2. **Equity will not compel the issuance of a policy of insurance** in accordance with the provisions of a contract to insure, where the property intended to be covered has been destroyed, and its owner has received from other insurers more than its value.
3. **Specific performance of a contract to issue a policy of insurance will not**

NOTE.—The application of equitable principles in the above case brings it within the ordinary rule which denies recovery on insurance policies for more than the actual loss, although the policy in question was one of marine insurance, and valued policies are upheld in cases of that kind. On the question how far the aggregate of several policies is binding as to the value of insured property, see *Havens v. Germania F. Ins. Co. (Mo.)* 26 L. R. A. 107, and *note*.

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be granted where it was effected by agents of the property owner, and was not binding on him without ratification, and he did not ratify it until after the loss, when it was to his interest to do so.

(January 15, 1903.)

APPEAL by defendant from a judgment of the Circuit Court of Baltimore City in favor of plaintiffs in an action brought to enforce specific performance of an agreement to issue a marine insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. George Whitelock and Edward L. Keonts, for appellant:

By the act of 1896 the legislature has effected a complete revolution in the rights of parties litigant in courts of original common-law jurisdiction.

The legislature cannot add to the powers of the court of appeals.

Sevilskey v. Wagus, 76 Md. 336, 25 Atl. 468.

Certainly it cannot subtract from the appellate jurisdiction of the court.

Crane v. Meginnis, 1 Gill & J. 472, 19 Am. Dec. 237; *State v. Northern C. R. Co.* 18 Md. 210.

The insured may elect between a suit in equity or an action at law.

Wood, Fire Ins. 2d ed. p. 34; *Phoenix Ins. Co. v. Ryland*, 69 Md. 446, 1 L. R. A. 548, 16 Atl. 109.

The measure of damages is the same at law and in equity.

Kerr, Ins. p. 60; 2 Sedgw. Damages, 8th ed. p. 574; *Morris v. Sumner*, 2 Wash. C. C. 203, Fed. Cas. No. 9,837.

The contract was for "valued insurance," and was properly treated by the lower court as conclusive of the amount recoverable.

Schaefer v. Baltimore Marine Ins. Co. 33 Md. 117.

The appellees, if entitled to relief at all, had a plain and adequate remedy at law.

Orient Mut. Ins. Co. v. Andrews, 68 Md. 378, 7 Atl. 693.

The record does not present a case in which the plaintiff is entitled to some remedy, but not in the particular court to which he first applied.

Dunnock v. Dunnock, 3 Md. Ch. 150.

The application does not constitute a contract.

Kerr, Ins. p. 63; *Delaware State F. & M. Ins. Co. v. Shaw*, 54 Md. 551.

The undertaking was indefinite as to the liability of the insured.

Pom. Spec. Perf. of Contracts, 2d ed. §§ 166 et seq.; *Gelston v. Sigmund*, 27 Md. 344; *Duvall v. Myers*, 2 Md. Ch. 405; *Orient Mut. Ins. Co. v. Wright*, 23 How. 411, 16 L. ed. 529; Fry, Spec. Perf. 3d ed. p. 137; *Schaefer v. Baltimore Marine Ins. Co.* 33 Md. 109.

The lower court, in the exercise of its sound discretion, should have refused to grant the relief prayed.

Thistle Mills Co. v. Bone, 92 Md. 58, 48 Atl. 37; *Bamberger v. Johnson*, 86 Md. 41, 37 Atl. 900; *Penn v. McCullough*, 76 Md. 231, 24 Atl. 424.

The American clause provides that, if the insured shall have made any other insurance upon the premises aforesaid prior in date to this policy, then this insurance company shall be answerable only for so much of the amount as such prior insurance may be deficient toward fully covering the premises hereby insured.

Whiting v. Independent Mut. Ins. Co. 15 Md. 297.

Regardless of representations as to the existence or nonexistence of insurance on the 25th day of February, 1896, if prior insurance was then outstanding more than three times in excess of the invoice value of the cargo, no waiver, abandonment, renunciation, alteration, or compromise by the insured and the first insurer of the policy could possibly supply the subject-matter upon which the second policy might operate, especially after that very subject-matter had been itself destroyed.

Schaefer v. Baltimore Marine Ins. Co. 33 Md. 118; *Seamans v. Loring*, 1 Mason, 135, Fed. Cas. No. 12,583.

Messrs. Robert H. Smith and Alfred S. Niles, for appellees:

The question whether a case has sufficient merit to justify the trial judge in sending it to another court is one directed entirely to the discretion of the judge, and is uncontrollable by the court of appeals.

Brehm v. Sperry, 92 Md. 408, 48 Atl. 368; *George v. Reed*, 101 Mass. 378. 61 L. R. A.

A contract to insure is specifically enforceable in equity.

Phoenix Ins. Co. v. Ryland, 69 Md. 437, 1 L. R. A. 548, 16 Atl. 109; *Patapsco Ins. Co. v. Biscoe*, 7 Gill & J. 293, 28 Am. Dec. 219.

The Boston insurance company never had insurance on anything but a one-half interest in the cargo actually shipped.

The "American clause" can have no application except in case of double insurance.

Whiting v. Independent Mut. Ins. Co. 15 Md. 297.

Double insurance is where the insured makes two insurances upon the same risk and the same interest.

3 Kent, Com. p. 280; Phillips, Ins. § 359; *Howard Ins. Co. v. Scribner*, 5 Hill, 302; *Baltimore F. Ins. Co. v. Loney*, 20 Md. 20; *Whiting v. Independent Mut. Ins. Co.* 15 Md. 313; *Hanover F. Ins. Co. v. Brown*, 77 Md. 64, 25 Atl. 989, 27 Atl. 314.

Fowler, J., delivered the opinion of the court:

The plaintiffs in this cause are the administrators of John W. Schall, deceased, and the defendant is the Insurance Company of North America. The former brought an action of assumpsit against the latter in the court of common pleas of Baltimore city on an alleged contract to insure a cargo of coconuts. Upon the trial it appeared, however, that the defendant company had never issued a formal policy, but had simply given what is called a "binder," which was signed by both parties, or their representatives, and indicates that a special policy would be issued when the necessary declarations of value have been given in. At the conclusion of the case the court, at the instance of the defendant, instructed the jury that the plaintiffs were not entitled to recover; but, instead of submitting to a judgment of *non pros.*, they availed themselves of the provisions of the act of 1896 (chap. 229), which has been codified as § 42, art. 26, and § 107a, art. 75. By this act it is provided that in every case at law or equity in which it shall appear the plaintiff is entitled to some relief or to some remedy, but not in the particular court in which the suit is brought, the plaintiff shall not on that account be nonsuited, or the case dismissed, but the case may, in the discretion of the court, be removed to such proper court as the nature of the case may require. It is further provided that, upon such removal, such proceedings shall be had, by amendment of the pleadings or otherwise, as may be necessary and proper, according to the practice of the court to which the case has been removed. The learned judge of the court of common pleas, after hearing both sides, ordered that the case be removed to the circuit court of Baltimore city, upon the theory that the binder or application sued on in this case is not a complete policy, and that the remedy, if any, was in a court of equity. *Delaware State F. & M. Ins. Co. v. Shaw*, 54 Md. 546. Accordingly the plaintiffs filed their bill on the 4th of February, 1902, in the circuit court for Baltimore city.

1. The first question presented arises upon

the objections of the defendants to the validity and constitutionality of the act of 1896, chap. 229. This objection, as we understand, is based upon the ground that there is no right of appeal secured to the litigants from the order of removal, and that, therefore, while a party, under the Constitution, is entitled to a final judgment in the court where he brings his case, and to an appeal from that judgment to this court, the act of 1896 substitutes for these rights the arbitrary discretion of the lower court. It is well settled that the right of appeal to this court exists in such cases only as the legislature makes provision for, and hence when the act of 1896 conferred upon the court below the power, in his discretion, to remove the case from a court of law to a court of equity, and failed to provide for an appeal, none can be taken, for two very plain reasons: First, because no provision is made for it; and, second, because no appeal lies from the discretionary action of the trial judge. We are unable to discover any constitutional objection to the legislation in question. The act was passed evidently in pursuance of the laudable purpose on the part of the courts and the bar, with the aid of the legislature, to prevent delay in legal proceedings and to promote justice. Experience may, perhaps, demonstrate that further legislation may be desirable to effect the object sought to be attained by the act, but we are unable to agree with the severe criticism passed upon it by the counsel for the defendant. In *Massachusetts* the act of 1865 (chap. 179) was passed authorizing the supreme judicial court and the superior court to allow amendments changing a suit at law into a proceeding in equity if the same be necessary to enable the plaintiff to sustain the action for the cause for which it was originally intended to be brought. As far as we have been able to ascertain, the validity of this act has never been challenged. In the case of *George v. Reed*, 101 Mass. 378, it is said that this statute (1865) "extends the power to grant amendments but a single step. It confers no new jurisdiction."

2. We will now consider the merits of the case, as disclosed by the bill, answer, and testimony. In the first place, it should be stated that the bill is one for specific performance, and therefore we must be guided by the well-settled principles of equity applicable to such a case in reaching a conclusion here. It was said in *Bamberger v. Johnson*, 86 Md. 38, 37 Atl. 900,—are the same general doctrine has been repeatedly announced here and elsewhere,—that, in deciding whether a bill for specific performance will be maintained, "the court takes into consideration the conduct of the plaintiff and all the circumstances of the case, and the mere fact that a valid contract exists is not conclusive in plaintiff's favor." And in *O'Brien v. Pentz*, 48 Md. 562, it was held that, in every case where a specific performance is asked, "the question must be whether the exercise of the power of the court is demanded to subserve the ends of justice, and, unless the court is satisfied that it is right 61 L. R. A.

in every respect, it refuses to interfere." With these general rules to guide us, we will proceed to state what, as appears by the record, the case before us is: The bill alleges that Thomas B. Schall, the plaintiffs' intestate, purchased about the 18th February, 1896, a cargo consisting of 370,389 coconuts, and shipped them on board the schooner Percy W. Schall; that, on or about the 25th February, Schall, through George H. Stetson, an insurance broker in New York, applied to the defendant insurance company, at its New York office, for insurance against loss and damage on a one-half interest in said cargo, and that said application was accepted by defendant in writing. This accepted application, binder, or contract to insure, or whatever it may be called, was signed by the agents of defendant and Mr. Stetson, claiming to represent Schall, the assured. It is set out in full several places in the record, but, in the view we have formed, it will not be necessary to reproduce it here. It provided, however, for insurance of one fourth, instead of one half, the cargo. On the voyage from Porto Rico to Baltimore the schooner took fire, and both she and her cargo were thereby wholly lost. After the loss the assured, Schall, through his broker, Stetson, declared, according to the usage in such cases, the value of one fourth interest, viz., \$1,677.50, which was the invoice price, with 10 per cent added, and demanded from the defendant a special policy of insurance, such as was contemplated by the written application: but it refused, and still refuses, to comply with the demand. The bill alleges that the assured has complied in all respects with his duty in the premises, and during his lifetime was always ready to pay the defendant the premium due for said insurance, and the plaintiffs tender themselves ready to do the same, and in all other respects to comply with the terms of said application for insurance. The prayer is that the defendant may be required to issue and deliver its policy on one-quarter interest in the cargo mentioned, and that it be required to pay the plaintiffs the said sum of \$1,677.50,—one fourth of the invoice value, and 10 per cent added,—with interest. The answer of the defendant admits the cargo was shipped as alleged, and that it was destroyed at sea, and the execution of the application of the 25th February for insurance, but denies that Stetson, the broker, represented Schall. We deem it unnecessary to refer to all the defenses set up by the answer, but it will suffice for the present purpose to call attention to some of the allegations of the tenth paragraph, by which it is set forth that at the time of the loss Thomas B. Schall owned a policy in the Boston Marine Insurance Company, covering the whole cargo in question; that on 15th January, 1896, Schall notified J. H. Sirich, who was the manager of the Boston company, to cover under the policy this cargo of coconuts, worth from \$4,000 to \$6,000, and an entry was at that time made in the pass-book; that the cargo was lost about 21st February, 1896, and a few days thereafter

a clerk of Schall, who was then in Porto Rico, received advices that the cargo amounted to 370,389, coconuts, and that he had "figured out" insurance amounting to over \$22,000 on the cargo; that the Boston company, through Sirich, objected to the amount of the risk, and, in the absence of Schall, but apparently with the consent of his clerk, arranged with the defendant to assume a portion (one fourth) of the risk; that between the 25th February, 1896, and the subsequent return of Schall to Baltimore, and after the defendant had agreed to insure, his clerk took the passbook to the Boston company, and the entry therein was changed so as to reduce the liability of that company; in other words, its policy was made, or attempted to be made, to cover only one half, instead of the whole cargo. The contention of the plaintiffs, and some of the witnesses so testify, is that the Boston company never intended to assume more than half the risk; but whether that be so or not, or whether the Boston company's policy was or was not changed without the consent of Schall, we do not feel called upon to determine. Nor need we pass definitely upon the many other questions argued at bar, for it seems to us there is one circumstance which must necessarily prevent the plaintiff from succeeding. And it is this: When the Boston company and the other company settled for their share of the loss, they discovered that the estimate of \$22,000 for the value of the cargo was excessive, and instead of paying some \$11,000, which it would have been required to pay under that excessive valuation, the Boston company paid about half that amount. The other company, it is not denied, paid \$2,500. So that there has been collected by the plaintiffs over \$8,000 on a cargo which was valued in the invoice at \$6,000, and in the Boston company's policy by the assured at \$5,700. If there was nothing else in the case, it is clear, upon the well-settled rules we have already referred to, that a court of equity would not aid the assured in recovering

money claimed upon a concededly excessive valuation. It is evident that if the clerk of the assured had not, by mistake or other wise, "figured out" the valuation \$22,000, instead of \$6,000, the Boston company would not have even attempted to reinsure to protect themselves or the assured; and it certainly is neither reasonable nor just that the plaintiffs should, by their own or their intestate's mistake, be allowed to recover in a court of equity more than the fair value of the property. It is not to be supposed—there is no proof to the contrary—that the cargo was undervalued both in the invoice and the passbook. In the one it is valued at \$6,000, and in the other at \$5,700. But in addition to the fact that the plaintiffs have already received full compensation for the loss of the insured cargo, there are other facts, either conceded or proved by the testimony, which would make a court of equity hesitate to grant relief by way of specific performance in such a case as this. Thus it is clear, on the evidence, that Schall would not have been bound by what his clerk and the Boston company did if he had not, after the loss, when it was his interest to do so, ratified their acts in securing additional insurance. And of course, if he was not bound, mutuality would be wanting, and the defendant could not have been held. Again, the evidence in regard to the entering of the words "½ interest" in red ink on the passbook does not afford a satisfactory explanation, under all the circumstances of this case. If that entry had not been placed there, the policy of the Boston company would have covered the whole cargo, and under the protection of the provisions of the American clause, which was contained in the defendant's policy, it would have been relieved of all liability.

Without prolonging this opinion, our conclusion is that the plaintiffs are not entitled to relief in a court of equity.

Decree reversed, with costs, and bill dismissed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

O. S. HUSET, *Plff. in Err.*,

v.

J. I. CASE THRESHING MACHINE COMPANY.

(120 Fed. 865.)

*1. It is the general rule that a contractor, manufacturer, or vendor is

*Headnotes by SANBORN, Circuit Judge.

not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles.

2. An act of negligence of a manufacturer or vendor, which is imminently dangerous to human life or health, and which occurs in the preparation or sale of articles, like foods and poisons, whose primary use is to preserve, destroy, or affect life and health, is actionable by parties who have no con-

NOTE.—As to liability of manufacturer or seller of dangerous article to person injured thereby where there is no privity of contract between them, see *Schubert v. J. R. Clark Co.* (Minn.) 15 L. R. A. 818, and *note*; *Helzer v. Kingsland & D. Mfg. Co.* (Mo.) 15 L. R. A. 821; *State use of Hartlove v. Fox* (Md.) 24 L. R. A. 679; *Lewis v. Terry* (Cal.) 31 L. R. A. 220; *Ives v. Welden* (Iowa) 54 L. R. A. 854; and 61 L. R. A.

McCaffrey v. Mossberg & G. Mfg. Co. (R. I.) 55 L. R. A. 822.

As to liability for injury to third person by sale of dangerous food or drug, see *Craft v. Parker, W. & Co.* (Mich.) 21 L. R. A. 139, and *note*; *Meyer v. King* (Miss.) 35 L. R. A. 474; *Wise v. Morgan* (Tenn.) 44 L. R. A. 548; and *Peters v. Jackson* (W. Va.) 57 L. R. A. 428.

tractual relations with the manufacturer or vendor.

3. An owner who impliedly invites third parties to use defective machines or instruments manufactured or furnished by him is liable to them for injuries resulting from his negligence in the manufacture or care of them.
4. A manufacturer or vendor who, without giving notice of its character or qualities, supplies or delivers to another a machine or article which, at the time of delivery, he knows to be imminently dangerous to the life or limbs of anyone who may use it for the purpose for which it is intended, is liable to anyone who sustains injury from its dangerous condition, whether he has any contractual relations with him or not.

(February 26, 1903.)

ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been inflicted upon plaintiff by reason of a defective machine manufactured and sold by defendant. *Reversed.*

Statement by **Sanborn**, Circuit Judge:

This writ of error was sued out to reverse a judgment sustaining a demurrer to the amended complaint of O. S. Huset, the plaintiff below and the plaintiff in error here, in an action for personal injury, which he brought against the J. I. Case Threshing Machine Company, a corporation. These are the facts which the complaint discloses: The threshing machine company was a corporation engaged in the manufacture and sale of threshing rigs, which consisted of an engine, a separator, a band-cutter, and self-feeder. The band-cutter and self-feeder consisted of a series of fast revolving knives covered with a sheet-iron covering and a frame designed to fit into the front of the separator in which the cylinder was located. The cylinder was made of iron and steel about 48 inches in length and 20 inches in diameter, set with rows of steel teeth and spikes projecting about 2 inches, and so placed as to pass between similar teeth in a concave frame in front of and under the cylinder. When the machine was in operation, this cylinder revolved at a very high rate of speed with great force, and threshed the grain. The self-feeder and band-cutter was designed to be fastened to the separator, and its sheet-iron covering fitted onto the front of the separator just above and over the front part of the cylinder so as to cover the cylinder completely. The object and design of the defendant in placing this covering over the cylinder were that it should be used by any person who might operate the machine to walk upon in passing from the top of the main part of the thresher to the self-feeder. This sheet iron covering was made without any support, and was so pliable and easily bent that it was incapable of sustaining the least weight, and would necessarily bend and collapse when subjected to the weight of

any man who might walk or step upon it. It was necessary for the operator to walk over the covering of the cylinder in operating the machine. This machine, covered in this way, was imminently and necessarily dangerous to the life and limbs of those who operated it, and it was well known to be thus dangerous by the defendant when it shipped the same and supplied it to the purchaser, J. H. Pifer; but this dangerous condition was of such a nature as not to be readily discovered by persons engaged in operating the machine or working thereon, but was concealed, and thereby rendered more dangerous still. On August 25, 1901, the defendant sold this threshing outfit to J. H. Pifer, who started to operate it on the next day, and employed the plaintiff, O. S. Huset, as a laborer to assist him in running it. It became the duty of the plaintiff to walk upon the top of the machine over the cylinder while it was in operation in order to superintend the pitching of bundles into the self-feeder, to prevent its clogging, and to oil the bearings of the parts of the cylinder and band-cutter. When he walked upon the covering of the cylinder this covering sank so as to come in contact with the cylinder, and the plaintiff's right foot was caught thereby, and his foot and leg were drawn into it and crushed to a point above the knee joint, so that it was necessary to amputate the leg above the knee. The demurrer to this complaint rests upon the ground that the defendant owed no duty to the plaintiff, who was a stranger to the transaction between the defendant, the manufacturer and vendor of the threshing machine, and the vendee, Pifer. The court sustained the demurrer, and dismissed the action.

Argued before **Caldwell**, **Sanborn**, and **Thayer**, Circuit Judges.

Messrs. Halvor Steenerson and Charles Loring, for plaintiff in error:

If harm may come reasonably and probably to anyone from another's action, there is a duty on him so to act as to avoid such injury.

Peters v. Johnson, 50 W. Va. 644, 57 L. R. A. 428, 41 S. E. 190; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L. R. A. 818, 51 N. W. 1103; *Empire Laundry Mach. Co. v. Brady*, 164 Ill. 58, 45 N. E. 486; 1 Thomp. Neg. § 820; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Bright v. Barnett & R. Co.* 88 Wis. 299, 26 L. R. A. 524, 60 N. E. 418; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621.

The machine as constructed by the defendant in error constituted a veritable trap.

Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; *National Sav. Bank v. Ward*, 100 U. S. 204, 25 L. ed. 624; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Elkins v. McKean*, 79 Pa. 493; *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; *Bragdon v. Perkins-Campbell Co.* 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63

Fed. 400; *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Langridge v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 337; *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 271, 272, 37 L. ed. 728, 732, 13 Sup. Ct. Rep. 837; *George v. Skivington*, L. R. 5 Exch. 1.

There was deceit in the case at bar, sufficient to bring it within the rule of *Langridge v. Levy*.

1 Jaggard, Torts, p. 573; *North Eastern R. Co. v. Wanless*, L. R. 7 H. L. 12; *Farrant v. Barnes*, 11 C. B. N. S. 553; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 615, 15 L. R. A. 821, 19 S. W. 630; 6 Am. & Eng. Enc. Law, 2d ed. p. 611.

Messrs. Cary, Upham, & Black, for defendant in error:

The manufacturer of an article is not liable for negligence to a third person, between whom and the manufacturer there is no privity.

Goodlander Mill Co. v. Standard Oil Co. 27 L. R. A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Longmeid v. Holliday*, 6 Exch. 761; *Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1035; *Collis v. Selden*, L. R. 3 C. P. 495; *Bragdon v. Perkins-Campbell Co.* 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109; *LeLievre v. Gould* [1893] 1 Q. B. 401; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L. R. A. 821, 19 S. W. 630; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746, 15 S. W. 1112; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322, 21 Atl. 244; *Daugherty v. Herzog*, 145 Ind. 255, 32 L. R. A. 837, 44 N. E. 457; *Burke v. DeCastro & D. Sugar Ref. Co.* 11 Hun, 354; *Swan v. Jackson*, 55 Hun, 194, 7 N. Y. Supp. 821; *Barrett v. Singer Mfg. Co.* 1 Sweeny, 545; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *Neoker v. Harvey*, 49 Mich. 517, 14 N. W. 503; *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 381, 55 L. R. A. 822, 50 Atl. 651.

The complaint fails to state a cause of action for deceit.

Actionable deceit is a breach of the duty one owes another to forbear to mislead him to his damage by false and fraudulent representations.

Bigelow, Torts, § 1; *Ming v. Woolfolk*, 116 U. S. 599, 29 L. ed. 740, 6 Sup. Ct. Rep. 489; *Watson v. Poulson*, 15 Jur. 1111; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436; *Merchants' Bank v. Armstrong*, 65 Fed. 932; *Peek v. Gurney*, L. R. 13 Eq. 79, L. R. 6 H. L. 377; *Hunnewell v. Dunbury*, 154 Mass. 286, 13 L. R. A. 733, 28 N. E. 267; *Hoyt v. Hanbury*, 128 U. S. 584, *sub nom. Shields v. Hanbury*, 32 L. ed. 565, 9 Sup. Ct. Rep. 176.

Mere silence does not amount to deceit unless it is in violation of a duty to speak, and is for the purpose or with the intent of deceiving another.

14 Am. & Eng. Enc. Law, 2d ed. p. 68; *DeWitt v. Berry*, 134 U. S. 306, 313, 33 L. ed. 896, 899, 10 Sup. Ct. Rep. 536.

An express warranty of certain qualities

excludes an implied warranty of other qualities.

J. I. Case Plow Works v. Niles & S. Co. 90 Wis. 590, 63 N. W. 1013.

Sanborn, Circuit Judge, delivered the opinion of the court:

Is a manufacturer or vendor of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life and limbs of anyone who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use?

The argument of this question has traversed the whole field in which the liability of contractors, manufacturers, and vendors to strangers to their contracts for negligence in the construction or sale of their articles has been contested. The decisions which have been cited are not entirely harmonious, and it is impossible to reconcile all of them with any established rule of law. And yet the underlying principle of the law of negligence, that it is the duty of everyone to so act himself, and to so use his property, as to do no unnecessary damage to his neighbors, leads us fairly through the maze. With this fundamental principle in mind, if we contemplate the familiar rules that everyone is liable for the natural and probable effects of his acts; that negligence is a breach of a duty; that an injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen or reasonably anticipated as the probable effect of such an act is not actionable, because the act of negligence in such a case is the remote, and not the proximate, cause of the injury; and that, for the same reason, an injury is not actionable which would not have resulted from an act of negligence except from the interposition of an independent cause (*Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 949),—nearly all the decisions upon this subject range themselves along symmetrical lines, and establish rational rules of the law of negligence consistent with the basic principles upon which it rests.

Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreements. Hence the limits of liability for negligence are not the limits of liability for breaches of contracts, and actions for negligence often accrue where actions upon contracts do not arise, and *vice versa*. It is a rational and fair deduction from the rules to which brief reference has been made, that one who makes or sells a machine, a building, a tool, or an article of merchandise designed and fitted for a specific use is liable to the person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the manufacturer or vendor in its construction or sale. But

when a contractor builds a house or a bridge, or a manufacturer constructs a car or a carriage, for the owner thereof, under a special contract with him, an injury to any other person than the owner for whom the article is built and to whom it is delivered cannot ordinarily be foreseen or reasonably anticipated as the probable result of the negligence in its construction. So, when a manufacturer sells articles to the wholesale or retail dealers, or to those who are to use them, injury to third persons is not generally the natural or probable effect of negligence in their manufacture, because (1) such a result cannot ordinarily be reasonably anticipated, and because (2) an independent cause—the responsible human agency of the purchaser—without which the injury to the third person would not occur, intervenes, and, as Wharton says, “insulates” the negligence of the manufacturer from the injury to the third person. Wharton, Neg. 2d ed. § 134. For the reason that in the cases of the character which have been mentioned the natural and probable effect of the negligence of the contractor or manufacturer will generally be limited to the party for whom the article is constructed, or to whom it is sold, and, perhaps more than all this, for the reason that a wise and conservative public policy has impressed the courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines and structures which are to be operated or used by the intelligent and the ignorant, the skilful and the incompetent, the watchful and the careless, parties that cannot be known to the manufacturers or vendors, and who use the articles all over the country hundreds of miles distant from the place of their manufacture or original sale, a general rule has been adopted and has become established by repeated decisions of the courts of England and of this country, that in these cases the liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends is limited to the persons to whom he is liable under his contracts of construction or sale. The limits of the liability for negligence and for breaches of contract in cases of this character are held to be identical. The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles. *Winterbottom v. Wright*, 10 Mees. & W. 109; *Longmeid v. Holliday*, 6 Exch. 764, 765; *Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1035; *Collins v. Selden*, L. R. 3 C. P. 495, 497; *National Sav. Bank v. Ward*, 100 U. S. 195, 204, 25 L. ed. 621, 624; *Bragdon v. Perkins-Campbell Co.* 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583, 11 C. C. A. 253, 259, 24 U. S. App. 7, 63 Fed. 400, 406; *Loop v. Litchfield*, 42 N. Y. 351, 359, 1 Am. Rep. 513; *Loosee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 623; *Curtin v. Somerset*, 61 L. R. A.

140 Pa. 70, 12 L. R. A. 322, 21 Atl. 244; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 615, 617, 15 L. R. A. 821, 19 S. W. 630; *Daugherty v. Herzog*, 145 Ind. 255, 32 L. R. A. 837, 44 N. E. 457; *Burke v. De Castro & D. Sugar Ref. Co.* 11 Hun. 354; *Swan v. Jackson*, 55 Hun. 194, 7 N. Y. Supp. 821; *Barrett v. Singer Mfg. Co.* 1 Sweeny, 545; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 381, 55 L. R. A. 822, 50 Atl. 651; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Davidson v. Nichols*, 11 Allen, 514; *J. I. Case Plow Works v. Niles & S. Co.* 90 Wis. 590, 63 N. W. 1013.

In these cases third parties, without any fault on their part, were injured by the negligence of the manufacturer, vendor, or furnisher of the following articles, while the parties thus injured were innocently using them for the purposes for which they were made or furnished, and the courts held that there could be no recovery, because the makers, vendors, or furnishers owed no duty to strangers to their contracts of construction, sale, or furnishing: A stagecoach,—*Winterbottom v. Wright*, 10 Mees. & W. 109; a leaky lamp,—*Longmeid v. Holliday*, 6 Exch. 764, 765; a defective chain furnished one to lead stone,—*Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1035; an improperly hung chandelier,—*Collins v. Selden*, L. R. 3 C. P. 495, 497; an attorney's certificate of title,—*National Sav. Bank v. Ward*, 100 U. S. 195, 204, 25 L. ed. 621, 624; a defective valve in an oil car,—*Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583, 11 C. C. A. 253, 259, 24 U. S. App. 7, 63 Fed. 401, 406; a porch on a hotel,—*Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322, 21 Atl. 244; a defective side saddle,—*Bragdon v. Perkins-Campbell Co.* 30 C. C. A. 567, 58 U. S. App. 1, 87 Fed. 109; a defective rim in a balance wheel,—*Loop v. Litchfield*, 42 N. Y. 351, 359, 1 Am. Rep. 513; a defective boiler,—*Loosee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 623; a defective cylinder in a threshing machine,—*Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 615, 617, 15 L. R. A. 821, 19 S. W. 630; a defective wall which fell on a pedestrian,—*Daugherty v. Herzog*, 145 Ind. 255, 32 L. R. A. 837, 44 N. E. 457; a defective rope on a derrick,—*Burke v. De Castro & D. Sugar Ref. Co.* 11 Hun. 354; a defective shelf for a workman to stand upon in placing ice in a box,—*Swan v. Jackson*, 55 Hun. 194, 7 N. Y. Supp. 821; a defective hoisting rope of an elevator,—*Barrett v. Singer Mfg. Co.* 1 Sweeny, 545; a runaway horse,—*Carter v. Harden*, 78 Me. 528, 7 Atl. 392; a defective hook holding a heavy weight in a drop press,—*McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 381, 55 L. R. A. 822, 50 Atl. 651; a defective bridge,—*Marvin Safe Co. v. Ward*, 46 N. J. L. 19; shelves in a dry goods store, whose fall injured a customer,—*Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; a staging erected by a contractor for the use of his employees,—*McGuire v. McGee* (Pa.) 13 Atl. 551; defective wheels,—*J. I. Case*

Plot Works v. Niles & S. Co. 90 Wis. 590, 63 N. W. 1013.

In the leading case of *Winterbottom v. Wright* this rule is placed upon the ground of public policy, upon the ground that there would be no end of litigation if contractors and manufacturers were to be held liable to third persons for every act of negligence in the construction of the articles or machines they make after the parties to whom they have sold them have received and accepted them. In that case the defendant had made a contract with the Postmaster General to provide and keep in repair the stage-coach used to convey the mail from Hartford to Holyhead. The coach broke down, overturned, and injured the driver, who sued the contractor for the injury resulting from his negligence. Lord Abinger, C. B., said: "There is no privity of contract between these parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." Baron Alderson said: "I am of the same opinion. The contract in this case was made with the Postmaster General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty."

The views expressed by the judges in this case have prevailed in England and in the United States, with the exception of two decisions which are in conflict with the leading case and with all the decisions to which reference has been made. Those cases are *Derlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, in which Smith, a painter, employed Stevenson, a contractor, to build a scaffold 90 feet in height, for the express purpose of enabling the painter's workmen to stand upon it to paint the interior of the dome of a building, and the court of appeals of New York held that Stevenson was liable to a workman of Smith, the painter, who was injured by a fall, caused by the negligence of Stevenson in the construction of the scaffold upon which he was working; and *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L. R. A. 818, 51 N. W. 1103, in which a painter purchased of a manufacturer a stepladder, and one of the painter's employees, who was injured by the breaking of a step caused by the negligence of the manufacturer, was permitted to recover of the latter for the injuries he had sustained. The decision in *Derlin v. Smith* may, perhaps, be sustained on the ground that the workmen of Smith were the real parties in interest in the contract, since Stevenson was employed and expressly agreed to construct the scaffold for their

use. But the case of *Schubert v. J. R. Clark Co.* is in direct conflict with the side-saddle case, — *Bragdon v. Perkins-Campbell Co.* 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109; the porch case, — *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322, 21 Atl. 244; the defective cylinder case, — *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 617, 15 L. R. A. 821, 19 S. W. 630; the defective hook case, — *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 581, 55 L. R. A. 822, 50 Atl. 651, and with the general rule upon which all these cases stand.

It is, perhaps, more remarkable that the current of decisions throughout all the courts of England and the United States should be so uniform and conclusive in support of this rule, and that there should, in the multitude of opinions, be but one or two in conflict with it, than it is that such sporadic cases should be found. They are insufficient in themselves, or in the reasoning they contain, to overthrow or shake the established rule which prevails throughout the English speaking nations.

But while this general rule is both established and settled, there are, as is usually the case, exceptions to it as well defined and settled as the rule itself. There are three exceptions to this rule.

The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. *Dixon v. Bell*, 5 Maule & S. 198; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Elkins v. McKean*, 79 Pa. 493, 502; *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; *Peters v. Johnson*, 50 W. Va. 644, 57 L. R. A. 428, 41 S. E. 190, 191. The leading case upon this subject is *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. A dealer in drugs sold to a druggist a jar of belladonna, a deadly poison, and labeled it "Extract of Dandelion." The druggist filled a prescription of extract of dandelion, prepared by a physician for his patient. The patient took the prescription thus filled, and recovered of the wholesale dealer for the injuries she sustained. In *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298, a recovery was had by a third party for the sale of laudanum as rhubarb; in *Bishop v. Weber*, for the furnishing of poisonous food for wholesome food; in *Peters v. Johnson*, for the sale of saltpetre for epsom salts; and in *Dixon v. Bell*, for placing a loaded gun in the hands of a child. In all these cases of sale the natural and probable result of the act of negligence—nay, the inevitable result of it—was not an injury to the party to whom the sales were made, but to those who, after the purchasers had disposed of the articles, should consume them. Hence these cases stand upon two well-established principles of law: (1) That every one is bound to avoid acts or omissions imminently dangerous to the lives of

others, and (2) that an injury which is the natural and probable result of an act of negligence is actionable. It was the natural and probable result of the negligence in these cases that the vendees would not suffer, but that those who subsequently purchased the deleterious articles would sustain the injuries resulting from the negligence of the manufacturers or dealers who furnished them.

The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner. *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387; *Bright v. Barnett & R. Co.* 88 Wis. 299, 26 L. R. A. 524, 60 N. W. 418, 420; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 241, 12 L. R. A. 746, 15 S. W. 1112. In *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387, the owner of a building employed Osborn & Martin to construct a cornice, and agreed with them to furnish a scaffold upon which their men could perform the work. He furnished the scaffold, and one of the employees of the contractors was injured by the negligence of the owner in constructing the scaffold. The court held that the act of the owner was an implied invitation to the employees of Osborn & Martin to use the scaffold, and imposed upon him a liability for negligence in its erection. The other cases cited to this exception are of a similar character.

The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. *Langridge v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 337; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64, 67; *Lewis v. Terry*, 111 Cal. 39, 31 L. R. A. 220, 43 Pac. 398. In *Langridge v. Levy*, 2 Mees. & W. 519, a dealer sold a gun to the father for the use of the son, and represented that it was a safe gun, and made by one Nock. It was not made by Nock, was a defective gun, and when the son discharged it, it exploded and injured him. The son was permitted to recover, because the defendant had knowingly sold the gun to the father for the purpose of being used by the plaintiff by loading and discharging it, and had knowingly made a false warranty that this might be safely done, and the plaintiff, on the faith of that warranty, and believing it to be true, had used the gun, and sustained the damages. The court said in conclusion: "We therefore think that, as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."

This case was affirmed in 4 Mees. & W. 337, on the ground that the sale of the gun 61 L. R. A.

to the father for the use of the son with the knowledge that it was not as represented was a fraud, which entitled the son to recover the damages he had sustained.

In *Wellington v. Downer Kerosene Oil Co.* the defendants knowingly sold to one Chase, a retail dealer, to be sold by him to his customers as oil, naphtha, a dangerous and explosive liquid. Chase sold the naphtha as oil, the plaintiff used it in a lamp for illuminating purposes, it ignited and exploded, and he recovered of the wholesale dealer. Judge Gray, later Mr. Justice Gray of the Supreme Court, said: "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for an injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault. Thus, a person who delivers a carboy, which he knows to contain nitric acid, to a carrier, without informing him of the nature of its contents, is liable for an injury occasioned by the leaking out of the acid upon another carrier, to whom it is delivered by the first in the ordinary course of business, to be carried to its destination. *Farrant v. Barnes*, 11 C. B. N. S. 553. So, a chemist who sells a bottle of liquid, made up of ingredients known only to himself, representing it to be fit to be used for washing the hair, and knowing that it is to be used by the purchaser's wife, is liable for an injury occasioned to her by using it for washing her hair. *George v. Skivington*, L. R. 5 Exch. 1."

In *Lewis v. Terry*, 111 Cal. 39, 31 L. R. A. 220, 43 Pac. 398, a dealer, knowing a folding bed to be defective and unsafe, sold it to a Mr. Apperson without informing him of the fact. His wife suffered a broken arm and other severe injuries from the negligence of the dealer in the sale of the bed, and recovered of him the damages she sustained.

The supreme court of Missouri, in *Heizer v. Kingsland & D. Mfg. Co.*, in which they held that the manufacturer was not liable to a third person for negligence in the construction of the cylinder of a threshing machine, which burst and injured him, said: "Had the defendant sold this machine to Ellis, knowing that the cylinder was defective, and for that reason dangerous, without informing him of the defect, then the defendant would be liable, even to third persons not themselves in fault. *Shearm. & Redf. Neg.* 4th ed. § 117."

Turning now to the case in hand, it is no longer difficult to dispose of it. The allegations of the complaint are that the defendant prepared a covering for the cylinder of the threshing machine, which was customarily and necessarily used by those who operated it to walk upon, and which was so incapable of sustaining the least weight that it would bend and collapse whenever anyone stepped upon it; that it concealed this defective and dangerous condition of the threshing rig so that it could not be readily discovered by persons engaged in operating

or working upon it; that it knew that the machine was in this imminently dangerous condition when it shipped and supplied it to the employer of the plaintiff; and that the plaintiff has sustained serious injury through this defect in its construction. The case falls fairly within the third exception. It portrays a negligence imminently dangerous to the lives and limbs of those who should use the machine, a machine imminently dangerous to the lives and limbs of all who should undertake to operate it, a concealment of this dangerous condition, a knowledge of the defendant when it was shipped and supplied to the employer of the plaintiff that the rig was imminently dangerous to all who should use it for the purpose for which it was made and sold, and consequent damage to the plaintiff. It falls directly within the rule stated by Mr. Justice Gray that when one delivers an article, which he knows to be dangerous to another person, without notice of its nature and qualities, he is liable for an injury which may be reasonably contemplated as likely to result, and which does in fact result therefrom, to that person or to any other who is not himself in fault. The natural, probable, and inevitable result of the negligence portrayed

by this complaint in delivering this machine when it was known to be in a condition so imminently dangerous to the lives and limbs of those who should undertake to use it for the purpose for which it was constructed was the death, or loss of one or more of the limbs, of some of the operators. It is perhaps improbable that the defendant was possessed of the knowledge of the imminently dangerous character of this threshing machine when it delivered it, and that upon the trial of the case it will be found to fall under the general rule which has been announced in an earlier part of this opinion. But upon the facts alleged in this complaint, the act of delivering it to the purchaser with a knowledge and a concealment of its dangerous condition was so flagrant a disregard of the rule that one is bound to avoid any act imminently dangerous to the lives and health of his fellows that it forms the basis of a good cause of action in favor of anyone who sustained injury therefrom.

The judgment of the Circuit Court must be reversed, and the cause must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

MISSOURI SUPREME COURT.

Robert H. WIDDECOMBE, *Respt.*,
v.

Martha S. CHILES *et al.*, *Appts.*

(.....Mo.....)

Where a small strip of land which lies between a government grant and a river is washed away so that the granted land becomes riparian, and then accretions to the granted land carry the river boundary far beyond its old location, they will belong to the grantee, and no title will vest in the government which it can grant to a third person.

(March 18, 1908.)

A PPEAL by defendants from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Paxton & Rose, for appellants:

When the 8-acre strip went entirely into the river, it never came back, though land may afterward have formed within its original lines. As long as any part of a tract remains it may gain accretion and grow larger, but after it has entirely disappeared it can never come again.

Naylor v. Cox, 114 Mo. 232, 21 S. W. 589; *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617;

NOTE.—As to law of accretions to shore lands, see *De Lassus v. Faherty* (Mo.) 58 L. R. A. 193, and *note*.

As to right to follow accretions across division line previously submerged by action of water, see *Ocean City Assn. v. Shriver* (N. J. L.) 51 L. R. A. 425, and *note*.
61 L. R. A.

Welles v. Bailey, 55 Conn. 292, 10 Atl. 565; *Wallace v. Driver*, 61 Ark. 429, 31 L. R. A. 317, 33 S. W. 641; *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592.

The state of Missouri, by virtue of its sovereignty, owns the bed of the Missouri river, and when this 8 acres went into the river it became the property of the state, and, in no event, could have come back as the property of the United States.

Cooley v. Golden, 117 Mo. 33, 21 L. R. A. 300, 23 S. W. 100; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *State ex rel. Citizens' Electric Lighting & P. Co. v. Longfellow*, 169 Mo. 109, 69 S. W. 374.

When plaintiff's grantor purchased land from the United States, he purchased it subject to the laws of the state of Missouri.

Benson v. Morrow, 61 Mo. 345; *Cummings v. Powell*, 116 Mo. 473, 21 S. W. 1079; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

Mr. J. N. Southern, for respondent:

The title to the land conveyed by the United States government by its patent dated October 13th, 1896, under which respondent claims, and the accretions added thereto, is vested in respondent.

19 Am. & Eng. Enc. Law, p. 353; *Turner v. Donnelly*, 70 Cal. 597, 12 Pac. 469; *Minster v. Crommelin*, 18 How. 87, 15 L. ed. 279.

The change of the channel of the river from a point entirely west of the land described in the patent, from the north side of said land to the south side of the same in the year of 1840 or 1841 up to the year of 1850 or 1851, and the filling up of the

new channel again at the west side where the river first broke through in the restoration of the current to the old channel north of the land in question, did not divest the United States of the title to the land in controversy.

Tiedeman, Real Prop. § 686; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848; *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112; *United States v. Stone*, 2 Wall. 535, 17 L. ed. 767; *Bagnell v. Broderick*, 13 Pet. 450, 10 L. ed. 242; *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 206, 3 N. E. 581; *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276; *Bates v. Illinois C. R. Co.* 1 Black, 204, 17 L. ed. 158.

The land sued for at the time of the government survey and plat, about 1826, and at the time it was conveyed by the government of 1896, lay, and now lies, north of the half-section line and between said land and the river. None of the calls of appellants' patents or deeds reach the river, and they were not by their patents and deed riparian owners. Hence, their claim here cannot be sustained.

Smith v. St. Louis Public Schools, 30 Mo. 290; *Benson v. Morrow*, 61 Mo. 345; *Buse v. Russell*, 86 Mo. 209; *Ellinger v. Missouri P. R. Co.* 112 Mo. 525, 20 S. W. 800; *Sueringen v. St. Louis*, 151 Mo. 348, 52 S. W. 346.

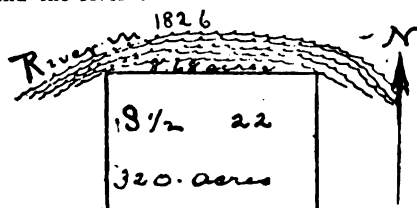
As against respondent's paper title, mere possession by appellant for a period less than is required to put the law of limitation in force is not sufficient defense.

Mulherin v. Simpson, 124 Mo. 620, 28 S. W. 86; *Dunn v. Miller*, 75 Mo. 260; *McDonald v. Schneider*, 27 Mo. 405.

Valliant, J., delivered the opinion of the court:

This is an action in ejectment for possession of N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ N. W. $\frac{1}{4}$, section 22, township 51, range 30, in Jackson county, containing about 230 acres. The land in suit is the result of the land-building propensity of the Missouri river, and the question is whether it was an accretion to the north half of section 22, or the south half.

By the United States survey in 1826, section 22 was a fractional section, consisting of the south half, which was a full half section, and a small strip containing 8.68 acres lying along the north line of the south half and extending to the Missouri river. This strip of 8.68 acres was all there was of the north half, and it lay between the south half and the river thus:



From 1826 to 1853 the river gradually
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changed its bed by cutting away its south bank until it had washed away all of the 8.68 acres forming the fractional north half of the section, and a considerable part of the south half, so that not only was the south bank of the river in the south half of the section, but the whole river flowed through the south half and converted it into a fractional half section. About 1853 the river ceased encroaching, and began to gradually rebuild where it had washed away, and this process continued until 1896, when it had not only rebuilt where it had washed away, but had added more than 200 acres, which would have been in the north half of the section if it had existed when the government survey was made in 1826.

In 1896 plaintiff's grantor obtained a patent from the United States for the fractional north half of this section, containing, in the words of the patent, "eight acres and sixty-eight hundredths of an acre." The claim of the plaintiff is that the accretion was to the $8 \frac{68}{100}$ acre strip, and, if that is true, he is entitled to recover. The defendants claim that the accretion was to the south half of the section, and, if that is true, the judgment should be for them. It was agreed that, if plaintiff was entitled to recover, his damages should be assessed at \$1, and the rents and profits at \$4 a month. The court gave peremptory instructions for the plaintiff, which resulted in a verdict and judgment in his favor, from which the defendants appeal.

The principles upon which the decision of this case must be founded have already been established by previous decisions in this court, although, perhaps, the identical question, at least the question in identical form now before us, has not been answered.

In *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589, the facts were that in 1817, when the government survey was made, there was an island in the river which afterwards became the property of the plaintiff. The land of the defendant in that suit was shown by that survey to be on the north bank of the river, the main channel of which ran between the island and defendant's land. The river made encroachments on defendant's land, thereby pushing its north bank farther north, and taking into its bed a portion of what has been defendant's land. After a while it changed its course, the main channel got around on the south side of the island, and accretions began to form against the north side thereof, and in the course of time these accretions extended across what had formerly been the bed of the river, and covered that space where defendant's land had been before it was washed away. The defendant in that case insisted that when the accretions reached the place where, according to the old survey, his land had been, they became his property, being in fact his land restored. But this court, per Gantt, P. J., said: "On the contrary, if, after the original survey in 1817, a part of said fractional section 4 was washed away by the river, and the main channel of the river covered the place where it originally stood, for any con-

siderable length of time, and afterwards accretions to the island began, and gradually grew, and extended north toward the north bank until they went beyond what was originally the southern or river boundary of said section 4, said accretions thus formed to the island belonged to the owner of the island, and not to the owner of the original fractional section 4." In support of that doctrine the court cites the following cases: *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565; *Buse v. Russell*, 86 Mo. 209; *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396.

The principles there laid down are that the accretions belong to the man who owns the land against which the deposits were made, and that they do not belong to the man who owns land against which such deposits were not made, although they cover a space where his land was before the river washed it away. The only difference between that case and this is that there the original lands of both parties were riparian, and neither at any time ceased to have a visible body above water and a river front, while here the original land which the plaintiff's patent calls for had been washed away entirely, and the land of the defendant did not have a river front until the 8-acre strip had been cut away by the river. Yet the principles deduced from that case are applicable here. If there had been an island in front of this 8-acre strip in 1826, when the survey was made, and if, after the strip had been cut away and the river had encroached far into the south half of the section, accretions had formed against the island and extended over the 8-acre strip and over the washed-away part of the south half, the law as declared in *Naylor v. Cox*, would have given the title to the owner of the island, although the accretions filled the space that had once been filled by the 8-acre strip and the washed-away part of the south half of the section.

The land in dispute in *Naylor v. Cox* became the subject of another suit between the same parties, and reached this court under the style of *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592. In the latter case the evidence seemed to show that the made land in dispute was the result of a tow-head which had arisen out of what had been the bed of the river, and that accretions were made to the tow-head until it reached the mainland. The plaintiff in that case, who was the defendant in the *Naylor* suit, and was the owner of the mainland, contended that, as the new land had come up out of the bed of the river in the space where his land had been before it was washed away, it belonged to him, and not to the owner of the island. But the court held that, as he was the plaintiff in the case, it was not sufficient for him to show that the land was not an accretion to the island, or that it was an accretion to the tow-head where his land had once been, but that, before he could make his title good, he must show that it was an accretion to his mainland, and that the fact that the tow-head came up out of the bed of the river at a

point where his land was, before it was washed away, did not constitute it his land restored.

The facts in the case at bar do not make it necessary for us to decide to whom the accretion would have belonged if it had grown from a tow-head that had come up out of the bed of the river in the place where the 8-acre strip had once been, for there is no evidence tending to show such a condition.

This court, in every case that has come before it involving the subject of accretions to riparian lands, has held that, in order to show title to the accretions, one must show that they were formed by deposits against visible land which he or his grantors owned. *Buse v. Russell*, 86 Mo. 209; *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233; *Price v. Hallett*, 138 Mo. 561, 38 S. W. 451.

The question, in the very form we now have it, has been decided by the supreme court of Connecticut in a case referred to in *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589. The Connecticut court said: "They say, in the first place, that the law of accretion applies only to the case of riparian land, and that, as the plaintiff's lot did not originally bound upon the river, but was conveyed to him by distinct lines and boundaries, at least upon the sides affected by the present questions, it cannot become, by any changes of the river, riparian land. We cannot accede to this claim. If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had been originally such. This follows necessarily from the ordinary application of the principle. All original lines submerged by the river have ceased to exist. The river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relation of the river and the land at any former period. If, after washing away the intervening lot, it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter, but now proximate, lot. Having become riparian, it has all riparian rights. This general principle is recognized by all the text-writers, and by numerous decisions of the English and American courts. The river boundary is treated in all cases as a natural boundary, and the rights of the parties as changing with the change of its bed. The defendants claim, in the next place, that though a riparian owner may take by accretion to the middle of a stream, or, in the case of a navigable river to high-water mark, yet, that being the limit of his original title, and, in the case of a non-navigable river, the line of the adjoining owner, he cannot take such accretions beyond that line. This claim is utterly without support."

That case is referred to with approval in *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617, and *Wallace v. Driver*, 61 Ark. 429, 31 L. R. A. 317, 33 S. W. 641, in both of which also our cases of *Naylor v. Cox* and *Cox v. Arnold* are quoted with approval.

We are cited by respondent to *Crandall v. Allen*, 118 Mo. 403, 22 L. R. A. 591, 24 S. W. 172, as holding contrary to the doctrine above mentioned, but we do not so understand that case. There the plaintiff's land was bordered by the river. It lay north of the land of defendant, and between it and the river. But, in the course of time, so much of the plaintiff's land was washed away as that it brought the river to defendant's land and gave him a river front, but it did not wash away all of the plaintiff's land. Then, when the river changed, it began building land against the defendant's front, and continued the process until the new-made land came in front of plaintiff's land, and there were accretions to the plaintiff's land also. The contention of the defendant was that he was entitled, not only to the accretions to his own front, which were conceded to him, but also to that in front of the plaintiff, because the land-building had its beginning on his land; but it was held that he was entitled only to that formed on his own front. The court said: "We find nothing in the record that questions that this accretion in front of plaintiff's land formed to his shore." The court by no means qualifies what it said in *Naylor v. Cox*, but reaffirms it. *Crandall v. Allen* is itself authority for the proposition that land, though it did not reach the river when it was originally surveyed, or when the party bought it, yet became riparian land when the intervening land is cut away by the river, and that the owner has title to accretions formed against it. In support of the contention that the south half of section 22 could not be considered riparian land because its description on the survey does not call for the river as its boundary, we are referred to *Smith v. St. Louis Public Schools*, 30 Mo. 290; *Benson v. Morrow*, 61 Mo. 345; *Buse v. Russell*, 86 Mo. 209; *Ellinger v. Missouri P. R. Co.* 112 Mo. 525, 20 S. W. 800; *Sweringen v. St. Louis*, 151 Mo. 348, 52 S. W. 346. But in none of those cases had the river cut away the intervening land and given the land in question a river boundary in fact. Those decisions go no farther than to hold that if the call in the deed is for a boundary short of the river, for example, to a street or to a wharf line, the grant is not to the river, and the land granted is not riparian.

This court has not said in either of those cases, and we doubt if any court has ever said, that land acquired under a deed giving metes and bounds which do not reach the river—which in fact did not reach the river when the deed was made—does not become riparian when the intervening land is washed away, and the river in fact becomes a boundary.

It is said, as in support of the plaintiff's claim, that the United States never parted 61 L. R. A.

with the title to the fractional north half of section 22 until 1896, when the patent under which plaintiff claims issued. But that fact does not alter the law of the case. If the government parted with the title to the south half, but held title to the fractional north half until the latter was entirely washed away and accretions formed against the south half, they became the property of the owner of the south half. The owner of the south half holds his title as much from the government as does the owner of the north half; a patent to the south half would carry to the grantee, not only the then present title, but also all the incidents of ownership, of which is the ownership of accretions. The learned counsel for respondent in their brief say: "In the absence of express legislation by Congress, the rules of the common law applied to its (the government's) ownership of this land, and, as plaintiff's grantor obtained the patent for it in 1896, this action should be reviewed as if the government itself at the time of the grant had found the defendants on the survey of this land and had brought an action to evict them." That is true. The common law does apply to the title held by the government (except in certain particulars, as, for example, that it is not affected by prescription or the statute of limitations) in the same manner that it applies to the title held by an individual, and it is by virtue of the rules of the common law, as declared by the courts of this country, that the accretions in question in this suit, if they formed against the south half, after the fractional north half had entirely disappeared in the bed of the river, belonged to the owner of the south half. When this fractional north half was surveyed and offered for sale by the government, it was visible land, capable of being held in possession; it was not in the bed of the river. The government never undertook to sell land the metes and bounds of which were at the bottom of the river, and, if it should sell land bounded by a river, that boundary is subject to shifting the same as if an individual was the seller. The Supreme Court of the United States, speaking of land belonging to the government, has said: "Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting water line exactly as it does up to the fixed side lines." *Jefferis v. East Omaha Land Co.* 134 U. S. 178, 196, 33 L. ed. 872, 878, 10 Sup. Ct. Rep. 518.

And, as bearing on this point, we quote again from that court: "The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation . . . should be given to or imposed upon the terms of the ordinary conveyance which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government where the lands may lie. . . . In our judgment, the grants of the government for lands bounded on streams and other waters, without any

reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie." *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

The learned counsel for appellant in their brief illustrate the proposition under consideration by such an apt hypothetical case that we quote it: "Suppose A owns a tract of land which does not touch the river, but in front of it are lots 1 and 2, which belong to the United States. B buys lot 1, and then the river entirely cuts away both lot 1, belonging to B, and lot 2, belonging to the government, encroaching on A. Then accretions form on A's land, and extend over the places formerly occupied by lots 1 and 2. C

now gets a patent to lot 2. Is C, who bought a spectral title, any better off than B, who bought a real title?"

This case ought to have been submitted to the jury on the theory that, if the fractional north half of section 22 was entirely washed away, making the south half the river front, and the accretions formed against the south half, they become the property of the owner of the south half, even though they extended over and beyond the space where the fractional north half had been when the survey was made.

The judgment is reversed, and the cause remanded to be retried according to the law as herein declared.

All concur.

NEBRASKA SUPREME COURT.

Re Estate of Daniel HOWELL, Deceased.

Sarah M. HOWELL et al., Plffs. in Err., v.

Peter ANDERSON et al.

(.....Neb.....)

*1. Where one is indebted to a person who dies intestate, and afterwards becomes administrator of his creditor's estate, if he be solvent and able to pay the debt at the time of his appointment, or at any time during the administration of his office, and before his final settlement and discharge, he will be required to pay over to the

estate, in cash, the amount of his antecedent debt.

2. If an administrator seeks to be discharged from his official liability for such antecedent debt on account of his insolvency and total inability to pay the same, the burden is upon him to establish that fact.

3. Where it is shown that an administrator at the time of his appointment was hopelessly insolvent, was so during all of the time of his administration, and remained in that condition up to and including the time of his final settlement, he will be permitted to turn over the evidence of his uncollectible debt to his successor, or other proper authority, and will be discharged from his official liability therefor.

*Headnotes by BARNES, C.

(December 3, 1902.)

NOTE.—In the district court of Saunders county Judge Good, whose decision is affirmed by the above case, filed an opinion reviewing the authorities on the subject as follows: "The appeal presents a single question for determination: Did the county court err in requiring the administrator to charge himself with so much cash, instead of a worthless note? To state it differently: Are the sureties of an administrator bound by their obligation to enhance the estate of the deceased by making good the individual note of an insolvent debtor, who is afterwards appointed administrator?"

"By § 255 of the probate act, the final settlement of an administrator's account by the county court is binding upon the sureties, unless appealed from. By § 274, an administrator is made chargeable with 'the whole of the goods, chattels, rights, and credits of the deceased which may come to his possession,' and also all profit and income that may be derived through said office. Section 279 provides: 'No executor or administrator shall be accountable for any debts due the deceased, if it shall appear that they remain uncollected without his fault.' Sections 275 and 276 provide that the administrator shall account for the appraised value of such estate that may come into his hands, and that such administrator shall neither profit nor lose by the advance or decrease in the value of property in his hands. Section 285 provides that, if the executor or administrator fails to pay the amount of money charged to him in his final account, the county court may proceed against him as for contempt.

"In the case of *Jacobs v. Morrow*, 21 Neb. 238, 61 L. R. A.

31 N. W. 739, our supreme court, speaking through Justice Maxwell, said: 'The rule is well settled that the granting administration of an estate to one indebted to the intestate is an extinguishment of the debt. The chose in action becomes converted into a chose in possession, and is transmuted by the mere operation of law, which is equivalent to judgment and execution. The debt is thus satisfied and extinguished. The instant administration is granted, the administrator, being the person to receive and to pay, is considered to have paid the debt, and as holding the amount in his hands as assets; and, the debts having once become assets, no act of the parties can return them back to an obligation.' In a second appeal of the same case, the foregoing doctrine was reiterated. *Brown v. Jacobs*, 24 Neb. 712, 40 N. W. 137.

"An examination of the first case will disclose the fact that it is not in point here, for the reason that the rule announced is *dictum*, as the precise question at bar was not in that case. It seems that Glase was appointed administrator of Gray, deceased, and Jacobs was surety on his administrator's bond. The penalty of this bond was \$10,000. While administrator, Glase had collected more than \$10,000 for which he had failed to account. Glase was removed by the county court, and Jacobs, the surety, was appointed administrator *de bonis non* by the county court. Under this state of facts the supreme court properly held that it was the duty of Jacobs to charge himself with the full penalty of the bond, to wit, the sum of \$10,000. The general rule quoted by Judge

ERROR to the District Court for Saunders County to review a judgment reversing a judgment of the County Court refusing to discharge the responsibility of Anderson as administrator of the estate of Daniel Howell, deceased, upon a note which he owed to the estate. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. V. L. Hawthorne, for plaintiffs in error:

Where one holds money in several capacities, the law will attach to him liability in that capacity in which of right it ought to be held, as, where a man in his own person unites, by operation of law, the characters of debtor and creditor.

Kirby v. State, 51 Md. 383; *State v. Cheston*, 51 Md. 352; *Citizens' Nat. Bank v. Sharp*, 53 Md. 521; *Jacobs v. Woodside*,

6 S. C. N. S. 490; *Griffin v. Bonham*, 9 Rich. Eq. 71.

When a debtor is appointed administrator of his creditor's estate, the debt owing by him to the deceased (if intestate) becomes assets in his hands, as administrator, and the debt is considered as having been paid, and he is chargeable with the amount thereof in the settlement of his accounts.

2 Woerner, Am. Law of Administration, § 311, pp. 651-653; *Hall v. Pratt*, 5 Ohio, 82; *Bigelow v. Bigelow*, 4 Ohio, 147, 19 Am. Dec. 591; *Brown v. Jacobs*, 24 Neb. 712, 40 N. W. 137; *Jacobs v. Morroic*, 21 Neb. 233, 31 N. W. 739; *Winship v. Boss*, 12 Mass. 199; *Hays v. Jackson*, 6 Mass. 149; *Stevens v. Gaylord*, 11 Mass. 259; *Leland v. Felton*, 1 Allen, 531; *Turbell v. Jewett*, 129 Mass. 457; *Choate v. Thorndike*, 138 Mass. 371; *McGaughey v. Jacoby*, 54 Ohio St. 487, 44

Maxwell is no doubt the law, where the administrator is solvent at the time of his appointment. The rule is applied because the administrator cannot sue himself, and when such officer is solvent no injustice would result from the application of the rule. The administrator is required, under such circumstances, to charge his account with an amount of cash equal to his debt, and during the course of the administration of the estate the debt is so treated by the court, and final settlement is made upon this basis. As the precise question under consideration has never been passed upon in this state by our supreme court, we will briefly consider the adjudications of other courts. In the briefs and upon oral arguments, counsel upon either side conceded that the judicial settlement in the county court would be conclusive evidence against the sureties in an action upon the bond of an administrator, and for this reason the rights of the sureties must likewise be considered.

"In the case of *Leland v. Felton*, 1 Allen, 531, after reviewing all of the earlier cases in that state, the supreme court said: 'But it will be seen, from a reference to the adjudicated cases, that the principle upon which the executor and his sureties are held chargeable with his indebtedness to the testator was broader than this, and that the law gives the right to those interested to treat as assets received by the executor the amount of his acknowledged debts to the testator, upon his acceptance of the trust of executor, and returning the same in the inventory as assets of his testator. This legal liability, once assumed, cannot, against the will of those interested in the estate, be devested by resigning the trust. There is no legal ground of defense, in the alleged fact that the executor, at the time of taking said trust, had not sufficient property to pay his debts, including those due from him to his testator, and that one year and four months after taking upon himself the executorship he failed and stopped payment, and soon after made application for the benefit of the insolvent laws. Having taken the office and thereby placed himself in the position of executor, and so continued for this length of time, it is no answer now to charging his indebtedness in his account of administration that, if payment of all his other debts had been enforced, as well as this, he would have been unable to meet them.'

"Ohio is likewise committed to the doctrine adhered to so many years in Massachusetts, as will be seen from an examination of the case of *McGaughey v. Jacoby*, 54 Ohio St. 487, 44 N. E. 231. We quote from the opinion: 'Sure-

ties on the bonds of executors, like other sureties, are presumed to contract in view of the law in force, at the time, controlling their liability; and it is not a hardship to hold them to the obligation which the law attaches to their undertaking when it is entered into in any other sense than that a security debt is a hard debt to pay. . . . The indebtedness of the executor to the testator being regarded by the law as so much money in his hands and assets in that form, with which he is chargeable in the administration of his trust, its proper application and distribution by him to the parties entitled thereto is a duty coming within the conditions of the bond which the executor is required to give, and for the performance of which the sureties undertake to be responsible, so that their liability for his failure to make faithful administration of that fund is within the express terms of their obligation. That this is so, as a general rule, is not disputed, but it is claimed an exception exists, or should be made, where the executor is insolvent at the time of his appointment, and continues to be so until the final settlement of the estate; for the reason, as it is said, that it would be a hardship on the sureties in such a case to hold them for the executor's individual debt to the testator when they contemplated and intended no further responsibility, by their obligation of suretyship, than that for the performance of his duties in the administration of the actual assets which are within his control, and in that respect his indebtedness to the testator is, or should be, on no different footing from that of other debtors.' After reviewing the earlier Ohio decisions on this subject, the court adhered to the Massachusetts rule. Ohio has a statute which is almost identical with § 279, above quoted, and we deem it proper to remark that there is a statute in that state which, in substance, provides that an executor shall be liable for any indebtedness to his testator, 'as for so much money in his hands, and shall apply and distribute the same in the payment of debts and legacies and among the next of kin as part of the personal estate of the deceased.'

"The supreme court of New Hampshire, in the case of *Judge of Probate v. Sulloway*, 68 N. H. 511, 49 L. R. A. 347, 44 Atl. 720, holds that 'sureties upon an executor's bond are liable for the payment of his personal debt to the testator,' although he is insolvent, under a statute making such debt 'assets in his hands for which he shall account in the same way and manner as for a debt against any other person.' New Hampshire has a statute almost identical in

N. E. 231; *Crow v. Conant*, 90 Mich. 247; 51 N. W. 450; *Robinson v. Hodgkin*, 99 Wis. 327, 74 N. W. 791; *Re Walker*, 125 Cal. 242, 57 Pac. 991; *Wright v. Lang*, 66 Ala. 389.

Whether the administrator is solvent or insolvent is immaterial.

Stevens v. Gaylord, 11 Mass. 256; *Winship v. Bass*, 12 Mass. 198; *Ipswich Mfg. Co. v. Story*, 5 Met. 310; *Leland v. Felton*, 1 Allen, 531; *Tarbell v. Parker*, 101 Mass. 165; *Tarbell v. Jewett*, 129 Mass. 457; *Choate v. Thorndike*, 138 Mass. 371; *Bigelow v. Bigelow*, 4 Ohio, 138, 19 Am. Dec. 591; *Hall v. Pratt*, 5 Ohio, 73; *Tracy v. Card*, 2 Ohio St. 431; *McGaughey v. Jacoby*, 54 Ohio St. 487, 44 N. E. 231; *Jacobs v. Morrow*, 21 Neb. 233, 31 N. W. 739; *Brown v. Jacobs*, 24 Neb. 712, 40 N. W. 137; *United States v. Eggleston*, 4 Sawy. 199, Fed. Cas.

language with the Ohio statute above quoted. After reviewing the conflicting decisions of other states upon this question, the court said: "In other words, in New Jersey, as in Vermont, when the executor is solvent and able to pay, and no surety is needed, the surety is responsible for his debt: but when the executor is unable to pay, and a surety's liability would be valuable, the surety is not liable."

"The case of *Wright v. Lang*, 66 Ala. 389, is likewise in point. This state follows the early rule adopted in Massachusetts upon this question. It will be thus seen that Massachusetts, Ohio, New Hampshire, and Alabama are committed to the doctrine of holding the sureties of an insolvent administrator for the payment of his debt due the estate. Cases are cited from Wisconsin, Michigan, Maine, Connecticut, South Carolina, Maryland, and Illinois to sustain the doctrine of the foregoing cases, but a careful examination discloses the fact that they are not in point. These cases simply recognize the general rule quoted from *Jacobs v. Morrow*, 21 Neb. 233, 31 N. W. 739, and have no application to insolvent administrators.

"By § 1447 of the Code of Civil Procedure of the state of California, an executor or an administrator is bound for his debt to the estate in all respects as if the same were cash in his hands. Notwithstanding this statute in that state, it was held that an administrator is to be charged with a personal debt due from him to the decedent as money on hand, but he, as administrator and his sureties are not bound for the debt any further than the administrator has had the means to pay. Hence, if he has, at all times since his appointment, been unable to pay anything on the debt, they are not liable at all.

"The fiction of law that a debt of an administrator is to be considered as money on hand is based upon the supposed ability of the administrator to pay, and will not be allowed to work injustice against an insolvent administrator, by placing him in such a position that he might be charged with contempt or embezzlement for a failure to pay over moneys not received, and which he was unable to pay, or by charging his sureties with liability beyond the faithful discharge of the duties of administrator. . . . All fictions of the law were created to enable the court to do justice. *In fictione juris semper equitas existit*. But where the indulgence of a legal fiction will work injustice, its limit has been found. A court will never allow it to work wrong and

No. 15,027; *Charles v. Jacobs*, 9 S. C. N. S. 205; *Rader v. Yeargin*, 85 Tenn. 486, 3 S. W. 178; *Robinson v. Hodgkin*, 99 Wis. 327, 74 N. W. 791; *Condit v. Winslow*, 106 Ind. 142, 5 N. E. 751; *Webster v. Webster*, 7 Ky. L. Rep. 302; *Swart v. Reveal*, 16 Ky. L. Rep. 503, 29 S. W. 24; *Harker v. Irick*, 10 N. J. Eq. 269; *Soverhill v. Suydam*, 59 N. Y. 140; *Childress v. Childress*, 3 Ala. 752; *Hampton v. Shehan*, 7 Ala. 298; *Wright v. Lang*, 66 Ala. 389; *Re Miner*, 46 Cal. 564; *Davenport v. Richards*, 16 Conn. 310.

Messrs. E. E. Good and G. W. Simpson, for defendants in error:

At common law when a debtor is appointed executor the debt is extinguished, provided his estate is solvent.

When a debtor is appointed administrator suit on the debt is temporarily suspended; and in equity, and by statute in many states,

injustice.' *Re Walker*, 125 Cal. 242, 57 Pac. 991, 73 Am. St. Rep. 40.

"The California statute was taken from New York, and in the case of *Baucus v. Barr*, 45 Hun, 583, the court of the latter state likewise refused to charge the sureties of an insolvent administrator with the amount of his debt, notwithstanding the statute. Upon this question the court said: 'The testator did not by his ownership of this note have money or money's worth. The sureties did not covenant to augment his estate out of their own, but, if this action is sustained, they will be compelled to do it. They agreed, it is true, that the executor should "obey the orders of the surrogate touching the administration of the estate," and the surrogate has ordered that the executors pay the amount of this note. Now the executor cannot obey this order because the estate brought him nothing to do it with. Can he make something out of nothing? No; he has not defaulted, therefore, and the sureties simply agree to make good his default. The order rests upon the condition that the estate brought the means of obedience to his hands, or, but for his default as executor, might have brought them. The order is obeyed, so far as the facts permit its obedience. If it is to be construed as requiring the executor to make something out of nothing, then to the extent of the capacity of the executor to make something out of nothing the sureties are liable for the full execution of that capacity, and they are not shown to have defaulted. But why should the statute compel such an order? Because it is right that the order should operate if there was, is, or shall be, anything for it to operate upon. But if there is nothing the order is harmless. The statute cannot create money; and if the money never existed the statute has nothing to operate upon;' citing *Harker v. Irick*, 10 N. J. Eq. 269; *The Ordinary v. Kershaw*, 14 N. J. Eq. 528; *McCarty v. Frazer*, 62 Mo. 263; *Garber v. Com.* 7 Pa. 265; *Re Piper*, 15 Pa. 533.

"The decision in this case was affirmed by the court of appeals of New York, and is found in 107 N. Y. 624, 13 N. E. 939.

"In the case of *McCarty v. Frazer*, 62 Mo. 263, the supreme court of Missouri, in speaking of the liability of insolvent administrators, said: 'Even had the legislature in express terms provided that debts due to the testator by the executor should be money in his hands, the deduction desired by plaintiff's counsel would not follow, whereby worthless assets are transmuted into cash, unless, indeed, the creative faculty can be accorded to our law-makers, or the touch of Midas to their enactments.' Such

when a debtor is appointed executor or administrator the debt is charged to his account, provided he is solvent.

Crowell, Exrs. & Admsrs. p. 243.

There is neither reason nor sense in saying that, because the debtor of an intestate is appointed administrator, an uncollectible debt due to the intestate is converted into money and immediately becomes a cash asset in his hands, available for the payment of debts or legacies.

Baucus v. Burr, 45 Hun, 583.

All the later cases where the administrator or executor is shown to have been insolvent at the time of his appointment, during the incumbency of his office, and at the time of his discharge, hold that the bondsmen are not liable for his individual debt.

Re Walker, 125 Cal. 242, 57 Pac. 991; *Baucus v. Stover*, 89 N. Y. 1, 107 N. Y. 624, 13 N. E. 939; *Keegan v. Smith*, 25 N. Y. Civ. Proc. Rep. 417, 39 N. Y. Supp. 826; *Re Georgi*, 21 Misc. 419, 47 N. Y. Supp. 1061; *Bachelor v. Schmela*, 49 Neb. 37, 68 N. W. 378; *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5; *McCarty v. Frazer*, 62 Mo. 263; *Harker v. Irick*, 10 N. J. Eq. 269; *Re Piper*, 15 Pa. 533; *Rader v. Yeargin*, 85 Tenn. 486, 3 S. W. 178; *United States v. Eggleston*, 4 Sawy. 199, Fed. Cas. No. 15,027; *State ex rel. McClamrock v. Gregory*, 119 Ind. 503, 22 N. E. 1; *Condit v. Winslow*, 108 Ind. 142, 5 N. E. 751.

Barnes, C., filed the following opinion:

On the 28th day of March, 1899, one Daniel Howell, a resident of Saunders county, died intestate, and on the 1st day of June of the said year Peter Anderson, the defend-

ant in error, was duly appointed administrator of his estate, gave his bond, was duly qualified, and entered upon the performance of his duties as such administrator. It appears that, at the time Howell died, Anderson owed him \$700, which was evidenced by an interest-bearing note executed some time before that date. When Anderson took charge of the estate as administrator, he scheduled and listed his note as a debt due to the estate. After he had collected and disbursed to the several heirs nearly \$4,000 belonging to the estate, a petition was filed by the widow of the deceased with the county judge of Saunders county, asking for his removal. Anderson appeared in answer to a citation based upon the petition, and was allowed to file his report. He thereupon tendered his resignation, and asked leave to turn over to the court all the money and property in his hands belonging to the estate, together with his own note, and prayed for an order relieving him from his said trust. Anderson also filed an answer in which it appeared that at the time he was appointed administrator of the estate he was insolvent; that he remained in that condition during all of the time he acted as such administrator, and was still insolvent, and entirely unable to pay the note in question, or any part thereof, at the time of his proffered settlement. He also asked that the fees which were due him for the performance of his duties as administrator, amounting to about \$134, be applied upon his note, and that the court receive said note, with its unpaid balance, and credit him with it as an uncollectible debt due the estate. The fact of Anderson's insolvency was fully es-

a construction would make the sureties of the executor not only guarantors of his official integrity and competency,—the intentment of the statute,—but guarantors, also, as to the estate of his individual solvency, thus enriching the estate in that proportion. The risks of sureties in cases of this kind are already sufficiently great without burdening them with unsuspected dangers.

"In *Harker v. Irick*, 10 N. J. Eq. 269, the supreme court of that state held: 'If a person becomes surety for one as administrator who at the time is a debtor to the estate, and is insolvent, and is never able to discharge such indebtedness, such surety is not bound for such a delinquency of his principal. He is only bound for the faithful performance of his duties as administrator.'

"In the case of *Rader v. Yeargin*, 85 Tenn. 486, 3 S. W. 178, it was held that 'a surety upon an administrator's bond does not thereby become surety for an antecedent debt due from his principal to the estate; but, if such debt is lost by the subsequent insolvency of his principal, he will be held responsible therefor if it could have been collected off his principal, by one representing the estate in that matter, with due and proper diligence.'

"In *United States v. Eggleston*, 4 Sawy. 199, Fed. Cas. No. 15,027, the court, in construing the word 'assets' under a statute similar to ours, held: 'My own conclusion is that the personal property or choses in action in the hands of an administrator is not assets applicable to the satisfaction—payment—of a demand against the estate within the meaning of 61 L. R. A.

this section; and that nothing is such an asset but money,—that which is a legal tender, and with which a debt can be discharged.'

"In the case of *State ex rel. McClamrock v. Gregory*, 119 Ind. 503, 22 N. E. 1, the supreme court of Indiana held that 'the debt of the administrator is to be accounted for as other debts or assets, and he may show his insolvency during the period of administration in discharge of his official liability.'

"The supreme court of Vermont has also passed upon this question in the case of *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5, where it was held that the surety on the bond of an executor, who is also a legatee, will not be held liable for the failure of the executor to pay a debt due from him to the testator when he was insolvent at the time of his appointment.

"The foregoing cases have been cited and liberally quoted from to show the precise holdings of the different courts upon the question under consideration. As the question of the insolvency of the administrator was not involved in the *Jacobs Case* the court is untrammelled by any former adjudications of our supreme court, and is, therefore, at liberty to adopt the rule which seems to be in accord with well-established principles of justice. The case has been admirably briefed and ably argued by counsel on either side, and the labors of the court reduced to the minimum by the many cases cited. It is familiar law that sureties are considered favorites, and in order to bind them it must be shown that the liability sought to be imposed is within the strict letter of the bond. It is undisputed that the administrator was wholly

tablished, and is now conceded by all parties to this controversy. The county court held against Anderson on his petition for a discharge, and found that the note in question was cash in the hands of the administrator, and made his order accordingly. From this judgment or order Anderson appealed to the district court of Saunders county, where the matter was tried *de novo*, the order of the county court was reversed, a judgment rendered in favor of Anderson, permitting him to turn over to his successor, or to the county judge, his note, after crediting thereon the amount of his fees, as a part of the uncollectible debts due the estate, and an order was entered discharging him from his trust as administrator. From that judgment the widow and heirs of the deceased prosecute error to this court.

Plaintiffs contend that the district court erred in its findings and judgment, in this: That, when a debtor is appointed administrator of his creditor's estate, the debt owing by him to the deceased becomes assets in his hands as administrator; that the debt is considered paid, and he is chargeable with the amount thereof in the settlement of his accounts, without any regard to his financial condition before and during the time he acted as such administrator. They thus seek, not only to charge Anderson with the amount of his debt to the estate, as for so much cash in his hands, but, by obtaining an order to that effect, to fix beyond question the liability of his bondsmen to pay that amount to the estate. On the other hand, the defendant contends that where an insolvent debtor is appointed administrator of his creditor's estate, and is at all times unable

to pay his debt, by reason of his insolvency, his debt should be considered as uncollectible in his hands, the same as though it were the debt of a third person, and that his bondsmen are not liable to the estate for the payment of such antecedent debt.

Upon this question the authorities are very much divided. In an early day the courts of Massachusetts laid down the rule contended for by the plaintiffs in error, and since then have steadily adhered to it. A few of the other states, including Ohio, New Hampshire, and some other of the southern states, have adopted this view of the law, and it is contended by the plaintiffs that this court has followed this rule. In support of such contention they cite the cases of *Jacobs v. Morrow*, 21 Neb. 233, 31 N. W. 739, and *Brown v. Jacobs*, 24 Neb. 712, 40 N. W. 137. In *Jacobs v. Morrow* the administrator *de bonis non* had been surety for his predecessor on his bond as administrator of an estate. His predecessor had collected about \$12,000 in money, which he held in his hands when he was removed. The only question in that case was whether the administrator *de bonis non* should charge himself with the penalty of the bond. No question of the solvency or insolvency of the first administrator was involved in that case. Neither was it claimed that he was indebted to the estate at the time he was appointed. It was held that, if he had collected and held in his hands money belonging to the estate while he was the administrator thereof, and failed to pay it over to his successor, his bondsmen were certainly liable for it. In the case of *Brown v. Jacobs* the facts were that B was appointed administrator of the

insolvent for several years prior to his appointment. By signing the bond the sureties became liable to the estate for such damages as were within the contemplation of the parties at the time of the execution thereof. Counsel for the estate insists that the sureties, not only became liable for the faithful and proper discharge of the duties of the administrator, but, by the execution of the bond, they became sureties for the payment of any sum within the penalty thereof that the administrator owed the deceased in his lifetime.

"It is contended for the administrator and his bondsmen that no such liability was contemplated by the sureties when they signed the bond, and for this reason they should not be held. It is further contended that the administrator is not liable because the statute does not hold him responsible for debts that are uncollectible, and that the administrator should not be compelled to enrich the estate because of the provisions of the statute above quoted. The evidence is, likewise, undisputed that Mr. Anderson did not gain by his appointment, and has faithfully accounted for all funds that came into his hands by virtue of his office. His commissions to the amount of \$134.07 have been applied in part payment of his note. If the county court had appointed an administrator other than Mr. Anderson, what would have been the result to the estate? Manifestly the administrator so appointed would have treated the Anderson note as an uncollectible asset. The court would have allowed him the statutory commission, and the estate would have been reduced by this amount. In this view of 61 L. R. A.

the case the estate would have been diminished by the amount of these commissions, whereas it has been enriched by the amount credited on the Anderson note. Instead of taking from the estate, Mr. Anderson has contributed his services gratuitously, and the estate saved the expense that would otherwise have gone to another administrator. It is unfortunate that the estate should lose the residue of the Anderson note, but should the court by this fiction impose this loss on Anderson's sureties? The application of this rule would compel the sureties to pay a debt which Howell was unable to collect in his lifetime. Fictions are resorted to for the purpose of promoting justice. In this particular instance the net result of the fiction would take \$700 from the pockets of the sureties to reimburse Mr. Howell's heirs for an unfortunate investment in his lifetime. In this respect the heirs have all that Mr. Howell had during his lifetime,—a note of an insolvent party. The sureties did not sign this note, and the execution of the administrator's bond certainly did not convert a worthless note into cash, or create something out of nothing. 'It was not so nominated in the bond.' It seems clear that the great weight of judicial authority in the United States is in favor of discharging the sureties under such circumstances.

"It therefore follows from what has been said that the judgment of the county court was contrary to law, and a general finding of fact and of law will be made in this court in favor of the administrator."

estate of A, and C was the sole surety on his bond. B was removed from his trust, and his bondsman, C, was appointed as his successor. C was charged with the penalty of B's bond. C soon died intestate, and one D was appointed administrator of his estate, and one E was appointed a second administrator *de bonis non* of the estate of A. E filed his claim against the estate of C for the full amount of the penalty of the administrator's bond given by B and C, which claim was disallowed. An appeal to the district court resulted in the same judgment, and on error to this court the judgment of the district court was affirmed. It thus appears that neither of these cases is in point, and, never having passed upon the precise question involved herein, we must now determine which line of cases we will follow.

The "Massachusetts rule," as we will call it for convenience, is based on a legal fiction, and the presumption that all men are solvent and able to pay their obligations. It was but a short cut to say that one who was an administrator could not sue himself, and therefore he would be required to account to the estate for his individual debt as so much cash. It was an easy way of solving a difficult problem, and one which we fully approve of, where the fact of insolvency is not satisfactorily made to appear. In case the administrator was solvent at the time of his appointment, or any time during the administration of his office, and before his final settlement and discharge, he should be required to pay over in cash the amount of his antecedent debt. In such a case the rule contended for by plaintiffs is a salutary one. It results in no hardship to anyone, and for that reason should be invoked and enforced. But it seems to us that this rule should have no application where it is made to appear that the administrator was wholly insolvent when appointed, while acting, and at the time of settlement. The defendant in this case filed his report in response to the citation, and brought his individual note into court, together with the other uncollectible claims due the estate, and turned them over to the county judge. As the estate had not been fully administered, it was the duty of the county judge to appoint an administrator *de bonis non*, into whose hands the administrator's note, as well as the others uncollected and unconverted, would go. The result to the estate would have been the same had another person than the defendant been appointed administrator. The estate has in no wise suffered by any act of his subsequent to his appointment. It appears beyond question that, at the time the defendant was appointed administrator of Howell's estate, he was wholly insolvent; that he remained in such insolvent condition during the entire time that he served as such administrator, and was insolvent at the time of his resignation and proposed settlement; that by reason of his condition it was at all times impossible for him to pay the antecedent debt he owed to the estate. Section 279, chap. 23, Comp. Stat., provides 61 L. R. A.

that "no executor or administrator shall be accountable for any debts due to the estate if it shall appear that they remain uncollected without his fault." There is no reason why the antecedent debt of the administrator, where it is at all times uncollectible, and it is impossible for him to pay it, should be treated any different from any other uncollectible debt due the estate. The defendant in this case delivered up to the court his own uncollectible note, which came into his possession as administrator of the estate, and asked to have credited thereupon his commissions, amounting to \$134.07. If he had not owed the estate this antecedent debt, he would have been entitled to withdraw from the assets thereof the amount above stated. It follows that his appointment, instead of reducing the available assets of the estate, resulted in their increase by the full amount of his commission. Instead of taking anything from the estate, he contributed his services to it gratuitously, and it was saved the expense that would otherwise have been paid to another administrator. It is unfortunate that the estate should lose the balance due upon Anderson's note, but if we should hold that this balance should be treated as cash in his hands, and make an order requiring him to pay it over, the result of such order would be to require Anderson's sureties to pay the antecedent debt he owed Howell, which could not be collected at any time during Howell's lifetime, and has at all times since that date remained absolutely uncollectible. By adhering to this legal fiction, we would require Anderson's sureties to take \$700 from their pockets and pay it over to Howell's heirs on account of an unfortunate investment made by him in his lifetime, and impose upon them a liability upon their bond which they never contracted. Their agreement was that Anderson was an honest, capable, and upright man, and would discharge his duties as administrator of Howell's estate properly; in other words, that he would account for all of the assets thereof that came into his hands, and pay over all the moneys collected for and on behalf of the estate to his successor, or other proper authority. They never covenanted that Anderson was solvent and able to pay his antecedent debts. The sureties on his bond did not agree to convert Anderson's worthless note into cash, or create something out of nothing. Legal fictions should only be resorted to for the purpose of preventing a failure of justice, and when they would result in an unjust and inequitable judgment they should never be invoked.

The later cases hold that where the administrator or executor is shown to have been insolvent at the time of his appointment, during the incumbency of his office, and at the time of his discharge, his bondsmen are not liable for his individual debt. *Re Walker*, 125 Cal. 242, 57 Pac. 991; *Baucus v. Stover*, 89 N. Y. 1, Affirmed in 107 N. Y. 624, 13 N. E. 939; *Keegan v. Smith*, 25 N. Y. Civ. Proc. Rep. 417, 39 N. Y. Supp. 826; *Re Georgi*, 21 Misc. 419, 47 N. Y. Supp.

1061; *McCarty v. Frazer*, 62 Mo. 263; *Harker v. Irick*, 10 N. J. Eq. 269; *Rader v. Yeargin*, 85 Tenn. 486, 3 S. W. 178; *State ex rel. McClamrock v. Gregory*, 119 Ind. 503, 22 N. E. 1; *Condit v. Winslow*, 106 Ind. 142, 5 N. E. 751. In *State ex rel. McClamrock v. Gregory*, 119 Ind. 503, 22 N. E. 1, the court uses the following language: "One question which seems to have been overlooked on the trial of the cause was the financial condition of Levin T. Miller, the administrator, during the period of his administration. The money collected by him while professing to act as the agent of the administrator in Missouri, and for which he had not accounted when he became administrator, was a claim in favor of his trust, which he should have inventoried and charged himself with; and if, by the use of due diligence, all or any part of the claim could have been saved to the estate, his sureties are therewith chargeable, but, if he was hopelessly insolvent, they do not become liable therefor, the burden as to the question of insolvency being on the administrator and his sureties." Further on in the opinion the court says: "The debt of the administrator is to be accounted for as other debts or assets, and he may show his insolvency during the period of administration in discharge of his official liability," citing *Woerner*, Am. Law of Administration, p. 654, § 311; *Griffith v. Chew*, 8 Serg. & R. 17, 11 Am. Dec. 556; *Eichelberger v. Morris*, 6 Watts, 42; *Tarbell v. Jewett*, 129 Mass. 457; *McCarty v. Frazer*, 62 Mo. 263. There being no direct statutory provision upon the question in this state, there seems to be no reason why the above rule should not be adopted. The recent text-writers recognize this rule to be in force generally at this time. *Crowell, Exrs. & Admsrs.* p. 243, says: "In most states, however, by statutory provision, it is enacted that the appointment of a debtor as executor or administrator does not operate as an extinguishment of the debt, but it is treated as any other debt owing to the estate, and, if it can be collected (i. e., if the executor or administrator is solvent), then he is held to account for it as part of the assets. In other states the statutes, while not extinguishing the debt, treat it as cash in the hands of the executor or administrator, just as the equitable rule above stated does. In such a case, if the executor or administrator is insolvent during the period of administration, the debt is not charged as assets, but considered as an ordinary uncollectible debt." In *Danie, Administration*, § 189, we find the following: "It is a well-established rule of law, running back even before the Revolution, that an executor or administrator is considered as having paid the debts due from him to the estate, and as actually having in his possession that much more cash. If the personal representative is insolvent, the courts, in the interests of all concerned, modify this rule somewhat. He still charges himself with the amount of his debt, but it does not make it actually money. The law does not require impossi-

bilities, and there is no more reason why he should be considered as having paid what he was utterly unable to pay, than any other creditor. He is held liable to the estate to the extent of his ability to pay the same at any time during administration." The text above quoted is supported by the case of *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5. We think this is the better rule, and we therefore hold that where one is indebted to a deceased person, and is afterwards appointed administrator of his estate, and the fact is shown that when so appointed he was hopelessly insolvent, was so during all of the time of his administration, and remained in that condition up to and including the date of his settlement as administrator, he should be permitted to turn over the evidence of his uncollectible debt to his successor, or other proper authority, and be discharged from his official liability therefor.

For these reasons, we hold that the judgment of the district court was right, and we recommend that it be affirmed.

Oldham and Pound, CC., concur.

Per Curiam:

For the reasons given in the foregoing opinion, the judgment of the District Court is affirmed.

George W. SIEVER

c.

UNION PACIFIC RAILROAD COMPANY
and

George MILTONBURGER et al., Appts.

(.....Neb.....)

*1. A suit in equity may be maintained to enjoin a judgment creditor from prosecuting a multiplicity of proceedings in garnishment to subject the wages of laborers, mechanics, and clerks, which are absolutely exempt by law from attachment, execution, and garnishee process, to the payment of his judgment.

2. The employer from whom such wages are due, and who has been served with garnishee process, is a proper and necessary party to such suit, in order to authorize the court to make a decree which will afford plaintiff suitable, adequate, and complete relief.

3. Where the employer is thus made a party, and the suit has been properly brought against him in any county, and service of summons therein has been made on him, a summons issued to the sheriff of another county, where the judgment creditor resides, which is properly served on him, gives the court jurisdiction of all the parties.

*Headnotes by BARNES, C.

NOTE.—As to validity of successive garnishment of wages, see also, in this series, *Rustad v. Bishop* (Minn.) 50 L. R. A. 168.

As to exemption of wages from garnishment generally, see *Bell v. Indian Live Stock Co.* (Tex.) 3 L. R. A. 642; *Wildner v. Ferguson* (Minn.) 6 L. R. A. 338; *Missouri P. R. Co. v. Sharitt* (Kan.) 3 L. R. A. 385; and *Re Flukes* (Mo.) 51 L. R. A. 178.

to the action, and full power to grant the proper relief therein.

4. In such cases it must appear that the defendant served in the county where the suit is brought has a substantial interest in the legal questions involved, and the relief prayed for in the action, and that he is a real, and not a sham, defendant.

(March 4, 1903.)

APPPEAL by defendants Miltonburger *et al.* from a judgment of the District Court for Sarpy County in plaintiff's favor in an action brought to enjoin the maintenance of repeated garnishment proceedings. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Courtwright & Sidner, for appellants:

Service of process in a personal action in a county, brought upon a nominal defendant merely, who has no actual or substantial interest in the subject of the litigation adverse to the plaintiff, will confer no authority upon the court to bring in another party by the issuing of a summons to, and by the service of the same upon, such person in another county.

Hanna v. Emerson, 45 Neb. 708, 64 N. W. 229; *Hurlburt v. Palmer*, 39 Neb. 175, 57 N. W. 1019.

By answering we did not enter a general appearance.

Anheuser-Busch Brewing Assn. v. Peterson, 41 Neb. 897, 60 N. W. 373; *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801, 89 N. W. 269; *Hurlburt v. Palmer*, 39 Neb. 159, 57 N. W. 1019; *Mayer v. Nelson*, 54 Neb. 434, 74 N. W. 841; *Miller v. Meeker*, 54 Neb. 453, 74 N. W. 962.

Messrs. John N. Baldwin and Edson Rich for Union Pacific Railroad Company.

Mr. H. Z. Wedgwood, for appellee:

Where a pleading, or a so-called objection to the jurisdiction of the court, raises the question of the sufficiency of the petition, at law,—that is, that it does not state a cause of action,—such declaration or plea constitutes a general demurrer, and gives the court jurisdiction over the person of the defendant so pleading.

Bankers' L. Ins. Co. v. Robbins, 59 Neb. 173, 80 N. W. 484; 2 Enc. Pl. & Pr. pp. 635, 636; *Stevens v. Harris*, 99 Mich. 230, 58 N. W. 230; *Thompson v. Michigan Mut. Ben. Assn.* 52 Mich. 522, 18 N. W. 248; *Handy v. Insurance Co.* 37 Ohio St. 366; *Elliot v. Lauched*, 43 Ohio St. 171, 1 N. E. 577.

In equity every person who is interested in the event of the suit, or the subject-matter thereof, should be made a party, either plaintiff or defendant, in order that a complete and final decree may be made, and a multiplicity of suits avoided.

Pom. Eq. Jur. §§ 114, 209; 10 Enc. Pl. & Pr. pp. 892-912; *Sherwin v. Gaghagen*, 39 Neb. 249, 57 N. W. 1005.

The injunction was rightfully granted for at least three reasons: (1) To give the appellee, Siever, the possession, to which he 61 L. R. A.

was entitled, of exempt property which was being illegally taken from him under a claim of right; (2) the appellee was without an adequate remedy at law; and (3) to prevent a multiplicity of suits.

The property being exempt, the debtor was entitled to the possession of it, and was entitled to be protected in this possession in the most expedient manner.

Cunningham v. Conway, 25 Neb. 617, 41 N. W. 452; *Johnson v. Hahn*, 4 Neb. 149; *Bankers' L. Ins. Co. v. Robbins*, 53 Neb. 45, 73 N. W. 269; *Carter v. Warner* (Neb.) 89 N. W. 747.

The objection, not having been made in the lower court, is not timely.

Sherwin v. Gaghagen, 39 Neb. 238, 57 N. W. 1005; *Fowler v. Brown*, 51 Neb. 414, 71 N. W. 54.

Barnes, C., filed the following opinion:

This was a suit in equity, in which George W. Siever was plaintiff, and the Union Pacific Railroad Company, George Miltonburger, and Walter Miltonburger were defendants. The trial resulted in a decree enjoining the Miltonburgers from suing out or prosecuting any further or other proceedings in garnishment against the said Siever; and at the same time the Union Pacific Railroad Company was restrained and enjoined from answering any such further or other proceedings, and from paying the wages which it owed to Siever into court thereon, or to anyone except him, on the ground that such wages were absolutely exempt to him from execution or proceedings in garnishment. From that decree the Miltonburgers bring the case here on appeal.

It further appears that the appellants obtained a judgment before a justice of the peace at North Bend, in Dodge county, Nebraska, against the appellee and another, on a claim for damages caused by the breaking of a buggy; that appellee was a married man, the head of a family, and resided at Papillion, Sarpy county, Nebraska, and was employed by the Union Pacific Railroad Company as its station agent at that place when the action was commenced; that appellants resided in Dodge county; and that they sued out garnishment proceedings against the appellee before the justice of the peace in that county, and served the writ or notice on the Union Pacific Railroad Company, requiring it to answer in said court, and pay over the wages due appellee, if any, in satisfaction of the judgment; appellee employed an attorney, who went to Dodge county, and successfully defended against the proceedings, and the garnishee was discharged; that within a month thereafter the Union Pacific Railroad Company was again served with garnishee process, and appellee was again required to, and did, employ an attorney to go to North Bend and defend against the proceedings, in order to save his exempt wages for the support of his family; that, on the appearance of appellee's attorney therein, the second proceeding was dismissed for want of prosecution; that within thirty days thereafter a third writ in garnishment

was sued out by appellants, and served on the Union Pacific Railroad Company, and said company then notified appellee that something must be done, or it would be necessary for it to, and that it would, pay over the wages then due him into court. In order to protect his right to the said wages, which were absolutely exempt to him, and to prevent a further multiplicity of suits, and save himself from further trouble, annoyance, and expense, appellee commenced this action in the district court of Sarpy county, where he resided, against the Union Pacific Railroad Company and the appellants, setting up the foregoing facts in this petition, and praying for the relief which was decreed to him as aforesaid. The company was duly served with a summons in Sarpy county, and thereupon a summons was issued to the sheriff of Dodge county, and was served on the appellants. The railroad company defaulted, and thus, on its part, confessed all of the allegations of the petition to be true. Appellants appeared specifically and objected to the jurisdiction of the court for the reason that the railroad company was only a nominal party, and was improperly joined with them as a defendant in the suit, and that therefore the court obtained no jurisdiction over them. The same objection to the jurisdiction of the court was pleaded in their answer, and, while the court did not specifically rule thereon, still the objection was, in effect, overruled, by retaining the action for trial, in trying the same, and rendering its decree for the appellee herein. On the trial the appellee introduced his evidence, the Union Pacific Railroad Company defaulted and confessed the allegations of the petition as to it to be true, and the court, so found, while the appellants introduced no evidence to contradict the allegations of the petition, or rebut the evidence introduced by the appellee. Therefore the sole question for our consideration is one of jurisdiction.

It must be conceded that the decree, so far as the railroad company is concerned, is a proper one; and, if the court had jurisdiction of the persons of the appellants, then the judgment is just and equitable as to them, and must be affirmed. The facts pleaded and proved by the appellee surely call for the interposition of a court of equity, and demand the relief prayed for. It cannot be successfully asserted that the appellee had an adequate remedy at law in this case. The court found that his wages, sought to be subjected by the proceedings complained of to the payment of the judgment, were absolutely exempt to him by law. The appellants knew this as well as he did, and yet, by a series of garnishment proceedings, amounting to a persecution, in this case, they sought to compel him to pay the judgment out of such exempt money, or expend it all in protecting his legal right thereto. Not only this, but they evidently sought to annoy and harass his employer until he must pay, or perhaps lose his employment. Again, it may be fairly assumed that, by suing out a number of writs of gar-

nishment, appellee would at some time be unable to protect his rights, or the company would inadvertently default, and an order would thereupon be obtained which would result in compelling it to pay the money into court, leaving it still liable to pay the wages to appellee, or perhaps altogether deprive him thereof. Against such iniquitous proceedings there is no adequate remedy at law, and such practices should receive our severest condemnation. When the property of a debtor is exempt, he is entitled to the possession of it, and should be protected in this possession in the most expedient manner. *Cunningham v. Conway*, 25 Neb. 617, 41 N. W. 452; *Johnson v. Hahn*, 4 Neb. 149. Appellee was entitled to the decree to save him from being harassed by a multiplicity of suits. *Johnson v. Hahn*, 4 Neb. 149; *Uhl v. May*, 5 Neb. 161; *Normand v. Otoe County*, 8 Neb. 21; *Touzalin v. Omaha*, 25 Neb. 824, 41 N. W. 796; *Schock v. Falls City*, 31 Neb. 605, 48 N. W. 468; *Morris v. Merrell*, 44 Neb. 430, 62 N. W. 865.

This brings us to the consideration of the question of jurisdiction. Section 65 of our Code of Civil Procedure provides that "where the action is rightly brought in any county according to the provisions of title 4 a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request." [Neb. Comp. Stat. 1897, p. 1174.] Title 4, after designating the actions which must be brought in a certain specified county, provides that every other action must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned; and it is further provided in said title that a railroad company may be served with summons in any county into or through which its line of road passes. It follows that the Union Pacific Railroad Company was properly sued and served with summons in Sarpy county, and, if it was properly made a defendant in the action, the issuance of a summons to the sheriff of Dodge county, and its service therein on appellants, gave the court full and complete jurisdiction over them. If, on the other hand, the railroad was not a necessary, or at least a proper, party, there was what would amount to a collusive joinder, and the court was without jurisdiction of the appellants. It is well established that the defendant who may be sued in the county where the action is brought must be a necessary, and not a sham, defendant, joined solely for the purpose of bringing in the defendants served in another county. *Dunn v. Haines*, 17 Neb. 560, 23 N. W. 501; *Cobbey v. Wright*, 23 Neb. 250, 36 N. W. 505, 29 Neb. 277, 45 N. W. 460; *Hanna v. Emerson*, 45 Neb. 710, 64 N. W. 229; *Miller v. Meeker*, 54 Neb. 453, 74 N. W. 962; *Steuart v. Rosengren* (Neb.) 92 N. W. 586.

The true test, however, for determining whether or not the venue is proper, so that summons may issue to another county, is whether the defendant served in the county where suit is brought is a bona fide defendant to that action,—whether his interest in

the result of the action is in any manner adverse to that of the plaintiff with respect to the cause of action against the other defendants,—and in equity actions may be added the inquiry as to whether or not plaintiff can obtain full, suitable, and satisfactory relief without joining such party, and binding him by the terms of the judgment or decree.

Equitable doctrines with respect to parties and judgments are wholly unlike those which prevail at common law,—different in their fundamental conceptions, in their practical operation, in their adaptability to circumstances, and in their results upon the rights and duties of litigants. The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in the one suit the rights and duties of all the parties which really grow out of, or are connected with, the subject-matter of that suit. The primary object is that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be fixed, and all may be bound in respect thereto by the single decree. Pom. Eq. Jur. § 114. Speaking of the question of parties in actions to prevent a multiplicity of suits, Pomeroy says: "Under the greatest adversity of circumstances and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject-matter' among these individuals, but where there is, and because there is, merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." Further speaking of the objection raised to this doctrine, Pomeroy says: "The sole and sufficient answer to the objection is found in the actual facts. The jurisdiction has been exercised in a great variety of cases where the individual claimants were completely separate and distinct, and the only community of interest among them was in the question at issue, and perhaps in the kind of relief, and the single decree has, without any difficulty, settled the entire controversy, and determined the separate rights and obligations of each individual claimant. The same principle, therefore, embraces both the technical 'bills of peace,' in which there is confessedly a common right or title, or community of interest in the subject-matter, and also those analogous cases over which the jurisdiction has been extended, in which there is no such

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common right or title, or community of interest in the subject-matter, but only a community of interest in the question involved and in the kind of relief obtained." Pom. Eq. Jur. § 269. It cannot be said that the railroad company and appellants were not mutually interested in the questions involved in this case, and in the effect of the relief granted by the decree.

Again, garnishment proceedings had been already commenced for the third time, and notice had been served on the railroad company, requiring it to answer and pay the money into court. Therefore, a decree against the appellants alone would not have been binding on the company. It could still answer, and pay over the money into court, to the irreparable injury of the appellee. In any event, it was holding back the money due to him, and it was necessary to make the company a party, and by the decree release the fund, and require it to be paid to the owner thereof. It would thus appear that the railroad company was a proper party, and it may be further stated that it was a necessary party, in order to enable appellee to obtain suitable and complete relief in the case at bar. A decree restraining the appellants from prosecuting further proceedings to subject appellee's exempt wages to the payment of their claim would not have been effective, for the reason that a transfer of their claim to another would have enabled such other person to still proceed with further illegal attempts to obtain the money. Again, although enjoined from prosecuting further in the courts of this state, they might transfer their claim to Iowa, where the Union Pacific Railroad Company has a part of its line, and maintains some of its offices. The exemption laws of this state have no extraterritorial force, and it has been the universal policy of the courts of Iowa to disregard the exemption laws of other states. So that, without a decree enjoining the Union Pacific Railroad Company from paying over the money in satisfaction of the appellants' claim, it would be required to answer proceedings instituted in Iowa, and pay the money into court there; thus depriving the appellee of the wages which are absolutely exempt to him by the laws of this state. Notwithstanding we have a law prohibiting such transactions, yet it has in many cases failed to prevent parties from unlawfully collecting their claims in that manner. A decree, however, against the railroad company, enjoining it from paying the money into any court, or upon any proceedings, wherever instituted, could be pleaded in bar to such proceedings with binding effect.

So we are constrained to hold that the Union Pacific Railroad Company was not only a proper, but a necessary, party in the suit; that the action having been properly commenced against it in Sarpy county, and it having been served with summons therein, the issuance of summons to the sheriff of Dodge county, and the proper service thereof

on the appellants, gave the court full and complete jurisdiction to hear and determine the questions involved in the action, and render a suitable and proper decree therein.

We further hold that, according to the facts disclosed by the record, the decree of the district court was right, and we recommend that it be affirmed.

Oldham and Pound, CC., concur.

Per Curiam:

For the reasons given in the foregoing opinion, the judgment of the District Court is affirmed.

Rehearing denied

NEW JERSEY COURT OF ERRORS AND APPEALS.

John C. BOHLE *et al.*, *Appts.*,

v.

Diedrich HASSELBROCH, *Respt.*

(64 N. J. Eq. 334.)

*A trustee under a will, in disregard of the testator's directions, used trust funds in her hands, together with her own funds, to buy real estate, and took the title in her own name. The amount of trust funds so used could not be precisely ascertained, but it exceeded one half of the price paid at the time of purchase. *Held*, that the *cestuis que trust* were entitled, in equity, to elect whether they would claim a charge upon the real estate for the amount of trust funds so invested, or would claim the real estate itself, as owners, subject to a charge for the trustee's own money so used, and that, in endeavoring to ascertain how much trust money and how much of the trustee's own money had been invested in the property, every reasonable intendment should be made against the trustee, through whose default the truth had become obscure.

(March 3, 1902.)

A PPEAL by complainants from a decree of the Chancery Court in favor of defendant in a proceeding to restrain the maintenance of a suit to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. Charles W. Parker, for appellants:

The lien theory should not be adopted. It is artificial; it tends to encourage diversion of trust funds to speculative purposes of the trustee, and violates well-established principles of equity.

If one can, by contributing one third, become entitled to a resulting or constructive trust, then why not, by contributing two thirds or three fifths. It is nothing but a question of fractions. If such a proportionate trust could be declared in writing, why may it not result by operation of law?

Perry, Tr. §§ 464 et seq.

There should be no distinction between entire trust ownership and part trust ownership.

Van Syckle v. Kline, 34 N. J. Eq. 332; *Perry, Tr. §§ 127, 128; Cutler v. Tuttle*, 19

*Headnote by DIXON, J.

NOTE.—As to effect of commingling trust funds generally, see brief summary of cases in *notes* to Philadelphia Nat. Bank v. Dowd (C. C. E. D. N. C.) 2 L. R. A. 480, and First Nat. Bank v. Hummel (Colo.) 8 L. R. A. 788. 61 L. R. A.

N. J. Eq. 549; *Howell v. Howell*, 15 N. J. Eq. 75; *Bankson v. Bankson*, Decided by Bird, V. C. 1884; *Johnson v. Dougherty*, 13 N. J. Eq. 406.

Mr. J. W. Rufus Besson for respondent.

Dixon, J., delivered the opinion of the court:

Anton S. Bohle, who died in 1863 leaving a widow and four children, by his will appointed his wife, Anna, his executrix, and gave her all his property in trust for the maintenance of herself and his children during her life, and gave it after her death to his children. The will directed the trustee to keep the property invested "on good first bonds and mortgages of real estate." In August, 1864, the widow married Diedrich Hasselbroch, by whom she afterwards had three children. In January, 1868, she purchased two plots of land in Hoboken, taking title thereto in her own name. The purchase price of these lots was \$14,700, but, as they were encumbered for \$2,000, only \$12,700 was to be paid in cash. Of this sum more than one half (but exactly how much cannot be ascertained) was paid with money which Mrs. Hasselbroch held in trust under Mr. Bohle's will. At that time Mr. Bohle's children were all minors, living with their mother and stepfather. In December, 1898, Mrs. Hasselbroch died, and by her will devised the Hoboken lots to the three surviving children of Mr. Bohle, who now own the interest of their deceased sister, and are in possession of the property. Mr. Hasselbroch having brought an action of ejectment against these children, claiming that he was entitled to the possession of the property as tenant by the curtesy of his wife's fee, they filed the present bill to restrain that suit on the ground that in equity their mother was only tenant for life, and they were owners of the fee, because of the improper use of the trust funds in the purchase. The chancellor's decree denied this relief, but adjudged that the complainants were entitled to a lien on the property, prior to the husband's curtesy, for so much trust money as was shown to have been used in the purchase, *viz.*, \$6,423, and interest since Mrs. Hasselbroch's death, less rents and profits. From this decree the complainants appeal.

It is clear that Mrs. Hasselbroch committed a breach of trust when she used the trust funds in buying real estate, and took

the title to herself, without providing any bond and mortgage as a first lien in favor of the trust estate, as directed by the will of her deceased husband; and the question is, What equitable situation was thereby created? Several settled doctrines of courts of equity are pertinent to this inquiry. It is a fundamental principle in regard to trust estates that the trustee shall derive to himself no gain, benefit, or advantage by the use of the trust funds. Whatever of profit may be made shall belong to, and become parcel of, the trust estate. *McKnight v. Walsh*, 24 N. J. Eq. 498. An outgrowth of this principle is that, as between *cestui que trust* and trustee, and all persons claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to the trust, however much it may be changed or altered in its nature or character, continues to be subject to, or affected by, the trust. *Pennell v. Deffell*, 4 De G. M. & G. 372-388. As a concomitant of the rule just stated, and to effectuate fully the fundamental principle, another rule exists,—that, when the trustee has improperly changed the form of the estate, the *cestui que trust* may elect whether they will accept the estate in its new form, or will hold the trustee responsible for it in its original condition. *Ferris v. Van Vechten*, 73 N. Y. 113. If the improper conversion turns out to be advantageous, they may adopt it, and take the profit; if it results in loss, they may insist on having an equivalent for the estate as it was before the change; and when the *cestui que trust* are infants the court will deal with the matter as it shall consider best for their interest. *Holcomb v. Holcomb*, 11 N. J. Eq. 281. This right of election by the *cestui que trust* is upheld by courts of equity in many cases where there has been misconduct on the part of the trustee, as may be seen by reference to *Fox v. Mackreth*, 1 Lead. Cas. in Eq. 115, and has been fully approved by this court. *Mulford v. Bowen*, 9 N. J. Eq. 797; *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505. It is enforced in cases like the present; for if a trustee purchases property with trust funds in his hands, and takes title in his own name and for his own benefit, he will,

at the option of the *cestui que trust*, be declared to hold it in trust for them. *Durling v. Hammar*, 20 N. J. Eq. 220; *Story*, Eq. Jur. §§ 1200, 1202. And if, in such a purchase, he has mixed up moneys of his own with the trust funds, a trust will still result to the *cestui que trust*, at their option, and the burden will be on the trustee to show the amount of his own funds used in the purchase; and, so far as he fails to make that distinction, the court holds the property bound by the trust. *Russell v. Jackson*, 10 Hare, 204, 213; *Re Pumfrey*, L. R. 22 Ch. Div. 255; *Perry*, Tr. § 128; 2 Pom. Eq. Jur. § 1076 (2).

In accordance with these doctrines, we think that the complainants, when their right to the possession of the trust estate matured by the death of their mother, were entitled, upon showing that the trust funds had formed a considerable part of the purchase money by which their mother had acquired title to the Hoboken lots, to elect whether they would claim a lien upon the lots for the amount of trust funds used in the purchase, or would claim the lots, subject to be charged, in favor of the personal representatives of their mother, with so much of the purchase money as consisted of her own funds, and that, in endeavoring to ascertain how much was trust money and how much was the trustee's own, every reasonable intendment should be made against the trustee, through whose fault the truth had become obscure. Since the complainants, being in possession of the lots, have filed their bill in equity to have it decreed that by their trustee's purchase they became owners of the fee in remainder after their mother's life estate, they have thereby elected to take the real estate in lieu of the trust money invested therein, and to hold it charged only with their mother's own money so invested. Such a charge gives the husband no right to maintain ejectment, and consequently the complainants are entitled to a decree restraining his suit. The present proceedings are not adapted to the ascertainment, either of the amount of the charge, or of the persons entitled to enforce it.

Let the decree appealed from be reversed, and a decree be entered as above indicated.

OKLAHOMA SUPREME COURT.

Thomas P. QUEENAN, *Plff. in Err.*,
v.

Territory of OKLAHOMA.

(11 Okla. 261.)

*1. The provisions in the Constitution of the United States in relation to trials by jury for crimes, and to criminal prosecutions, apply to the territories of the United States.

*Headnotes by HAINER, J.

NOTE.—For another case in this series as to waiver of right to challenge juror, see *Slate v. McKett* (Iowa) 30 L. R. A. 302.
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2. The jury, within the meaning of the Federal Constitution, and the 6th Amendment thereto, is a jury constituted as it was at common law, of twelve persons,—neither more nor less.
3. A constitutional right cannot be waived by the defendant or his counsel in a felony case, but a statutory right may be waived. The right of the defendant to have a trial by a jury of twelve persons is a constitutional right, which the defendant cannot waive. It is not within the power of one accused of a felony, by consent expressly given, or by his silence, to authorize a jury of less than twelve persons to pass upon his guilt or innocence.
4. At common law the fact that a juror

was an alien, or that he had been convicted of a crime, were causes of challenge *propter defectum*; and there was no distinction at common law between a person who was convicted of a felony and one who was an alien. Most of the states of the Union have statutes which make such disqualifications of a juror a cause of challenge, and these statutes are but declaratory of the common law.

5. Where one of the jurors in a trial for murder had been convicted of a felony, although cause of challenge *propter defectum*, it is not a denial of due process of law, or of the equal protection of the laws to the person convicted, within the meaning of the Federal Constitution.
6. A known ground of disqualification to a juror, before or during the progress of the trial, is waived by withholding it or refusing or declining to raise the objection until after verdict.
7. In the absence of an express statute making a juror incompetent who has been convicted of a criminal offense punishable by imprisonment in a penitentiary of another state, such conviction and sentence can have no effect, by way of penalty or of personal disability or disqualification, beyond the limits of the state in which the judgment was rendered.
8. Where irregularities occur in the summoning of a special venire, it is incumbent upon the defendant or his counsel to interpose his objection at the proper time, and it is waived if it is raised for the first time after verdict.
9. The provisions of our statute in relation to the selecting, summoning, and impaneling of a jury are not mandatory, but merely directory, and hence mere irregularities will not be deemed prejudicial unless it is clearly shown that some injury has resulted therefrom.
10. On a trial for murder, where insanity is interposed as a defense, a nonexpert witness, after testifying to the acts, conduct, and appearance of the defendant, may state whether such acts, conduct, and appearance impressed him as being rational or irrational.
11. On a trial for murder, where the defense of insanity is interposed, the important issue to be determined is the sanity or insanity of the defendant at the time of the commission of the homicide; but it is permissible to receive evidence as to the condition of his mind both before and for a reasonable period after that time, as tending to show his mental condition at the time of the homicide.
12. We have examined instruction No. 5, which is assigned as error, and we think it fairly and correctly states the law applicable to this case, and comes within the rule announced by this court in *Maas v. Territory*, 10 Okla. 714, 53 L. R. A. 814, 63 Pac. 960. And there was no error in refusing to give instruction No. 4½ which was offered by the defendant, since said instruction was embodied in the general charge of the court.

(September 4, 1901.)

ERROR to the District Court of Oklahoma County to review a judgment convicting defendant of murder. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. W. Johnson and Howard & Ames, for plaintiff in error:
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Defendant could not waive the disqualification of the juror Harper.

One's life is not his own; when demanded, he cannot yield it out of court or in any irregular manner; he has no right to take it; no one has a right to take it from him with or without his consent; it can only be taken when forfeited by the law, and then only in the solemn manner the law prescribes.

Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202.

The Constitution was framed in the light of the common law.

United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

The "jury" mentioned in the Constitution means a common-law jury of twelve men.

Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77.

A state may change the jury system or dispense with it altogether, because the constitutional provisions do not operate to restrain it.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Moult v. California*, 149 U. S. 649, 37 L. ed. 884, 13 Sup. Ct. Rep. 959; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

But a territory can make no valid provision for a trial by other than a common-law jury.

Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

Only householders are competent at common law.

Goodson v. United States, 7 Okla. 117, 54 Pac. 432.

A felon is positively disqualified.

At the common law the causes for excusing jurors were classified: (1) *Propter honoris respectum*, or out of respect for his position, as that of lord of Parliament, by reason of which he could excuse himself or be excused; (2) *propter defectum*, or because of a simple defect in qualification; (3) *propter affectum*, or for suspicion of bias or interest, a simple ground for challenge; (4) *propter delictum*, or for crimes rendering the juror infamous and unfit, not only in the particular case, but always and in every case.

3 Cooley's Bl. Com. 360-364.

It is the duty of the Federal court to see to it that the jurors possess all necessary qualifications, that a fair and impartial trial may be had.

United States v. Benson, 31 Fed. 896.

Persons not experts, after testifying to facts and incidents in relation to a person tending to show soundness or unsoundness of mind, may testify to the impression produced upon them thereby.

People v. Strait, 148 N. Y. 566, 42 N. E. 1045; *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 450; *Clapp v. Fullerton*, 34 N. Y. 190, 96 Am. Dec. 685.

The opinions called for have been based upon observations after, as well as before, the act.

State v. Winter, 72 Iowa, 627, 34 N. W. 480; *People v. Borgetto*, 99 Mich. 336, 58 N. W. 328; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 744; *State v. Fiester*, 32 Or. 254, 50 Pac. 561; *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1006.

Mr. Stillwell H. Russel also for plaintiff in error.

McSsrs. J. C. Strang, Attorney General, **W. R. Taylor**, **H. B. Mitchell**, **T. G. Chambers**, and **M. Fulton** for defendant in error.

Hainer, J., delivered the opinion of the court:

The plaintiff in error, Thomas P. Queenan, was indicted, tried, and convicted in the district court of Oklahoma county for the crime of murder, and the jury fixed the punishment at death. The court, having duly considered and overruled the motion for new trial, and also in arrest of judgment, sentenced the plaintiff in error to be hanged, in accordance with the verdict of the jury. From this judgment and sentence the plaintiff in error brings the case here on appeal. A number of errors are assigned and argued by counsel for plaintiff in error, which we will consider in the following order:

1. It is first contended by plaintiff in error that error was committed by the trial court for the reason that it refused to set aside the verdict of the jury on the ground of the disqualification of one of the jurors. It appears from the record in this case that one of the jurors, upon his *voir dire*, in answer to the question whether he had ever been convicted of a felony under the laws of the United States or any state or territory, answered in the negative. The case proceeded to trial, and after the testimony on behalf of the territory in chief had been introduced, and the defense had begun to offer its testimony, the juror Harper disclosed the fact that he had been convicted of grand larceny, and had served a term in the penitentiary in the state of Nebraska. The court immediately advised counsel for defendant of this fact, and asked the defendant's counsel if they had any objections to make to the juror Harper, and if they objected to proceeding with the trial of the case with the jury then impaneled. To this suggestion and inquiry of the court, Mr. Johnson, one of the counsel for the defendant, made the following response: "We have nothing to say, your honor." The court, in reply to this statement of counsel, used the following language: "In this connection, I want to say, in proceeding with this trial, that as soon as this matter was discovered by the court I at once advised counsel for both the prosecution and the defendant, in order that they might avail themselves of any rights they might have under it. I was of the opinion, and am still of the opinion, that if a challenge were properly interposed by either party, and the fact properly presented, that it would be ground for excusing the juror. However, such facts are not before me in such a way that I can act upon . . ." It will thus be seen that counsel for defend-

ant did not request the court to excuse the juror Harper, and to impanel a new juror, and proceed anew with the trial of the cause, nor was any objection made to the trial proceeding with the jury as thus constituted. But after the trial was completed, and after the defendant was found guilty as charged in the indictment, a motion for new trial was made upon the ground, among others, that the juror Harper was disqualified, for the reason that he had been convicted of a felony in the state of Nebraska, and therefore the verdict should be set aside. It will thus be seen that the objection made to the disqualification of one of the jurors was made for the first time after the verdict was returned, and upon motion for new trial. We think that, upon principle and authority, this objection comes too late. The defendant, by failing or neglecting to object to the disqualification of the juror until after the verdict was rendered, notwithstanding he had knowledge of such fact during the progress of the trial, clearly waived any objection to the disqualification of such juror.

But it is earnestly contended by the able counsel for the plaintiff in error that this is a constitutional or fundamental right, which cannot be waived by the defendant. We think this contention is unsound. Article 3, § 2, of the Constitution of the United States provides: "The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." And by the 6th Amendment to the Constitution it is declared: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." That the provisions of the Federal Constitution in respect to the right of trial by jury in suits at common law apply to the territories of the United States is no longer an open question. The doctrine is also well established by decisions of the Supreme Court of the United States that the provisions of the Federal Constitution relating to trial by jury for crimes and to criminal prosecutions apply to the territories of the United States. *Thompson v. Utah*, 170 U. S. 345, 42 L. ed. 1064, 18 Sup. Ct. Rep. 620; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244. And the jury referred to in the Federal Constitution, and the 6th Amendment thereto, is the jury constituted as it was at common law, of twelve persons,—neither more nor less. *Thompson v. Utah*, 170 U. S. 345, 42 L. ed. 1064, 18 Sup. Ct. Rep. 620.

A constitutional right cannot be waived by the defendant or his counsel in a felony case. But a statutory right, such as the challenging of a juror for any particular cause, is a right or privilege which may be waived by the defendant or his counsel. The right of the defendant to have a trial by a jury of twelve persons is a constitutional right, which the defendant in this case could not waive. It is not within the power of one accused of a felony, by consent expressly given or by his silence, to authorize a jury of less than twelve persons to pass upon his guilt or innocence.

At common law the grounds for challenge were classified under four heads, as follows:

(1) *propter honoris respectum*; as, if a lord of Parliament be impaneled on a jury, he may be challenged by either party, or he may challenge himself; (2) *propter defectum*; as, if a jurymen be an alien born, this is defect of birth; (3) *propter affectum*; as for suspicion of bias or partiality;—this may be either a principal challenge, or to the favor; (4) challenges *propter delictum* are for some misdemeanor or crime that affects the juror's credit and renders him infamous; as for conviction of treason, felony, perjury, or conspiracy. 2 Cooley's Bl. Com. 3d ed. 360. It will thus be seen that at common law the fact that a juror was an alien, or that he entertained bias or prejudice, or that he was an infant, or that he was not a freeholder, or that he was convicted of a felony, were good grounds for a challenge; and there was no distinction at common law between a person who was convicted of a felony and one who was an alien, or who entertained bias or prejudice against the accused. Most states of the Union have statutes which make such disqualifications of a juror a ground of challenge for cause. These statutes are but declaratory of the common law. The fact that a juror is an alien, or that he is an infant, or that he has been convicted of a felony, or that he is not a freeholder, or that he is not an elector, or that he entertains bias or prejudice in a case, are grounds for the exercise of a challenge for cause to such juror; but the right to make a challenge for such cause may be waived. In other words, it is not a constitutional right or privilege that the accused cannot waive, but it is a common-law or statutory right of challenge. The right of the accused in all criminal prosecutions under the Federal Constitution to a speedy and public trial by an impartial jury of twelve persons, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to be present during the progress of the entire trial, are constitutional rights, which are not in the power of one accused of a felony, by consent expressly given or by his silence, to waive. The power to fix the qualifications of jurors is not a constitutional right, but has always been considered and regarded as a power which has been delegated to the various states and territories of the Union. And this power has been exercised by the various states and territories of the Union. And hence one 61 L. R. A.

placed on trial for a felony may waive any statutory right or privilege which does not contravene any constitutional or fundamental right. It must therefore follow that the right to challenge a juror on account of his incompetency, by reason of the fact that he had been convicted of a felony, may be waived by a person who is on trial for a felony, and even in a capital case. And this conclusion of ours is sustained by the great weight of modern authorities. In fact, it has been upheld by the Supreme Court of the United States, and by nearly every state in the Union, with the exception of Michigan and one or two other states.

In *Kohl v. Lehlback*, 180 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304, it is held that, where one of the jurors in a criminal case was an alien, although cause of challenge, is not a denial of due process of law or of the equal protection of the laws to the person convicted. And "the defect is not fundamental, as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it." In discussing this subject the learned chief justice of the Supreme Court of the United States said: "The line of argument seems to be that by the common law, as obtaining in New Jersey, an alien was disqualified from serving on a jury; that the disqualification was absolute; that the common law could not be changed in that particular under the state Constitution; that the proviso was therefore void; and that, if an alien sat upon a jury, the common-law right of trial by jury would have been invaded. So far as the petition shows, this contention may have been disposed of adversely to petitioner by the state courts; and, moreover, we are of opinion that in itself it cannot be sustained as involving an infraction of the Constitution of the United States. In *Hollingsworth v. Duane*, reported in Wall. Sr. 147, Fed. Cas. No. 6,613, and also, but imperfectly, in 4 Dall. 353, 1 L. ed. 864, Fed. Cas. No. 6,618, it was held by the circuit court of the United States for the eastern district of Pennsylvania, at October term, 1801, that alienage of a juror is cause of challenge, but is not *per se* sufficient to set aside a verdict, and this whether the party complaining knew of the fact or not; and that this was the rule at common law, as shown by authorities cited from the Year Books and otherwise. In *Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258, the supreme judicial court of Massachusetts held that 'a verdict will not be set aside because one of the jurors was an infant, where his name was on the list of jurors returned and impaneled, though the losing party did not know of the infancy until after the verdict.' And Mr. Justice Gray, then chief justice of Massachusetts, delivering the opinion, said: 'When a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict. This convenient and necessary rule has been applied by this court, not only to a juror disqualified by interest or relation (*Jeffries v. Randall*, 14 Mass. 205; *Woodward v. Dean*, 113 Mass. 297), but,

even in a capital case, to a juror who was not of the county or vicinage, as required by the Constitution (Declaration of Rights, art. 13; *Anonymous*, cited by Jackson, J., in *Amherst v. Hadley*, 1 Pick. 41, 42). The same rule has been applied by other courts to disqualification by reason of alienage, although not in fact known until after verdict. *Hollingsworth v. Duane*, 4 Dall. 353, 1 L. ed. 864, Fed. Cas. No. 6,618, Wall. Sr. 147, Fed. Cas. No. 6,618; *State v. Quarrel*, 2 Bay, 150, 1 Am. Dec. 637; *Presbury v. Com.* 9 Dana, 203; *King v. Sutton*, 8 Barn. & C. 417; s. c. nom. *King v. Despard*, 2 Mann. & R. 406. In *Re Chelsea Waterworks Co.* 10 Exch. 731, Baron Parke said: "In the case of a trial by a jury *de medietate linguæ*, which by the 47th section of the jury act is expressly reserved to an alien, he may not know whether proper persons are on the jury; yet if he was found guilty, and sentenced to death, the verdict would not be set aside because he was tried by improper persons, for he ought to have challenged them." See also *Case of a Jurymen*, 12 East, 231, note; *Hill v. Yates*, 12 East, 229. The great weight of authority is to that effect, though there are a few cases to the contrary. Thus in *Guykowski v. People*, 2 Ill. 470, it was held that a new trial should be granted because one of the jurors was an alien when sworn, of which fact the defendant was ignorant at the time; but in *Greenup v. Stoker*, 8 Ill. 202, the supreme court of Illinois, through Purple, J., reluctantly concluded that it was not indispensable to hold that that case was not the law, but limited its application to capital cases; and in *Chase v. People*, 40 Ill. 352, it was finally overruled. Mr. Justice Breese, spoke for the court, and it was held that alienage in a juror was not a positive disqualification, but ground of exemption or of challenge, and nothing more. It has been held that, under the Constitution of New York, the defendant in a capital case cannot consent to be tried by less than a full jury of twelve men (*Cancemi v. People*, 18 N. Y. 128), and that under the Constitution of California, a law authorizing a change of the place of trial of a criminal action to another county than that where the crime was committed, on application of the prosecution without defendant's consent, was invalid (*People v. Poucell*, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481); but in neither of these cases was it intimated that objection to individual jurors could not be waived by the accused, or that trial by jury would be violated if persons who were open to challenge happened to be impaneled. The disqualification of alienage is cause of challenge *propter defectum*, on account of personal objection, and if, voluntarily, through negligence or want of knowledge, such objection fails to be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental, as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it. *United States v. Gale*, 109 U. S. 65, 72, 27 L. ed. 857, 859, 3 Sup. Ct. Rep. 1." In the case of *Alexander v. United*

States, 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350, it was held that "it is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and, in case of an adverse ruling, to note an exception." In the case of *King v. Sutton*, 8 Barn. & C. 417, it was held that "alienage is a ground of challenge to a juror, and if the party has an opportunity of making his challenge and neglects it he cannot afterwards make the objection." In the case of *Chase v. People*, 40 Ill. 352, it was held that "alienage in a juror is not a positive disqualification. It simply enables him to excuse himself if he chooses to claim the exemption, or it is ground of challenge, and nothing more." In *Costly v. State*, 19 Ga. 614, it was held that "the nonresidence of a juror, being but a cause of challenge *propter defectum*, can, and consequently must, be made by the prisoner before the juror is sworn, and it makes no difference whether such want of qualification was known or unknown at the time the juror was sworn." In *State v. Bunker*, 14 La. Ann. 465, it is said: "Where a juror can be challenged for cause, the right must be exercised before the juror is sworn, and a verdict cures the defect." In *State v. Patrick*, 48 N. C. (3 Jones L.) 443, it is said: "It is too late, after juror has been taken and accepted by the prisoner, and has served on the trial, to except him for incompetency." So it has been held that, where the facts are known, an objection to the competency of the juror comes too late if it is made after verdict, even in capital cases. *People v. Coffman*, 24 Cal. 230; *Lisle v. State*, 6 Mo. 426; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269. In *State v. Powers*, 10 Or. 145, 45 Am. Rep. 138, it was held that the disqualification of a juror in a capital case is unavailable after verdict. In *George v. State*, 39 Miss. 580, a motion for new trial in a capital case was denied, in which it was found after verdict that one of the jurors was an alien. In *State v. Jackson*, 27 Kan. 581, 41 Am. Rep. 424, it was held that, "in a criminal prosecution for murder in the first degree, it was ascertained after the verdict was rendered that two of the jurors had voluntarily borne arms against the government of the United States during the war of the Rebellion, and that their consequent disabilities had not been removed, and therefore that they were not electors of the state of Kansas, and therefore were not proper persons to serve as jurors. No objection had previously been made to these jurors serving in the case, and it does not appear that any effort had been made previous to the rendering of the verdict, to ascertain whether they were competent jurors or not. After the verdict was rendered, and the defendant found guilty of murder in the first degree, as charged in the information, the defendant then moved for a new trial, and also in arrest of judgment, because of the incompetency of these two jurors. Held, that the fact that these two jurors were not electors

was not an absolute disqualification, but only a ground for challenge; that their disqualification would have been a proper ground for discharging them from the jury before they were sworn, but it is not a sufficient ground for granting the defendant a new trial, or for arresting the judgment after the verdict was rendered, and, where no objection is made because of such disqualification until after the verdict is rendered, the objection is made too late." In *State v. Ready*, 44 Kan. 697, 700, 26 Pac. 58, 59, it was held by the supreme court of Kansas that, "when a juror examined upon his *voir dire* said that he had not served upon a jury in any court of record in this state within twelve months, and it is shown that he had, and the fact of the prior service of the juror was not known to the appellant until after the trial, the fact of the prior service of the juror is not sufficient to grant a new trial." (*State v. Jackson*, 27 Kan. 581, 41 Am. Rep. 424, followed). And it was further held that, "where an objection to the incompetency of a juror, namely, that he had served as a juror in the same court in another case within the preceding year, is first raised after verdict, and the party objecting fails to show that the ground of challenge was unknown to him and his counsel when the juror was accepted, or that he would have exercised his right of challenge if he had known that the cause therefor existed, or that he has suffered any prejudice by the retention of the juror, the objection will not be available for the purpose of obtaining a new trial." In the case of *Stewart v. State*, 15 Ohio St. 159, it is said: "The plaintiff in error, defendant below, was put on trial for a penitentiary offense. After a jury had been impaneled and sworn, a juror arose in open court and stated that he had been one of the grand jurors by whom the indictment had been found. Pertinent inquiries had been openly made upon this subject by counsel for the state before the jury was sworn, to which the juror had failed to respond. The defendant's counsel thereupon, in answer to an inquiry by the court, objected to proceeding in the trial with the jury then impaneled, and at the same time declining to waive any of the defendant's rights. The jury was thereupon discharged by the court, and another jury was impaneled in the usual mode, and the trial proceeded, the defendant objecting thereto. Held, that the discharge of the jury first impaneled was the necessary result of sustaining the objection interposed by the defendant himself, and so did not take place without his consent, but was an act done at his own instance, and would not, therefore, operate as an acquittal, nor bar a further prosecution." Mr. Justice Scott, in delivering the opinion of the court, said: "Indeed, looking to the whole colloquy which took place between the court and counsel, it is quite evident that the defendant desired to be regarded as consenting to nothing which might in any respect prejudice his possible rights in any stage of the trial, and that he desired to secure for himself, by objecting to proceeding with the trial, the full

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right and benefit, in the event of his conviction, of a motion for a new trial on account of the fact when first disclosed, and at the same time, if possible, to obtain all the chances of acquittal from the jury then impaneled, by refusing to consent to its discharge. He had a clear right to one fair and legal trial by an impartial jury, but his right to demand two trials, as a prerequisite to legal conviction and sentence, cannot be conceded. Nor can he reasonably be allowed to acquire such an advantage by occupying at the same time two positions utterly inconsistent with each other. There were but two possible courses of action open to the court,—either to proceed with the trial before the jury then impaneled, or to discharge the jury. It was simply impossible not to do either, and a direct and absolute objection to the one was necessarily a demand for the other. The jury was not discharged until the defendant's counsel had been asked in open court if they objected to proceeding in the trial with the jury then impaneled, and had replied explicitly that they did. The objection thus openly and directly made was (and, under the circumstances, perhaps properly) sustained by the court; and, as a necessary and unavoidable result, the discharge of the jury followed."

In volume 17, 2d ed. p. 1161, of the American and English Encyclopædia of Law, the rule is thus stated: "Generally an objection to a juror for incompetency from any cause is waived if not made before verdict. The disqualification of a juror has, however, been frequently made the ground of an application for a new trial or other relief after verdict and the courts have not been in unison in their action on such applications. It is agreed that one who knew of a ground of disqualification before or during the trial cannot present such objection for the first time after verdict, and he must actually show the want of such knowledge on his part." In volume 12, p. 557, of the Encyclopædia of Pleading and Practice, it is said: "If rumors affecting the conduct of a juror are of so serious a character as to require a dismissal of the jury and the impaneling of another, it is incumbent on counsel to move in the matter upon information of the prevalence of the rumor, and they cannot sit silently by and speculate upon the result." Thompson, in his work on Trials (§ 114), lays down the following rule: "A known cause of challenge is always waived by withholding it and raising it as an objection after verdict, since such a practice is incompatible with the good faith and fair dealing which should characterize the administration of justice." And again the same author, in the same section, in discussing this subject, used the following language, which is clearly applicable to the facts in this case: "For counsel to sit in silence when the court is embarrassed in the process of impaneling a jury, declining to take action upon the suggestions of the court, and answering that they have nothing to say, and then raising the proper objection in case the verdict goes against them,—is a trifling with the court.

and with the administration of justice which will not be tolerated on the trial of the gravest offenses."

But is Harper disqualified from serving as a juror in this territory because he was convicted of a felony in the state of Nebraska? We think this question must be answered in the negative. Section 3093 of the Statutes of 1893, provides as follows: "All male citizens residing in any of the counties of this territory, having the qualifications of electors, and being over the age of twenty-one years, and of sound mind and discretion and not judges of the supreme court or district courts, clerks of the supreme or district courts, sheriffs, coroners, licensed attorneys engaged in practice, or any person licensed to sell liquor, or an habitual drunkard, or jailors, and not subject to any bodily infirmity amounting to disability, and who have not been convicted of a criminal offense punishable by imprisonment in the penitentiary, and not subject to disability for the commission of any offense which by special provision of law does or shall disqualify them, are and shall be competent persons to serve on all grand and petit juries within their counties or subdivisions respectively. . . ." Section 2, chap. 13, of the Session Laws of 1899, in relation to the qualification of electors in this territory, provides as follows: "The term 'qualified electors' within the meaning of this act, shall include all male persons of the age of twenty-one years or upwards belonging to either of the following classes, who have resided in the territory for the period of six months, in the township sixty days, and in the voting precinct thirty days next preceding any election: First, citizens of the United States; second, persons of foreign birth who shall have complied with the provisions of the laws of the United States on the subject of naturalization; third, civilized persons of Indian descent, not members of any tribe." Under § 5183 of our Code of Criminal Procedure a conviction for felony is a general cause of challenge. A felony, under our Criminal Code, is defined to be a crime which is or may be punishable with death or by imprisonment in the territorial prison. Stat. 1893, § 1841. There is no express provision in our statute which renders a person disqualified from serving as a juror in this territory who was convicted of a crime in any other state or territory. In the absence of an express statute making a juror incompetent who has been convicted of a criminal offense punishable by imprisonment in the penitentiary in another state, such conviction and sentence can have no effect by the way of penalty or personal disability or disqualification beyond the limits of the state in which the judgment was rendered. This is the rule laid down in the case of *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617, where Mr. Justice Gray, speaking for the court, said: "At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the state which enacts it to a conviction and sentence in another state, such con-

viction and sentence can have no effect, by way of penalty or of personal disability or disqualification, beyond the limits of the state in which the judgment is rendered. *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Com. v. Green*, 17 Mass. 515; *Sims v. Sims*, 75 N. Y. 466; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; *Story*, Conf. L. § 92; 1 Greenl. Ev. § 376." It must therefore follow that the conviction of the juror Harper for a felony in the state of Nebraska, and his sentence to the penitentiary in said state, did not make him an incompetent juror in the trial of this case.

2. It is next contended that the court erred in refusing to grant a new trial for the reason that there were certain irregularities in the summoning of the special venire. There is no merit in this contention. It appears from the record that the court ordered a special venire of sixty jurors, and the sheriff made return of sixty-one jurors. No objection was made by counsel or defendant to the manner in which the special venire was ordered, or the return thereof by the sheriff, and the objection was raised for the first time on motion for new trial. There is no showing made that any injury resulted by reason of any irregularity in the summoning of the jury, or the return thereof by the sheriff. This court has held that the provisions of our statute in relation to the selecting, summoning, and impaneling of a jury are not mandatory, but merely directory, and mere irregularities will not be deemed prejudicial unless it is clearly shown that some injury has resulted therefrom. *Huntley v. Territory*, 7 Okla. 60, 54 Pac. 314; *Harmon v. Territory*, 9 Okla. 313, 60 Pac. 115. In *Huntley v. Territory*, 7 Okla. 60, 54 Pac. 314, it was said: "Unless we could say that such error affected the substantial rights of the defendant, or might have affected his substantial rights, injuriously, we would not be justified in disturbing the verdict." But if irregularities occur in the summoning of a jury, it is incumbent upon the defendant to interpose his objection at the proper time, and we think it is waived if it is raised for the first time after verdict. In *Perry v. State* (Tex. Crim. App.) 45 S. W. 566, it was held by the court of criminal appeals of Texas that objections to the irregularities in regard to a special venire cannot be made for the first time after verdict.

3. Error is assigned that the court refused to admit certain competent and relevant testimony of nonexpert witnesses on behalf of the plaintiff in error. It is stated in the brief that the court refused to allow the witnesses—particularly John J. Queenan and Alice Welch, who were specially familiar with the defendant—to testify as to impressions made upon them by the conversation, conduct, and appearance of the accused. We have carefully examined the testimony of these witnesses, and we do not think that this is a fair statement of the record. The record discloses that the court permitted these witnesses to testify as to the actions, conduct, and appearance of the plaintiff in

of the opinion there was no error committed by the trial court in the admission or exclusion of competent and relevant testimony.

5. It is next claimed that the court erred in giving instruction No. 5, which reads as follows: "Homicide committed by one who has not sufficient knowledge and understanding to understand right from wrong, and to comprehend and understand the consequences of the mind that will excuse one for the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, and is able to comprehend and understand the consequences of such act the law recognizes him as sane, and holds him responsible for such acts; and, in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understood the consequences of such act, then and in that event it will be your duty to find the defendant guilty of murder, as

charged in the indictment. But on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty." We think that this instruction fairly and correctly states the law applicable to this case, and comes within the rule announced by this court in *Maas v. Territory*, 10 Okla. 714, 53 L. R. A. 814, 63 Pac. 960. And there was no error in refusing to give instruction No. 4½, which was offered by the defendant, since said instruction was covered by the general charge of the court.

Upon a careful examination and consideration of the entire record, we are of the opinion that no error was committed by the trial court prejudicial to the substantial rights of the plaintiff in error.

The judgment of the District Court is therefore affirmed.

All the Justices concur except **Burwell, J.**, who tried the cause in the court below, not sitting.

Affirmed by Supreme Court of United States, June 1, 1903.

PENNSYLVANIA SUPREME COURT.

James LAIRD, *Appt.*,

v.

City of PITTSBURG *et al.*

Joseph W. STENGER, *Appt.*,

v.

SAME.

Milton I. BAIRD, *Appt.*,

v.

SAME.

(205 Pa. 1.)

1. Land needed for an addition to a free library building which is located in a public park may be taken under statutory authority to exercise the right of eminent domain to secure land for a park.
2. A library does not cease to be public, so as to prevent the taking of property by eminent domain for its enlargement, by the fact that one half of its directors are appointed by private persons, where it is located on public land, and the public appoints the other half.

(January 5, 1903.)

APPLEALS by plaintiffs from decrees of the Court of Common Pleas, No. 2, for Allegheny County, refusing to enjoin the ap-

NOTE.—The above decision as to what constitutes park purposes for which land may be condemned seems to have no exact precedents, but exhibits a liberal application of the doctrines of eminent domain.

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propriation of plaintiffs' property for park purposes. *Affirmed.*

The city of Pittsburgh by ordinance reciting that it deemed it proper and expedient that it exercise the power of eminent domain, vested in it for the acquirement of real estate for park purposes, authorized the director of the department of public works to proceed to appropriate certain land for park purposes. The property owners brought these suits to enjoin such proceedings. The court below found the following facts:

That the land described in plaintiffs' bill adjoins a public park of the defendant city known as Schenley park, which park contains 422 acres of land, of which 1³⁸/₁₀₀ acres are occupied by the Carnegie Free Library building, 4 acres by the Phipps Conservatory, 2³/₄ acres by music stands, and acres by athletic grounds and race course.

That for the purpose of enlarging Schenley park, the defendant city has proceeded, under its right of eminent domain, to purchase and acquire, by condemnation proceedings, the properties of plaintiffs and others; that the properties so purchased and acquired contain together about 150,000 square feet of land. That the property of plaintiffs was acquired by condemnation proceedings, and not by purchase.

That the Carnegie Free Library building, referred to in the fourth finding of fact contains a free library, an art gallery, museum, and music hall, which building was completed in the fall of the year 1895, and dedicated to public use on the 10th day of November, 1895.

That the Carnegie Free Library was founded through the donation of Andrew Carnegie. Esquire, under an ordinance of the defendant city, approved on the 25th day of February, 1890, and its supplements, so that the funds for the erection of the building and the equipping of the library were furnished by the donor, while the defendant city undertook to appropriate \$40,000 per annum to maintain the same; and whereby the location, erection, and management of that institution were intrusted to a board of directors composed of the mayor of the city, the presidents of select and common councils, the president of the central board of education, and a library committee of five persons appointed by the councils of the defendant city, and nine other persons appointed originally by the donor, with the right and power in the nine persons so appointed to fill vacancies in their number and to elect their successors.

That the library and reading rooms in the building are open to the public free of charge; that free public musical entertainments are given at least twice a week in the music hall of the library building; that the hall is frequently let for entertainments, for which a rental is charged, the amount of the rental depending upon the nature of the entertainment, the purpose for which given, and by whom given. That the museum and art gallery, which occupy rooms in the building, are under the control of the Carnegie Institute, which is managed by a distinct board of trustees, though its occupancy of rooms in the Carnegie Library building is with the permission and co-operation of the board of trustees of the Carnegie Free Library; that the museum and art gallery are open throughout the year to the public, without charge.

That the board of trustees of the Carnegie Free Library has the management of the library building, and also the expenditure and disbursement of all funds belonging and applicable thereto, including the \$40,000 annually appropriated by the defendant city to assist in defraying the expenses necessary in maintaining the same.

That the trustees of the Carnegie Free Library desire to extend and enlarge the present library building at a cost of \$3,600,000, which sum has been donated by Mr. Carnegie, and is now subject to the order of the trustees, to be used by them for that purpose.

That it is the intention of the board of trustees of the Carnegie Free Library to ask permission of the Councils of the defendant city to use and occupy a further portion of Schenley park to erect thereon the proposed addition to its library building. That the land necessary for such extension includes, among other property, the lots taken from plaintiffs, and will require an area of about 96,000 square feet.

Messrs. **S. S. Mehard, A. W. Duff, H. E. Carmack, and H. A. Miller**, for appellants:

The acts of municipal bodies, whether in the form of resolutions or ordinances, may be 61 L. R. A.

impeached for fraud at the instance of persons injured thereby.

1 Dill. Mun. Corp. 3d ed. § 311.

If the representatives of the city of Pittsburgh are taking the property of the plaintiffs for purposes of the Carnegie Library in point of fact, and are covering such taking under the form of use for a public park, and if the city has not authority to take the property for the purpose intended, then, legally speaking, that would be a fraud.

Lance's Appeal, 55 Pa. 16, 93 Am. Dec. 722.

The city of Pittsburgh cannot exercise the power of eminent domain in taking land for the purposes of a Carnegie Free Library, because that institution is not under the control of the city, and its property is distinct from that of a public park.

Pa. Const. art. 1, § 10; *Lance's Appeal*, 55 Pa. 16, 93 Am. Dec. 722.

It cannot exercise this power, because such use would be inconsistent with that of a public park.

Lance's Appeal, 55 Pa. 16, 93 Am. Dec. 722; *Allegheny v. Ohio & P. R. Co.* 26 Pa. 355; *Com. v. Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 471.

The lands taken for public use as a park cannot lawfully be diverted to inconsistent uses, even of a public nature.

Wartman v. Philadelphia, 33 Pa. 202; *Burton's Appeal*, 57 Pa. 213; *San Francisco v. Itself*, 80 Cal. 57, 22 Pac. 74; *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130; *Lamar County v. Clements*, 49 Tex. 348; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696; *Rouzee v. Pierce*, 75 Miss. 846, 40 L. R. A. 402, 23 So. 307; *Princeville v. Auten*, 77 Ill. 325; *Atty. Gen. v. Goderich*, 5 Grant Ch. (U. C.) 402.

Messrs. **Thomas D. Carnahan and James C. Gray**, for appellees:

There can be no question as to the motives of the legislature of any state in passing an act, where the act on its face appears to be a valid and constitutional statute.

Com. v. Keary, 198 Pa. 500, 48 Atl. 472.

This rule is extended, by analogy, to ordinances and resolutions by boroughs and city councils.

Freeport v. Marks, 59 Pa. 253.

The city of Pittsburgh having the right to appropriate the land of the appellants for park purposes, the ordinances of March 7, 1901, constitute an actual and absolute appropriation.

Shields v. Pittsburgh, 201 Pa. 328, 50 Atl. 820.

Mitchell, J., delivered the opinion of the court:

These cases might well be affirmed on the technical ground found by the court below, that the power of the city to acquire land by eminent domain for park purposes is undisputed, and the ordinance and proceedings for that purpose are regular. But the case having been argued and fully considered on the real ground of controversy,—that the use proposed to be made of the land is not within

the legitimate scope of park purposes,—we proceed to determine the cases on the merits.

A public park, in the popularly accepted meaning of the present time, may be comprehensively defined as a public pleasure ground. The definitions by the lexicographers do not vary much from this. Worcester calls it “a piece of ground inclosed for public recreation or amusement;” Webster, “a piece of ground, in or near a city or town, inclosed and kept for ornament and recreation;” the Century Dictionary, “a piece of ground, usually of considerable extent, set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open-air recreation.” No doubt the idea of open air and space, with the land kept in grass and trees, as if approximately in the state of nature, still inheres in the general understanding of the word, but it is no longer the dominating thought, as it formerly was. The chief amusements of the great body of our ancestors in England were in the open air, and a park meant for them practically a small or private forest, left in condition for the home of wild animals of the chase. Blackstone defines a park as “an inclosed chase extending only over a man’s own grounds. The word ‘park,’ indeed, properly signifies an inclosure; but yet it is not every field or common which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park; for the King’s grant, or, at least, immemorial prescription, is necessary to make it so. Though now the difference between a real park and such inclosed grounds is in many respects not very material, only that it is unlawful at common law for any person to kill any beasts of park or chase, except such as possess these franchises of forest, chase, or park.” 2 Bl. Com. 38.

With the change of manners and habits of the people came also a change in their associations with the use of words. The idea of a public park in or near a city as a place of resort of the people generally for recreation and amusement necessarily banished the idea of a home for wild beasts of the chase, even in a very modified state of nature. The trimming away of thickets and underbrush, the substitution of regular pathways, paved, and perhaps railed and artificially lighted, which would have been incongruous to our forefathers, now enter into the accepted idea of a park. The growth of sentiment for artistic adornment of public grounds and buildings is part of the history of our time and country. Public parks have come to be recognized as not only the natural place for walks and drives afoot, on wheels, or with horse and carriage, for boating, skating, and other outdoor athletics, but also as the appropriate and most effective location for monuments and statues, either to historic heroes or to pure art, fountains, flower displays, botanical and zoölogical gardens, museums of nature and of art, galleries of painting and sculpture, music stands and

music halls, and all other agencies of æsthetic enjoyment of eye and ear. The parks of cultivated Europe are filled with works of art, and the great cities of this country are following fast in the same direction. Schenley park in Pittsburg, with which this case is immediately concerned, already devotes a portion of its space, as found by the court below, to the Phipps Conservatory of flowers, to music stands, and to the Carnegie Free Library building, as well as to athletic grounds and a race course. The Carnegie Free Library building, as also found by the court below, contains a free library, an art gallery, museum, and music hall, all free to the public.

The power to take by eminent domain is expressed in the statutes to be “for the purpose of public parks.” No further legislative definition is given, and it must be assumed that the words are used according to their general understanding. This, as already indicated, includes all the customary forms of the use of land as a public pleasure ground. The Free Library building, as already said, contains an art gallery, museum, and music hall, besides a free library. The latter is as much devoted to the public recreation as the other parts. It affords a place of resort and entertainment for the public at large in rainy and inclement weather, and at all times for those who prefer quiet study to sight-seeing or more active amusement. It may be conceded, as argued by appellants, that a library, in itself, is not an integral part of a park, and, were the taking here complained of a taking directly and solely for a library site, a different question would be presented. But a library occupying only a very small fraction of the park area, not interfering at all substantially with its open air and free space, does not differ in legal effect from the museums, picture galleries, music stands, and other incidental means of promoting the entertainment and pleasure of the people. Should the city, therefore, decide to devote the land now in controversy to the enlargement of the Free Library building, it could not be fairly said to be a use outside of what is legitimately implied in the authority to take for a public park. We have not found or been furnished with any case on the exact point here raised, but the analogous principles applicable to the use of a public square in a town plot are discussed in *Com. ex rel. Atty. Gen. v. Connellsville*, 201 Pa. 154, 50 Atl. 825, and cases there cited.

The further objection that the city cannot take this land because the Carnegie Free Library is not under the control of the city, and its property is distinct from that of a public park, is also untenable. The city takes and keeps the title and control of the land, though it commits the ordinary management—what may be called the “police administration”—to a board of direction in which it has by election and *ex officio* a representation of one half. This is not a taking of the property for a private institution.

Decree affirmed, with costs.

SOUTH DAKOTA SUPREME COURT.

G. E. ROCHFORD, *Appt.*,

v.

Alick McGEE, *Respt.*

(.....S. D.....)

An application for insurance, on a single sheet containing at the bottom a promissory note intended to secure assessments, is a single contract of which the removal of the note is a material alteration, so that it is void, even in the hands of a bona fide holder, although the note is written below a perforated line, if the general appearance of the paper is such that the applicant is not guilty of negligence in signing it.

(May 8, 1903.)

APPEAL by plaintiff from a judgment of the Minnehaha County Court in favor of defendant in an action brought to enforce the amount alleged to be due on a promissory note. *Affirmed.*

The contract of which the promissory note was a part was as follows:

The
Germania Live Stock Insurance Co.
Sioux Falls, South Dakota.
Amount of Incorporation, \$120,000.00.

Special.

Application of Alick McGee; Postoffice
Hartford; Township..... County
..... State S. D.

To the Germania Live Stock Insurance Company:

The undersigned hereby applies for insurance in your Company, and for indemnity for loss by death of Live Stock hereinafter described, for a period of five years, in accordance with its By-Laws:

The Live Stock on which insurance is desired is described as follows:

Dexter King; name..... age 10
years; breed..... name of sire
..... name of dam.....
registered number..... registered
in..... color black; value,
\$1,500, and to secure such indemnity I hereby answer the following questions, and the truthfulness of the answers I hereby warrant:

What is the total amount of insurance you desire to carry? Answer, \$1,000.

To whom do you desire insurance payable should loss occur? Answer,.....

What interest have you in the above described Live Stock? Answer, Owner.

Dated this 26 day of Sept. 1901.

Alick McGee.

NOTE.—As to what constitutes a material alteration of a note, see also, in this series, *Ruby v. Talbott* (N. M.) 3 L. R. A. 724, and cases in note thereto; *Montgomery v. Crosthwait* (Ala.) 12 L. R. A. 140; *Sanders v. Bagwell* (S. C.) 7 L. R. A. 743; *Palmer v. Poor* (Ind.) 6 L. R. A. 469; *Wilson v. Hayes* (Minn.) 4 L. R. A. 196; *Walton Plow Co. v. Campbell* (Neb.) 61 L. R. A.

\$50.

No.....

Hartford, South Dakota, Sept. 26, 1901, two months after date, for value received, I promise to pay the Germania Live Stock Insurance Co. (a corporation), or order, fifty Dollars, with interest at the rate of 8 per cent. per annum, after maturity, until paid. For the purpose of obtaining credit in the above named Company I hereby certify that I own of land in Section Township Range....., State of South Dakota, and free from all incumbrance except \$..... and I further certify that I own personal property to the amount of \$....., free from all incumbrance except \$.....

Alick McGee.

Mr. Joe Kirby, for appellant:

It was not the intent of the legislature to create the insured a ward of the courts, and deprive him of the power to issue his paper in negotiable form. Having issued it in such a form, he is now estopped from claiming, as against a bona fide holder, that he should have done otherwise.

Comp. Laws, § 4488; *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316; *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386; *Haskell v. Jones*, 86 Pa. 173; *Moses v. Comstock*, 4 Neb. 516; *Pape v. Hartwig*, 23 Ind. App. 333, 55 N. E. 271.

Where a negotiable instrument is so attached to a memorandum that it gives implied authority to remove it, or where the maker is so negligent in the making of the note and memorandum that the two can be easily separated, then he must respond on such note, which, after separation, has come into the hands of an innocent purchaser.

2 Dan. Neg. Inst. §§ 1405-1407; *Noll v. Smith*, 64 Ind. 511, 31 Am. Rep. 131; *Cornell v. Nckeker*, 58 Ind. 425; *Zimmerman v. Rote*, 75 Pa. 188; *Elliott v. Levings*, 54 Ill. 213; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Rainbolt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152.

There was no fraud in obtaining the note and application from the defendant by the agent's representing that the insurance company he was representing was a branch of the German Insurance Company of Freeport, Illinois, the defendant being able to read and write.

2 May, Ins. § 560 A; *Susquehanna Mut. F. Ins. Co. v. Svrunk*, 102 Pa. 17.

Mr. U. S. G. Cherry, for respondent:

Where a mutual insurance company issues a policy which it is prohibited by law to is-

16 L. R. A. 486; *Simmons v. Atkinson & L. Co.* (Miss.) 23 L. R. A. 599; *Erickson v. First Nat. Bank* (Neb.) 28 L. R. A. 577; *Citizens' Nat. Bank v. Williams* (Pa.) 35 L. R. A. 464, and note as to effect of alteration on bona fide holder of note; *Newman v. King* (Ohio) 35 L. R. A. 471; and *Brown v. Johnson Bros.* (Ala.) 51 L. R. A. 403.

sure, the policy is illegal and void, and the fact that premiums have been paid thereon, and used by the company, will not estop it from pleading *ultra vires* as a defense to a suit upon the policy.

Mutual Guaranty F. Ins. Co. v. Barker, 107 Iowa, 143, 77 N. W. 868.

Even if the assured gives a promissory note to a mutual company of which he is a member, for an alleged premium, or to cover future assessments, he does not become liable for the full amount of the note, but only for such assessments as may thereafter be properly made for the payment of losses and for the expenses of conducting the business of the company.

Dana v. Munro, 38 Barb. 528.

All "such notes are non-negotiable."

Sess. Laws 1897, chap. 71, § 8; *Second Nat. Bank v. Basuier*, 12 C. C. A. 517, 27 U. S. App. 541, 65 Fed. 58; *Johnson v. Schar*, 9 S. D. 536, 70 N. W. 838; *Hegeler v. Comstock*, 1 S. D. 138, 8 L. R. A. 393, 45 N. W. 331.

The detachment of the lower portion from the upper portion removed the notice from the face of the instrument, and therefore such detachment and separation constituted, as a matter of fact, a material alteration of the instrument.

Porter v. Hardy, 10 N. D. 551, 88 N. W. 458; *National Bank of Commerce v. Feeney*, 12 S. D. 156, 46 L. R. A. 732, 80 N. W. 186.

Fuller, J., delivered the opinion of the court:

The record in this action on a promissory note, resulting in findings of fact favorable to the defendant, and a judgment accordingly entered, discloses, among other facts, the following: On the 26th day of September, 1901, an authorized agent of the Germania Live Stock Insurance Company, by means of grossly false and fraudulent representations, upon which the defendant relied, procured his signature in two places to a one-paged instrument purporting to be an application for insurance in such corporation, by which the applicant was to be indemnified in the sum of \$1,000 against loss arising at any time within five years by reason of the death of a certain stallion therein described.

As a part of this application for insurance, and toward the bottom of the sheet containing the same, and just below the first signature of the defendant and a delicately perforated line extending entirely across the page and closely resembling a number of dotted lines above, there was, in printing, writing, and figures the promissory note in suit, signed by the defendant and thereafter detached at the perforated line, without his acquiescence, knowledge, or consent.

Although it was determined that plaintiff purchased the note without notice of the fraud, the trial court concluded, in effect, that the paper constituted an integral portion of a continuous instrument denominated "Application for insurance" and was made a part thereof for the purpose of securing the payment of subsequent assessments, none of which were ever made, and that the same

is non-negotiable; that the detachment and separation of the lower portion of the instrument constitutes a material alteration, rendering what appears to be a negotiable promissory note void in the hands of a bona fide holder.

The record clearly justifies the inference that the entire instrument, including the detached portion, was fraudulent in its inception, without consideration, and secured under such circumstances that the defendant was not guilty of negligence.

The Germania Live Stock Insurance Company, named in the note as payee, was a corporation organized pursuant to chapter 71, Laws of 1897, under the provisions of which it possessed no power to insure live stock against any loss other than that occasioned by fire, lightning, hail, tornadoes, cyclones, and hurricanes; and, in this instance, there was an attempt to insure generally against death from any cause in an amount tenfold greater than that authorized.

Section 8 of the act prohibits the insurance of property in any incorporated city or village, and expressly declares that all notes taken as evidence of indebtedness for unpaid assessments shall be in all cases non-negotiable.

When the application was written, and continuously thereafter, the stallion was kept in the incorporated village of Hartford, and that part of the paper involved in this action was taken in the form of a negotiable promissory note.

Had there been no material alteration, nor false and fraudulent representations, orally made, it is apparent from the statute that the recitals above mentioned would preclude a recovery in the hands of a third party, without further notice than that imported by the face of the instrument.

The trial court having found plaintiff to be a good-faith purchaser, it is needless to determine whether, under all the circumstances, the fact that the note was made payable to the "Germania Live Stock Insurance Company (a corporation), or order" was sufficient to put upon inquiry a purchaser in the due course of business.

The destruction of that part of the page above the perforated line materially changed the identity and legal effect of an instrument which, if otherwise valid, was payable only upon certain contingencies.

In the absence of negligence on the part of the maker, it is well settled that an alteration, which thus changes the relation of the immediate parties, vitiates the instrument, not only as to them, but as against a bona fide holder or indorsee without notice. *Porter v. Hardy*, 10 N. D. 551, 88 N. W. 458; 2 Cyc. Law & Proc. p. 177, and numerous cases there collated.

It is contrary to every rational conception of justice to hold a blameless person liable upon an instrument from which fundamental recitals, constituting a perfect defense, have been wrongfully eliminated and the privacy of contract destroyed.

The judgment appealed from is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

STANDARD LIFE & ACCIDENT INSURANCE COMPANY, *Plff. in Err.*,

v.

Mary E. SALE.

(121 Fed. 664.)

1. There is no error in refusing to direct a verdict for defendant, if, upon the evidence, the jury may, without acting unreasonably, find for plaintiff.
2. Good faith on the part of an applicant for insurance in denying the existence of a bodily infirmity will not prevent its rendering the policy void, where the policy expressly states that, if a statement of its nonexistence shall be untrue in any respect, then the policy shall be null and void.
3. An applicant for life insurance may be required to warrant himself sound in health.
4. Giving a correct instruction at the request of one of the parties does not correct an error in the general charge, unless the instructions there given are recalled or explained.

(April 15, 1903.)

ERROR to the Circuit Court of the United States for the Western District of Tennessee to review a judgment in favor of plaintiff in an action brought to enforce a claim upon an accident insurance policy. *Reversed.*

The facts are stated in the opinion.

Argued before *Lurton* and *Severens*, Circuit Judges, and *Wanty*, District Judge.

Mr. H. R. Boyd, for plaintiff in error:

The evidence does not disclose that Dr. Sale died from the accident as its sole and proximate cause.

National Masonic Asso. v. Shryock, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; *Hubbard v. Travelers' Ins. Co.* 98 Fed. 932.

Plaintiff must show that the result of the external, violent, and accidental means is not only sufficient to show an accident; it must be shown that the accident was the sole and proximate cause of the death.

Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Anderson v. Scottish Acci. Ins. Co.* 27 Scot. L. R. 20; *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L. R. A. 753, 30 N. E. 1013; *Knights of Pythias v. Rosenfeld*, 92 Tenn. 508, 22 S. W. 204; *Knights of Honor v. Dickson*, 102 Tenn. 255, 52 S. W. 862; *Endowment Rank, K. of P. v. Cogbill*, 99 Tenn. 28, 41 S. W. 340; *Woodward v. Iowa L. Ins. Co.* 104 Tenn. 49, 56 S. W. 1020; *Chicago Guaranty Fund Life Soc. v. Ford*, 104 Tenn. 533, 58 S. W. 239; *Rand v.*

NOTE.—As to effect of innocent misrepresentations as to health of insured when he has an undiscovered disease, see also, in this series, *Fidelity Mut. Life Ins. Asso. v. Jeffords* (C. C. App. 5th C.) 53 L. R. A. 193, and *note*. 61 L. R. A.

Provident Sav. Life Assur. Soc. 97 Tenn. 291, 37 S. W. 7; *Barry v. United States Mut. Acci. Asso.* 23 Fed. 712; *Ferris v. Home Life Assur. Co.* 118 Mich. 485, 76 N. W. 1041.

A false answer in an application makes the policy void, irrespective of the intention of good faith.

Cobb v. Covenant Mut. Ben. Asso. 163 Mass. 176, 10 L. R. A. 666, 26 N. E. 230; *Clemens v. Supreme Assembly, R. S. of G. F.* 131 N. Y. 485, 16 L. R. A. 33, 30 N. E. 496; *Standard L. & Acci. Ins. Co. v. Lauderdale*, 94 Tenn. 635, 30 S. W. 732; *Cushman v. United States L. Ins. Co.* 63 N. Y. 407; *Foot v. Aetna L. Ins. Co.* 61 N. Y. 576; *Provident Sav. Life Assur. Soc. v. Llewellyn*, 7 C. C. A. 579, 16 U. S. App. 405, 58 Fed. 940.

It makes no difference whether or not the conditions are reasonable. The parties have a right to make their own contract.

Jeffries v. Economical Mut. L. Ins. Co. 22 Wall. 47, 22 L. ed. 833; *Savage v. Howard Ins. Co.* 52 N. Y. 504, 11 Am. Rep. 741.

The question whether the statements are warranties, or simply representations, is one for the court alone, and not at all for the jury.

Stensgaard v. St. Paul Real Estate Title Ins. Co. 50 Minn. 429, 17 L. R. A. 575, 52 N. W. 910; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 342, 57 Am. Rep. 729, 8 N. E. 654.

Messrs. Smith & Tresevant, also for plaintiff in error:

Dr. Sale's omission to inform the company of his being under treatment for Bright's disease at the time of issuing the policy discharged the company.

Schane v. Metropolitan L. Ins. Co. 76 App. Div. 271, 78 N. Y. Supp. 582; *Boyd v. Vanderbilt Ins. Co.* 90 Tenn. 212, 16 S. W. 470.

Judges are not required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence is of such character that it would warrant the jury in finding a verdict in favor of the party introducing some evidence.

Marion County v. Clark, 94 U. S. 278, 24 L. ed. 59; *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. ed. 174.

Messrs. Patterson, Neely, & Henderson, for defendant in error:

If there is evidence before the jury on a material issue in favor of the party holding the affirmative of that issue, on which the jury could, in the eye of the law, reasonably find in his favor, it must be left to them to determine its weight and effect.

New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 26, 25 L. ed. 533; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Macon County v. Shores*, 97 U. S. 272, 24 L. ed. 889; *Merchants' Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 430, 24 L. ed. 506; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855; *Goodlett v. Lou-*

isville & N. R. Co. 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254; *Schuykill & D. Improv. & R. Co. v. Munson*, 14 Wall. 442, 20 L. ed. 867.

If this accident produced, as one of its effects, acute Bright's disease; if that was a sequence of the injury, and not a thing which preceded it, it would then be a link in the chain of causes of his death, although his death may have been the actual result of the then existing acute Bright's disease, as well as of the injury.

Provident Sav. Life Assur. Soc. v. Llewellyn, 7 C. C. A. 579, 16 U. S. App. 405, 58 Fed. 940; *National Masonic Asso. v. Shryock*, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; *Hubbard v. Travelers' Ins. Co.* 98 Fed. 932.

If Dr. Sale did not know, or believe, or suspect, and was acting honestly in the belief, that he had no physical infirmity, it would not be a breach of the statement that he never had any bodily or mental infirmity, although he may have had a temporary ailment of any kind.

Manhattan L. Ins. Co. v. Francisco, 17 Wall. 672, 21 L. ed. 698; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 197, 26 L. ed. 708; *Moulor v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; *Joyce, Ins.* § 1448.

Severens, Circuit Judge, delivered the opinion of the court:

This is a suit brought by Mary E. Sale, the defendant in error, to recover the sum of \$9,000 upon an accident insurance policy issued to her husband, Dr. E. Paul Sale, June 18, 1900, and in which she was the beneficiary. The insurance was for one year. Dr. Sale was a physician practising at Memphis, Tennessee, and was a member of the faculty of the Memphis Hospital Medical College. On April 29, 1901, while on a visit to a patient, he suffered an accident from being thrown by his horse violently upon a stone pavement, whereby the neck of the femur of his right leg was broken. He did not recover from the accident, and died on the 8th of June following. The policy stipulated for the payment of \$9,000 to the wife of the insured if death should result from the bodily injuries therein mentioned, "as the proximate and sole cause thereof," and contained the following statements and agreement on the part of the insured:

"The insured on the acceptance of this policy makes the following true and complete statements, which are hereby made a part of the contract of insurance, and if any of said statements shall be untrue in any respect, then this policy shall be null and void.

"(j) I have never had fits or disorders of the brain, vertigo, or hernia, or any bodily or mental infirmity or disorder, except as herein stated.

"(k) My habits of life are correct and

temperate, and I am in sound condition mentally and physically, except as herein stated."

The insurance company rested its defense upon these grounds: First, that the policy was void for the reason that the insured had, prior to this insurance, suffered a bodily disorder which increased the risk; second, that at the time the insurance was effected he was not in sound physical condition, as he stated; and, third, that the accident was not the proximate and sole cause of the death of the insured. There were a verdict and judgment for the plaintiff for the sum of \$9,418.50.

Upon the trial of the issues before the court and a jury, it was shown that in the latter part of April, 1900, the insured had an attack of pneumonia, or of bronchitis (it is not clear which), and that acute nephritis, or inflammation of the kidneys, was developed; that he was in the care of a physician for some time; that a chemical analysis of the urine made at that time disclosed a derangement of the kidneys, but whether of the nature of Bright's disease, so called, or whether of a merely temporary nature, did not certainly appear; that he dieted for this trouble about six weeks, and seemingly had recovered at the time the policy was issued; and that he resumed his professional practice, and continued it until the time of the accident, in April, 1901. The evidence contained in the record, upon the character and gravity of the disorder of the insured, both before and at the date of the policy, gives ground for widely different conclusions. Whatever view we might ourselves take of the case upon its facts, we are unable to say that a jury might not, without acting unreasonably, come to a different conclusion. The jury adopted that most favorable to the plaintiff, upon the issues presented to them by the court, for they must, at least, have found that Dr. Sale did not believe that he had at any time a serious malady.

There was also evidence showing that, after the accident, very serious kidney derangement appeared; and it is hardly open to dispute, and is perhaps not disputed, that a kidney disorder contributed with the accident to cause the death of the insured. But whether this disorder existed at the time of the accident, or was a consequence developed by it, was, on the evidence, a question for the jury; it being possible to conclude that the latter was the fact. At the close of the testimony, counsel for the defendant moved the court for a peremptory instruction to find a verdict for the defendant. The motion was denied. For the reasons already stated, we think that in this there was no error.

A statute of Tennessee (Laws 1895, p. 334, chap. 160, § 22) relating to representations and warranties in contracts of insurance reads as follows: Be it further enacted, that "no written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed material, or de-

feet or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increase the risk of loss."

But it is clear that it does not change or affect the general law of insurance applicable to the facts in this case, for it is not disputed that the matter which was the subject of the warranty increased the risk of loss, if the statement was not true, and in such case the matter is left by the statute as before.

The learned judge, in his instructions to the jury with reference to the interpretation and effect of the statements of the insured regarding his physical condition previous to and at the date of the issuance of the policy, said this: "Now, when a man says that he has no bodily infirmity, it means that he does not know or suspect or believe that he has any bodily ailment of a permanent character, such as is calculated to weaken the constitution, impair the strength of the system, or to shorten life. It consequently does not include mere temporary ailment which is curable and passes away by treatment,—for example, like a cold or a case of the grip, when it has passed away, or an acute indigestion or colic, or those many ailments which a man may suffer from overeating or overdrinking; acute alcoholism, such as a man getting too much whisky on a sudden occasion, so he would not be habitually subject to it, would be a condition from which he would recover, and would not be a serious ailment, although a very inconvenient one while it lasted." And further: "Now, if Dr. Sale knew, or believed, or suspected, that he had a serious ailment of this kind, and stated that he never had any bodily or mental infirmity, that would be a false statement, and would void this policy. On the contrary, if he did not know, or believe, or suspect it, and was acting honestly, in the belief that he had no physical infirmity, it would not be a breach of this statement, although he may have had a temporary ailment of any kind, which promptly yielded to treatment, and passed away with such treatment." Then, in summing up the issues on both branches of the case (that is to say, upon the question as to whether the accident was the proximate and sole cause of the death, and upon the question of the truth of the statements in regard to the physical condition of the insured before and at the time of the issuance of the policy), he said: "Now, if you find either one of these issues in favor of the defendant (that is to say, if you find that chronic Bright's disease combined with the injury as an efficient operative to produce death), why, then, your verdict should be for the defendant; or if you find there was false answer made to this statement in the fact that Dr. Sale at the time did have a serious bodily infirmity, namely, chronic Bright's disease, and that would be serious if he had it, if he knew it, or believed or suspected it, then in that case your verdict should be for the defendant."

These instructions were likely to convey, and we think did convey, to the jury the im-

pression that the question was not whether the statements were true in fact, but whether the insured believed them to be true. It was correctly held by the court below, and it is not questioned here, that these statements were of things material to the risk. Nor can it be doubted that they were warranties, as distinguished from mere representations resting on the belief of the insured. *Jeffries v. Economical Mut. L. Ins. Co.* 22 Wall. 47, 22 L. ed. 833; *Ætna L. Ins. Co. v. France*, 91 U. S. 510, 23 L. ed. 401; *Provident Sav. Life Assur. Soc. v. Llewellyn*, 7 C. C. A. 579, 16 U. S. App. 405, 58 Fed. 940; *Mutual Security L. Ins. Co. v. Webb*, 55 L. R. A. 122, 45 C. C. A. 648, 106 Fed. 808; *Rice v. Fidelity & D. Co.* 43 C. C. A. 270, 103 Fed. 427; *Carstairs v. American Bonding & T. Co.* 54 C. C. A. 85, 116 Fed. 449; 1 Arnould, Ins. 577; May, Ins. § 156. The question was not, therefore, one of good faith on the part of the insured, and the warranty would not be fulfilled unless the fact was as stated. That part of the instruction which involved the knowledge of the insured in regard to the disease was specially excepted to, and was not corrected.

From another part of the judge's charge, we infer that he was of opinion that, although a statement of the insured might be, in terms, a warranty, yet that, when applied to such a question as that of a man's health, had not the meaning it has when referring to an open and visible fact, capable of demonstration, but was rather matter of opinion. His language was "that, according to the *Mouler* and *Foster Cases*, even a warranty strictly so construed, with reference to the state of the assured's health, being, in its nature to an accident, matter of opinion, is somewhat different from a warranty as to the existence of a physical fact capable of demonstration and of definite knowledge." We suppose this reference is to *Mouler v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466. But that part of the opinion in that case bearing on such a question was employed *arguendo*, in demonstrating that the statements of the insured were not intended as a warranty of the facts, but as a warranty of the good faith of the insured in making them. The whole inquiry was determined when that result was reached. But here that question was settled by the terms of the policy, and there is no room left for the court to find, in doubtful phraseology, a meaning which may be cut down to a representation made of the honest belief of the insured. That has been done which Mr. Justice Harlan said insurers would have to do in order to lay such hard lines for the insured. "If," said he, "those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases, of the presence of which in his system he has, and can have, no knowledge, and which even skilful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclu-

sion." Still, it must be said that questions and answers such as we are considering have generally been regarded as not extending to merely temporary derangements, but only to such diseases or disorders as become settled, and so liable to affect the vitality of the person. The answer which is expected corresponds to the object of making the inquiry, which is not to ascertain the unimportant and casual disturbances which may have happened to the health of the applicant, and which do not ordinarily have any lasting consequences, but only to those of such gravity as might reasonably excite an apprehension that his health and vigor might be affected thereby. This is the extent of the insurer's interest in the subject. And generally it would seem that the applicant would know whether he had been, or then was, subject to a malady of so grave a character. To be sure, that might not always happen. But at all events, the law is settled that the insurer may require the applicant to warrant himself to have been and to be sound in health, within the meaning of such questions as we are considering; and the applicant, if he chooses to accept the insurance upon those terms, is bound by them. And the law is generally that parties may impose such reasonable conditions to their contractual liability as they may agree upon, if they be not contrary to law.

It is true that the judge gave to the jury an instruction requested by the defendant as follows: "The policy was issued in consideration of the warranties contained in it. If there was any breach of any of these warranties, that voids the policy, and there can be no recovery thereon. Subparagraphs 'j' and 'k' in section 16, on the back of the policy, are these: '(j) I have never had fits or disorders of the brain, vertigo or hernia, or any bodily or mental infirmity or disorder. (k) My habits of life are correct and temperate, and I am in sound condition mentally and physically.' These are warranties, and if previous to the time of the is-

suance of the policy, June 15, 1900, the insured, Dr. Sale, had any bodily infirmity or disorder which was of a serious character, then this statement would not be true; and that would be a breach of the policy, which would discharge the defendant. Again, if at the issuance of this policy the said Sale was not in a sound physical condition (that is, if he then had a serious disease which might have permanently impaired his health), that would also be a breach of the warranty, and defeat recovery for plaintiff."

These instructions stated the law correctly. But the mere giving them without recalling or explaining the instructions given on the court's own motion would not be likely to remove the impression already made. In order to render an error harmless, it must be made to appear clearly that the party complaining of it was not prejudiced.

The difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide; and, secondly, it is impossible after verdict to ascertain which instruction the jury followed. *Bank of the Metropolis v. New England Bank*, 6 How. 212, 12 L. ed. 409; *Gilmer v. Hickey*, 110 U. S. 47, 28 L. ed. 62, 3 Sup. Ct. Rep. 471; *Durant Min. Co. v. Percy Consol. Min. Co.* 35 C. C. A. 252-255, 93 Fed. 160; 11 Enc. Pl. & Pr. p. 146, where the rule and its reasons are well stated and explained, and a great number of authorities are cited.

The instructions of the court in regard to the meaning and effect of the condition that the accident must be the proximate and sole cause of the death seem free from fault.

Certain questions relating to the admission of evidence are presented by the record. But, as they may not arise in the same form upon another trial, we do not think it important to notice them.

For the error in the charge of the court herein noted, *the judgment must be reversed*, and a new trial awarded.

TENNESSEE SUPREME COURT.

Cora A. TOMPKINS
v.

NASHVILLE, CHATTANOOGA, & ST.
LOUIS RAILWAY.

H. C. LASSING *et al.*, Interveners, *Appts.*

(.....Tenn.....)

A statute giving attorneys a lien on the cause of action for their fees in suits instituted by them does not deprive the plaintiff of the right to dismiss the suit against

their will, or entitle them to be made parties, with a right to prosecute the action to protect their own interests.

(January 17, 1903.)

A PPEAL by interveners from a judgment of the Circuit Court for Davidson County refusing to permit them to continue the prosecution of a suit in which they had been retained as counsel, for the purpose of preserving their attorneys' lien upon the cause of action. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to settlement out of court after action brought, without knowledge or consent of attorney who has been given by contract supervisory control over distribution of the collection, see *Falciano v. Larsen* (Or.) 37 L. R. A. 254.

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As to validity of contract with attorney providing that client shall not settle controversy without attorney's consent, see *North Chicago Street R. Co. v. Ackley* (Ill.) 44 L. R. A. 177, and *Davis v. Webber* (Ark.) 45 L. R. A. 196.

Messrs. H. C. Lassing and Allen & Rains in propria persona.

Messrs. Whitaker & Lytle and A. B. Neal for appellee, Cora A. Tompkins.

McAlister, J., delivered the opinion of the court:

The present suit involves the proper construction of Acts 1899, § 1, chap. 243, *viz.*: "That attorneys of record, who begin a suit in a court of record in this state, shall have a lien upon the plaintiff's right of action from the date of filing the suit." The facts necessary to be stated to raise the question in litigation are that on September 2, 1902, Cora Tompkins, through her attorneys, H. C. Lassing and Messrs. Allen & Rains, instituted an action in the circuit court of Davidson county against the Nashville, Chattanooga, & St. Louis Railway to recover damages for the alleged negligent killing of plaintiff's husband. A declaration was filed on the 24th of October, 1902, in which it was alleged that the deceased was killed while riding as express messenger on one of defendant's trains in the state of Georgia, and that said train was negligently brought in collision with another of defendant's trains, occupying the same track, but going in an opposite direction. It appears that the writ and declaration were signed by H. C. Lassing and Allen & Rains, as attorneys for the plaintiff. At a subsequent day of the term, the plaintiff, without notice to her counsel, caused the following motion to be entered on the motion docket of the court, *viz.*: "In this cause the plaintiff moves the court for an order dismissing her suit against the defendant railroad company, without prejudice in any way to her right of action against the said railroad company." Prior to the hearing of said motion, Messrs. Lassing and Allen & Rains, by leave of the court, appeared and filed a petition in said cause, alleging, among other things, that petitioners were plaintiff's attorneys of record, and, as such, instituted the suit, and had a lien on plaintiff's right of action for their compensation; that, under the contract of employment made by petitioners, they would be entitled, if case should be compromised, to one fourth of the recovery, in lieu of fees for their services, and, if said case was prosecuted to final judgment, they would be entitled to more than one fourth of the recovery, to be governed by the extent of services rendered, but not to exceed one half of the recovery. It is alleged that petitioners are interested in any step or move which may be taken in said suit, and that petitioners are entitled to prosecute said suit to final judgment, because of their interest in said suit, and their lien on the plaintiff's right of action; that petitioners have not been paid for their services in said cause; and that plaintiff is insolvent, and unable to pay their fees unless she obtains a recovery in said cause. Petitioners resisted the right of plaintiff to dismiss her suit, and asked leave of the court to be allowed to prosecute said suit in plaintiff's name to final recovery, and to be made

joint parties with plaintiff in said suit. This petition was signed and sworn to. On the 8th November, 1902, plaintiff, by her attorneys, Whitaker & Lytle and A. B. Neal, interposed a demurrer to the petition, which was sustained by the court, and the original suit dismissed on the motion of plaintiff. The substance of the demurrer was that counsel's lien on the right of action cannot be enforced so long as plaintiff fails or refuses to prosecute the suit, that plaintiff is alone entitled to prosecute said right of action, and that petitioners are not entitled to be made parties to said action. We are constrained to believe this contention sound. The object of the legislature in giving an attorney's lien on the right of action was to prevent the compromise and settlement of cases out of court, so as to defeat the collection of fees for professional services rendered. It was not contemplated by the act that suitors should thereby be precluded from managing their cases or dismissing them at pleasure. In *Illinois C. R. Co. v. Wells*, 104 Tenn. 707, 59 S. W. 1043, in considering this statute, it is said: "The lien which the statute fixes on the plaintiff's right of action follows the transition without interruption, and simply attaches to that into which the right of action is merged. If a judicial recovery is obtained, the lien attaches to that; if a compromise agreement is made, the lien attaches to that; and in each case the attorney's interest is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent." "Since the passage of this act, as before, the plaintiff may prosecute or compromise or dismiss his suit at will, and the defendant is liable only for such sum as may be adjudged or stipulated in the plaintiff's favor." It is insisted, however, that the question presented in that case was whether counsel of record were entitled to a lien on the amount paid to plaintiff by way of compromise, and that the question presented in this record was not involved in the *Wells Case*. Counsel insist the question now presented is whether the plaintiff can defeat and defraud her attorneys of their lien on her right of action by dismissing her suit, the plaintiff being insolvent and unable to pay their fees. As already stated, it is not shown or charged in the petition of counsel that plaintiff has settled or compromised her suit, or has acted fraudulently or collusively with the defendant company. The allegation merely is that she has directed the dismissal of her suit without prejudice, and petitioners object to such dismissal, and ask the court for leave to prosecute the suit to final judgment in the plaintiff's name. Counsel cite in support of this contention *Twigg v. Chambers*, 56 Ga. 279; *Moses v. Bagley*, 55 Ga. 283; *Coleman v. Ryan*, 58 Ga. 132. The Georgia decisions hold that the plaintiff will not be allowed to dismiss or discontinue his suit, over the objection of his attorney, without paying his charges. Those cases, however, are based on a statute which not only gives an attorney's lien on the suit,

but provides that the attorney may control the suit to enforce his lien for the amount due him for services. Ga. Code, § 2814. By the act of 1826 (Shannon's Code, § 4940), suits may be dismissed, in writing, out of term time, as well as in term time, and further costs saved. So it was held in *Sharpe v. Allen*, 11 Lea, 521, that, by virtue of this statute, a dismissal of a suit in vacation puts an end to the suit, and terminates the control of the court over it. The jurisdiction of the court over it ceases, except to render judgment for costs. See also *Stanton v. Houston*, 12 Heisk. 266. So, in *Yoakley v. Hawley*, 5 Lea, 673, it was held that the attorney cannot prosecute or defend in the name of his client against the latter's consent. The fact that the attorney may be interested to continue the defense, in order to secure his fee does not give the right to control the case. The court in that case continues: "She [the plaintiff] had the right, as we have repeatedly held, to dismiss or compromise her suit, independent of their wishes, and this right was beyond their control." *Stephens v. Nashville, C. & St. L. R. Co.* 10 Lea, 450; *Thompson v. Thompson*, 3 Head, 529. The question, then, is presented, whether these holdings are changed or modified by Acts 1899, chap. 243. In *Illinois C. R. Co. v. Wells*, 104 Tenn. 711, 59 S. W. 1043, it was held "that this act does not deprive the plaintiff of the right to control her own suit, nor make all defendants in suits brought in courts of record liable for the fees of plaintiff's attorneys. Since the passage of this act, as before, the plaintiff may prosecute or compromise or dismiss her suit at will, and the defendant is liable only for such sum as may be adjudged or stipulated by compromise in plaintiff's favor." We may observe that if the

act of 1899 had, in terms, undertaken to deprive the plaintiff of the right to control his own suit, it would be open to grave constitutional objections; but, as held in the *Wells Case*, the act does not expressly or by necessary implication import such a meaning, but leaves the plaintiff to prosecute, compromise, or dismiss his suit at will. So we think that public policy and private right would be best subserved by adhering to the rule so long adopted in this state, both by statute and legal practice, of permitting a litigant to dismiss her suit without the intervention of her attorney. If, for instance, a complainant in a bill for divorce should conclude to withdraw her complaint and become reconciled to her husband, should the dismissal of her suit be prevented by her attorney, and he be permitted to become coplaintiff with her in the prosecution of her suit, because by attachment he has impounded property of the husband to secure her alimony? This very case was recently before this court, wherein it was seriously contended by counsel that he had a lien on complainant's cause of action, and the bill could not be dismissed without the settlement of his fees. It is needless to say that the question was resolved adversely to the contention of counsel. Again, it would seem that a litigant has a right to say when he will no longer incur the liability of a bill of costs for the prosecution of a suit. If he has no right to control this matter, his counsel can carry him through all the courts, and, at the end of a long litigation, leave him mulcted in a heavy bill of costs.

We are unable to agree with counsel in their construction of the statute, and the result is that *the judgment of the Circuit Court must be affirmed.*

TEXAS SUPREME COURT.

T. S. GARRISON, *Appl.*,

v.

J. W. COOKE.

(.....Tex.....)

Time is of the essence of a subscription contract to pay money for the cost of a railroad in consideration of its equipment, and the running of trains on or before a specified date, and the subscription cannot be enforced if the road is not completed by the time specified.

(February 16, 1903.)

QUESTIONS certified by the Court of Civil Appeals for the First Supreme Judicial District, which arose upon appeal by plaintiff from a judgment of the Panola County Court in favor of defendant in an

NOTE.—As to when time is of the essence of a contract, see also *notes* to *Boettler v. Tendick* (Tex.) 5 L. R. A. 270; *King Iron Bridge & Mfg. Co. v. St. Louis* (C. C. E. D. Mo.) 10 L. R. A. 826, and *Frink v. Thomas* (Or.) 12 L. R. A. 239; also *Dyer v. Duffy* (W. Va.) 24 L. R. A. 339.

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action brought to enforce a subscription in aid of the construction of a railroad. *Answers favorable to defendant returned.*

The facts are stated in the opinion.

Messrs. Blount & Garrison and Claude Pollard for appellant.

Messrs. J. H. Long, J. G. Woolworth, and H. N. Nelson, for appellee:

Where a party contracts to perform certain work or labor in a specified time and manner, the time is as much of the essence of the contract as the manner in which the work was to be done.

Batsell v. St. Louis, A. & T. R. Co. 4 Tex. Civ. App. 584, 23 S. W. 552; *McFarland v. Lyon*, 4 Tex. Civ. App. 589, 23 S. W. 554; *Beach*, Modern Law of Contracts, §§ 616, 618; *Morrison v. Wells*, 48 Kan. 494, 29 Pac. 601; *Pickering v. Greenwood*, 114 Mass. 479; *Slater v. Emerson*, 19 How. 224, 15 L. ed. 626; *Hill v. School Dist. No. 2*, 17 Me. 316; *Thomas v. Hammond*, 47 Tex. 43; *Miller v. Fichthorn*, 31 Pa. 260; *Cow v. Bray*, 28 Tex. 247; 1 Greenl. Ev. § 284, A; 2 Wharton, Ev. § 1027.

The donee, Garrison, would have to show by his pleading and proof that he had complied with his part of the obligation, and that he had complied with the conditions of said contract or subscription.

Low v. Studabaker, 110 Ind. 57, 10 N. E. 301; *Sickels v. Anderson*, 63 Mich. 421, 30 N. W. 78; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286.

The promisee must have expended money, furnished materials, or bestowed labor, upon the faith of the promise.

Richelieu Hotel Co. v. International Military Encampment Co. 140 Ill. 248, 29 N. E. 1044; *Presbyterian Church v. Cooper*, 112 N. Y. 517, 3 L. R. A. 488, 20 N. E. 352.

Messrs. Spencer & Scott, also for appellee:

The construction of the railroad and its operation as contemplated in appellee's subscription were not matters in which he had any property, right, or other immediate interest or concern; he could neither control, accept, nor reject it. His contract of subscription was purely voluntary, and could only become binding on him on performance of such conditions as he chose to impose on it.

Persinger v. Beville, 31 Fla. 364, 12 So. 366; *Indianapolis, D. & C. R. Co. v. Holmes*, 101 Ind. 348; *Low v. Studabaker*, 110 Ind. 57, 10 N. E. 301; *Moore v. Campbell*, 111 Ind. 328, 12 N. E. 495; *Burlington & M. River R. Co. v. Boestler*, 15 Iowa, 555; *Thompson v. Oliver*, 18 Iowa, 417; *Lawrence v. Smith*, 57 Iowa, 701, 11 N. W. 674; *Van Buren Div. of Toledo & S. H. R. Co. v. Lamphear*, 54 Mich. 575, 20 N. W. 590; *Port Huron & N. W. R. Co. v. Richards*, 90 Mich. 577, 51 N. W. 680; *Missouri P. R. Co. v. Levy*, 17 Mo. App. 501; *Yeatman v. Broadwell*, 1 La. Ann. 424; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164, 47 N. W. 652; *Sickels v. Anderson*, 63 Mich. 421, 30 N. W. 78; *Brown v. Dibble*, 65 Mich. 520, 32 N. W. 656.

Mr. W. R. Anderson also for appellee.

Gaines, Ch. J., delivered the opinion of the court:

The following questions have been certified for our determination:

"In this cause now pending before this court on motion for rehearing we are advised that a number of other claims of a like nature, growing out of the same transaction, are dependent upon the result of this case, and for that reason, and because this court is not unanimous in the conclusion already reached to affirm the judgment, and are in doubt as to the correctness of our judgment, we certify for your decision the questions hereafter set out. The facts, as disclosed by the record, are as follows: Some time in the spring of 1898 T. S. Garrison, the appellant, induced J. W. Cooke and other citizens of Carthage, Texas, to execute and deliver to him the following instruments, with the amount for which each was to be bound set opposite the respective signatures:

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"The State of Texas, }
Panola County. }

"Know all men by these presents, that we, and each of us, whose names are subscribed below, for and in consideration of T. S. Garrison constructing, equipping, and operating a line of railroad from Timpson, Shelby county, Texas, to Carthage, Panola county, Texas, and the running of daily trains between said points for the accommodation of freight and passenger traffic on or before the last day of October, 1898, agree to pay the amounts set opposite our respective names to such persons as said T. S. Garrison designates; said amounts to be paid when the road is completed and daily trains are running over same to the town of Carthage.

"J. W. Cooke."

"\$50.00.

"The time of completion to Carthage was subsequently extended by agreement of parties to November 1, 1898. The appellant proceeded with the construction of the proposed road, which was known as the 'Marshall, Timpson & Sabine Pass Railroad,' and by about the first of the year 1899 had completed it to within about half a mile of Carthage. Appellant then sold the road to the owners of a competitive railroad, the Texas, Sabine Valley, & Northwestern Railroad; and these parties, by March 1, 1899, but not before, completed the proposed road to Carthage, and had daily trains running thereon as stipulated in the contract. When the road was sold to them by appellant, it was stipulated by him that it should be completed to Carthage as per contract, though it would have suited the purchasers better to construct it by a different route to another point. On the completion of the line to Carthage, appellant demanded the subscription, but appellee refused to pay, whereupon this suit was brought. Appellee defended: First, upon the ground that time was of the essence of the contract, and that, as the road was not completed by November 1st, his liability for the subscription did not attach; and, second, that, as the road was not built to Carthage by appellant, but was sold out to and completed by parties who already had a railroad to Carthage, he was discharged from liability. Parol evidence was admitted to the effect that the subscribers had contracted that the road should be in operation to Carthage by October or November 1st, because they expected it, by competition with the other railroad, to affect the rate of freight on cotton to their advantage. A trial by jury resulted in a judgment for appellee.

"Questions: (1) Does the subscription contract show upon its face that time was of the essence of the contract? (2) Did the trial court err in hearing proof as to the situation of the parties, and the fact that the subscribers expected to derive benefit from the construction of the road by the date named in the way of reduction in freight rates on cotton? (3) Would the fact that appellant did not complete the

road himself, but sold out to a rival road, which completed it, constitute a defense to the action? (4) If parol evidence as to the situation of the subscriber at the date of the contract is admissible in explanation of its meaning and in aid of its construction, must such evidence be confined to the subscriber in question, or may such inquiry include his cosubscribers who signed contemporaneously with him? (5) Do the facts show that time was of the essence of the contract?"

"It is a familiar principle that in all cases where it is sought to enforce contracts consisting of reciprocal promises, and 'where the plaintiff himself is to do an act to entitle himself to the action, he must either show the act done, or, if it be not done, at least that he has performed everything that was in his power to do.' Accordingly, when, by the terms of a contract, one party is to do something at or before a specified time, and when he fails to do such thing within that time, he could not afterwards claim the performance of a contract if the stipulation as to time were construed according to its literal terms. The rule of the common law was that 'time is always of the essence of the contract.' When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it." Pollock, Cont. *462. The rule is also announced by the elementary text-writers that at law time is, in general, of the essence of the contract. Bishop, Cont. § 1344; Anson, Cont. 331; Clark, Cont. 596. See also Beach, Modern Law of Contracts, §§ 617 *et seq.* We understand the rule to apply where one party agrees to pay money to the other in consideration of the doing of an act by such other within a specified time. In general, in such a case, the promise to pay cannot be enforced, unless the act be performed within the time. Questions calling for its application have frequently arisen in cases like the one now before us,—that is to say, in cases of subscriptions for the construction of railroads and other like improvements,—and, so far as we have been enabled to discover, where there is nothing on the face of the contract itself tending to show that time was not of the essence of the engagement, it has been nearly, if not quite, uniformly held that, if the work was not completed within the specified time, the promisor was not liable. Such was the case of *Emerson v. Slater*, 22 How. 28, 16 L. ed. 360. There a railroad company became embarrassed, and was unable to pay the contractor, and a person interested in the company agreed to give the contractor his individual promissory notes if he would finish the work by a certain day; and it was held that the contractor could not recover, because he had not finished the work within the stipulated time. The case was cited with approval, and the rule was followed, in the following cases: *Jones v. United States*, 96 U. S. 28, 24 L. ed. 646; *Jordan v. Newton*, 116 Mich. 674, 75 N. W. 130; *Persinger v. Beville*, 31 Fla. 364, 12 So. 366. 61 L. R. A.

See, also, to same effect, *Indianapolis B. & O. R. Co. v. Holmes*, 101 Ind. 348; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164, 47 N. W. 652. The principle has been applied even as to subscriptions for stock in a railroad company, where the subscription is made upon condition that the road is to be completed within a certain time. But the case before us is a stronger one. A stockholder acquires an interest in the company,—a property right. A promisor of a bonus to a railroad company acquires no right by a construction of the road. He looks only to the incidental advantages that may result from such construction. It would seem but reasonable that in the latter case the promisee should be held to a rigid compliance with the conditions of the contract. In the case of *Presidio Min. Co. v. Bullis*, 68 Tex. 581, 4 S. W. 860, this principle was held applicable to a contract for the sale of real estate, to which ordinarily a less rigid rule applies. In that case the court says: "It was left entirely at the option of Cook whether he would take the land at the end of the year or not; and, in such cases it is the general rule, to which this case is no exception, that time is of the essence of the contract." So, in this case, the appellant did not bind himself to do anything, and the appellee merely promised to pay in consideration of the construction of the railroad on or before a certain day.

A contract to pay money in consideration that the promisee will build a railroad by a certain time implies very clearly that that money is to be paid only on condition that the road be constructed within the time; and, in our opinion, time in such a case is of the essence of the contract. The fact that the parties by subsequent agreement extended the time for the completion of the road shows that such was their own construction of the contract, and, even if it were a doubtful matter, ought to have a controlling effect in determining their intention. The cases mainly relied upon by counsel for appellant are *Traer v. Stuart*, 46 Iowa, 15; *Front Street, M. & O. R. Co. v. Butler*, 50 Cal. 574; and *Seley v. Texas & St. L. R. Co.* 2 Tex. App. Civ. Cas. (Willson), § 87, p. 66. The contract in each of the two cases first mentioned contained special stipulations as to the time of payment, from which the court drew the inference that the time of special performance was not an essential feature of the contract. They are, therefore, whether correctly or incorrectly decided, distinguishable from the present case. *Seley v. Texas & St. L. R. Co.* is based principally upon the authority of the other two cases, and may also be distinguished from the case before us by reason of a difference in the stipulations in the contract.

We answer the first question in the affirmative, and, since the parol evidence introduced did not tend to show that the intention of the parties was not to make time an essential element in the agreement, we deem it unnecessary to answer the others.

WISCONSIN SUPREME COURT.

STATE of Wisconsin *ex rel.* Jacob GARRETT

v.

William H. FROEHLICH.

(.....Wis.....)

The legislature cannot appropriate money from the public funds to redeem warrants issued under an invalid law providing for the treatment of inebriates at public expense, which are in the hands of innocent purchasers, where the Constitution provides that taxation shall be uniform, and requires the legislature to provide a tax sufficient to defray the estimated expenses of the state, since these provisions require taxes to be for a public, and not for a private purpose.

(Winslow and Dodge, JJ., dissent.)

(March 21, 1903.)

ON MOTION to quash an alternative writ of mandamus which had been granted to compel defendant, as secretary of state, to draw a warrant on the state treasurer for money which had been appropriated in favor of the relator. *Granted.*

Statement by **Cassoday**, Ch. J.:

October 22, 1902, the relator filed in this court a petition for an alternative writ of mandamus to compel the defendant, as secretary of state, to draw a warrant on the state treasurer, payable to him, for \$498.36, in the manner provided by chapter 468, p. 695, Laws 1901, or show cause to the contrary.

The petition alleges, in effect, that the relator was a resident and citizen of Eau Claire; that after the enactment of chapter 203, p. 338, Laws 1895, providing for the Keeley treatment and cure of inebriates, and during 1895, 1896, and 1897, one Dr. Montgomery established and maintained the Eau Claire Institute for such treatment of inebriates; that eight persons therein named were treated by such institute upon certified orders of county judges at the expense of the respective counties sending them, as prescribed in that act; that the aggregate amount of the expense of such treatment of said eight persons was \$815; that between September 10, 1895, and February 2, 1897, the relator sold and delivered to Dr. Montgomery merchandise and supplies to the amount of \$815, and received in payment therefor an assignment from Dr. Montgomery of said orders for the commitment and

NOTE.—As to right to use public money for treatment of inebriates, see also, in this series, *Baltimore v. Keeley Institute (Md.)* 27 L. R. A. 646; *Re House (Colo.)* 33 L. R. A. 832; and *Wisconsin Keeley Institute Co. v. Milwaukee County (Wis.)* 36 L. R. A. 55.

As to right to use public money for payment of a claim based on merely moral obligation, see *Conlin v. San Francisco (Cal.)* 33 L. R. A. 752.

61 L. R. A.

treatment of such inebriates to the amount of \$815, which orders are still owned by the relator, as an innocent purchaser thereof, and that they are wholly unpaid; that after the relator so purchased such orders and held the same, this court, on February 2, 1897, decided that chapter 203, p. 338, Laws 1895, was unconstitutional and void (*Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, 36 L. R. A. 55, 70 N. W. 68); that chapter 468, p. 695, Laws 1901, was enacted to reimburse, at least in part, the relator and other holders of similar orders for money so paid out and expended by them; that within sixty days after the publication of that act the relator filed with the secretary of state, state treasurer, and attorney general, as the auditing committee provided for therein, the said county orders so purchased by him, with full proof that he was such innocent purchaser, and the same were audited by such committee at \$815; that several other persons holding similar orders so filed the same and made similar proof before the committee, and the same were audited by such committee; that all orders so filed with the committee and audited amounted in the aggregate to \$49,658.44, which orders or claims should be paid *pro rata* out of the \$30,000 appropriated by chapter 468, p. 695, Laws 1901, and that the relator's proportionate share thereof is \$492.36; that the state treasurer has in his hands the \$30,000 so appropriated, and the same has not been appropriated for any other purpose; that it is the duty of the secretary of state to draw his warrant on the state treasurer payable to the relator for his proportionate share of such appropriation, to wit, \$492.36, and the duty of the state treasurer to pay the same, but that the secretary of state has refused, and still does refuse, to draw such warrant, and the state treasurer still refuses to pay to the relator the amount stated, and that such refusals are upon the sole ground that chapter 468, p. 695, Laws 1901, is unconstitutional and void.

On such petition an alternative writ of mandamus was issued by this court as prayed, October 22, 1902, and on November 11, 1902, the secretary of state, by E. R. Hicks, attorney general, appeared, and by way of return to the alternative writ of mandamus moved the court to quash the writ, for the reason that the facts stated were not sufficient to constitute a cause of action.

Messrs. Wickham & Farr and Ryan, Merton, & Newbury, for relator:

This proceeding is properly brought in this court to enforce a statutory duty imposed on a state officer, in order to enable the relator to recover money due him from the state.

State ex rel. New Richmond v. Davidson, 114 Wis. 563, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067.

The state legislature has authority to exercise any and all legislative powers not delegated to the Federal government, nor expressly or by necessary implication prohibited by the national or state Constitution.

Ibid.; *Northwestern Nat. Bank v. Superior*, 103 Wis. 43, 79 N. W. 54; *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 60, 8 N. W. 833; *State ex rel. Tesch v. Von Baumbach*, 12 Wis. 310; *Overshiner v. State*, 156 Ind. 187, 51 L. R. A. 748, 59 N. E. 468; *State v. Narragansett*, 16 R. I. 424, 3 L. R. A. 295, 16 Atl. 901; *State ex rel. Hicks v. Stevens*, 112 Wis. 170, 88 N. W. 48.

The legislative construction of the Constitution, continued without question for a long number of years, has great weight in determining the constitutionality of the law.

State v. Gerhardt, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *State v. Narragansett*, 16 R. I. 424, 3 L. R. A. 295, 16 Atl. 901; *People ex rel. Mooney v. Hutchinson*, 172 Ill. 480, 40 L. R. A. 770, 50 N. E. 599; *Boyd v. Brookline*, 8 Vt. 286; *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Maher v. State*, 1 Port. (Ala.) 265, 26 Am. Dec. 379; 6 Am. & Eng. Enc. Law, 2d ed. pp. 932, 933; *Dean v. Borchsenius*, 30 Wis. 236; *Cohen v. Virginia*, 6 Wheat. 264-418, 5 L. ed. 257-294; *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658.

If a valid claim against the state is presented for payment, and is correct in amount, it is the duty of the secretary of state to certify to its correctness.

State ex rel. Sloan v. Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; *Martin v. State*, 51 Wis. 407, 8 N. W. 248.

The appropriation is neither the giving, nor the loaning, of the credit of the state.

Anderson, Law Dict. p. 291; *Rogan v. Watertown*, 30 Wis. 259; *Speer v. Blairsville School Directors*, 50 Pa. 150; *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217; *Daggett v. Colgan*, 92 Cal. 53, 14 L. R. A. 474, 28 Pac. 51; *Kyes v. St. Croix County*, 108 Wis. 136, 83 N. W. 637; *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833; *State ex rel. Jones v. Fræhlich* (Wis.) 58 L. R. A. 757, 91 N. W. 115.

There is nothing in the Constitution providing that the legislature may make appropriations only for public purposes.

State ex rel. New Richmond v. Davidson, 114 Wis. 563, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067.

The appropriation is supported by considerations that are sufficient to support a direct tax.

Ibid.

The fund created by licensing the sale of intoxicating liquors is under the absolute control of the legislature, and it may enact such statutes as it deems fit for the disposition thereof.

17 Am. & Eng. Enc. Law, 2d ed. p. 272.

It is not a tax, and it may be used for the purpose of establishing homes for inebriates.

Ibid.; *People ex rel. Buckley v. Brooklyn Bd. of Police & Excise*, 63 N. Y. 623.

To justify a court in declaring a tax void, 61 L. R. A.

and arresting proceedings for its collection, the absence of all possible public interest in the purposes for which the funds are raised must be so clear and palpable as to be immediately perceptible to every mind.

State ex rel. New Richmond v. Davidson, 114 Wis. 563, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067; *Socons v. Racine*, 10 Wis. 271; *Lund v. Chippewa County*, 93 Wis. 640, 34 L. R. A. 131, 67 N. W. 927.

A claim supported by a moral obligation, or founded in justice and equity in the largest sense of those terms, or in gratitude or charity, will support a tax or appropriation.

Brodhead v. Milwaukee, 19 Wis. 624, 88 Am. Dec. 711; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *Lafibre v. Superior Bd. of Edu.* 81 Wis. 660, 51 N. W. 952; *Lund v. Chippewa County*, 93 Wis. 640, 34 L. R. A. 131, 67 N. W. 927; *State ex rel. New Richmond v. Davidson*, 114 Wis. 563, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067; *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521; *United States v. Realty Co.* 163 U. S. 427, 41 L. ed. 215, 16 Sup. Ct. Rep. 1120; *New York L. Ins. Co. v. Cuyahoga County*, 45 C. C. A. 233, 106 Fed. 123; *Minneapolis v. Janney*, 86 Minn. 111, 90 N. W. 312; *Cooley, Taxn.* 2d ed. 127, 128; *Friend v. Gilbert*, 108 Mass. 408.

Unless the court can say that no moral obligation rested on the part of the state to reimburse these persons for a portion of the loss they sustained the act is valid.

United States v. Realty Co. 163 U. S. 427, 41 L. ed. 215, 16 Sup. Ct. Rep. 1120; *New York L. Ins. Co. v. Cuyahoga County*, 45 C. C. A. 233, 106 Fed. 123; *Allen v. Smith*, 173 U. S. 389, 43 L. ed. 741, 19 Sup. Ct. Rep. 446; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513; *Curran v. Holliston*, 130 Mass. 274; *Cooley, Taxn.* 2d ed. 127; *State ex rel. Sayre v. Moore*, 40 Neb. 854, 25 L. R. A. 774, 59 N. W. 755; *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217; *Vcazie v. China*, 50 Me. 518; *Morris v. People*, 3 Denio, 389; *People v. Budd*, 117 N. Y. 13, 5 L. R. A. 559, 22 N. E. 670; *Booth v. Woodbury*, 32 Conn. 118; *Guilford v. Chenango County*, 13 N. Y. 143; *State ex rel. New Richmond v. Davidson*, 114 Wis. 563, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067; *Newcomb v. Smith*, 2 Pinney (Wis.) 131.

The expenditure of money in this manner is not against the policy of the law.

Folschow v. Werner, 51 Wis. 85, 7 N. W. 911; *Tippicanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822; *Pearson v. State*, 56 Ark. 148, 19 S. W. 499; *Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192; *Scio Bd. of Edu. v. McLandsborough*, 36 Ohio St. 227, 38 Am. Rep. 582.

On motion for rehearing.

The appropriation was made for a public purpose. It is supported by claims founded in justice and equity, and by a moral obligation on the part of the state.

State ex rel. McCurdy v. Tappan, 29 Wis. 664, 9 Am. Rep. 622; *United States v. Realty Co.* 163 U. S. 427, 41 L. ed. 215, 16 Sup.

Ct. Rep. 1120; *Creighton v. San Francisco*, 42 Cal. 446; *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565; *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435; *Scio Bd. of Edu. v. McLandsborough*, 36 Ohio St. 227, 38 Am. Rep. 582; *Pearson v. State*, 56 Ark. 148, 19 S. W. 499; *Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192; *Guilford v. Chenango County*, 13 N. Y. 143; *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217.

Mr. E. R. Hicks, Attorney General, for defendant:

If the state cannot loan its credit, it cannot borrow money on its own bonds and then loan the money. It cannot do indirectly what it cannot do directly. Taxation cannot be imposed for a private purpose; and, if the state can appropriate for a private purpose the money in its treasury, and then replace it by taxation, it can do indirectly what it cannot do directly.

William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568; *Spencer v. Joint School Dist. No. 6*, 15 Kan. 259, 22 Am. Rep. 268; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655-664, 22 L. ed. 455-461; *Hooper v. Emery*, 14 Me. 375; *Bristol v. Johnson*, 34 Mich. 123; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *State ex rel. Griffith v. Osaukee Twp.* 14 Kan. 418, 19 Am. Rep. 99; *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, 36 L. R. A. 55, 70 N. W. 68.

Private property of a private individual can never be taken for private use under any considerations without his consent.

Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 20 L. R. A. 662, 54 N. W. 1003.

The only justification for the distribution of public funds can be found in the use that is made of those funds, and that must be a public use.

State ex rel. New Richmond v. Davidson, 114 Wis. 563, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067; *Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549; 6 Am. & Eng. Enc. Law, p. 47; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

Cassoday, Ch. J., delivered the opinion of the court:

Chapter 203, p. 338, of the Laws of 1895, providing "for the treatment and cure of inebriates and persons addicted to the excessive use of drugs and other narcotics," was held to be unconstitutional and void, because it involved the imposition upon the respective counties of the state, without their consent, of a tax for the benefit of private institutions and individuals, not the legitimate objects of public charity. *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, 158-160, 36 L. R. A. 55, 58, 70 N. W. 68, 70. In that case it was said by the court that "the act in question does not go upon the theory that the victim of such addiction is helpless and destitute, and hence the subject of public charity. It does treat such addiction as a 'disease,' but it does not treat it as a contagious or infec-

tious disease, and there is no allegation or claim that it is a contagious or infectious disease. The question recurs whether any county may be compelled to pay any private party for treatment, medicines, and board of any resident therein having a disease not contagious or infectious, merely because such diseased person 'has not the means to pay for said treatment.' If a county may be compelled to make such payment for such treatment, medicines, and board of a person having such a disease, then it logically follows that every county may be compelled to pay private parties for treatment, medicines, and board of any person having any disease, though not contagious nor infectious, provided the victim has not the present means of making such payment himself. We are clearly of the opinion that no such power exists." The following cases are there cited, in which this court had previously held that the legislature had no power to compel or authorize a municipality to raise money by taxation for a purely private purpose: *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 181, 3 Am. Rep. 30; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 684, 9 Am. Rep. 622; *Atty. Gen. v. Eau Claire*, 37 Wis. 436. From this last case this quotation was made in the *Keeley Case* from the opinion of the court by Chief Justice Ryan: "Taxation is the absolute conversion of private property to public use. And its validity rests on the use. In legislative grants of the power to municipal corporations, the public use must appear. . . . The legislature can delegate the power to tax to municipal corporations for public purposes only; and the validity of the delegation rests on the public purpose. Were this otherwise, as was said at the bar, municipal taxation might well become municipal plunder." Thus, it appears that chapter 203 was declared to be unconstitutional upon the express ground that it compelled any county to pay out of the public moneys of the county, to a private party for a purely private purpose, a sum not exceeding \$130 for every inebriate found therein and treated upon the order and certificate of the county judge thereof, as prescribed in the act. The case was distinguished in the later case of *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, 666, 667, 79 N. W. 422, 427, but it was there said by my Brother Marshall that "no 'public purpose,' within any reasonable scope of the term, was discovered in the Keeley law. That was why it met the fate of legislation going beyond the boundaries of constitutional limitations. True, stress was put on the feature that the services of caring for the committed persons were performed by private agencies for private gain. But it was not decided that such feature alone was fatal to the law. The combination of it with the purely private service rendered showed that the entire scheme was private. . . . Stress was laid on the fact that, in order to enable a person to enjoy the benefits of the act, it was not requisite that he should be without

means of paying therefor; destitution as to present means, money in hand, as it were, to make such payment, was all that was required. It was thus demonstrated that there was an absolute absence of any public purpose whatever covered by the law." In a still later case it was held by this court that "neither the county board nor any county officer has any authority, under our statutes, to incur any liability for medical treatment of a pauper to cure him of inebriety as a disease. A county cannot ratify the unauthorized acts of its agents which are beyond the scope of its corporate powers." *Putney Bros. Co. v. Milwaukee County*, 108 Wis. 554, 556, 557, 84 N. W. 822, 823. In that case the inebriate was committed under chapter 203, p. 338, Laws 1895, and, following *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, 36 L. R. A. 55, 70 N. W. 68, it was held "that no liability arose by reason of the commitment;" but it was there contended "that it was the duty of the county to relieve and care for" the victim, "under § 1517, Rev. Stat. 1898, and that, when this task had been performed by a private person, . . . the county" should be held "liable if its officers knew of the facts and made no objection, and the pauper had been restored to health." In the opinion of the court by my Brother Winslow it is said that "the doctrine here invoked is that of ratification or estoppel.

. . . The claim here is not for ordinary relief or care, but for the medical treatment of a pauper for what is termed inebriety, his board being simply a minor incident of the treatment. Neither the county board nor any county officer has authority under any specific statute to contract with a private person or corporation for such treatment, and entail a liability therefor upon the county. Inebriates may, indeed, be received into county asylums under certain restrictions, . . . and may be committed to a county poorhouse, . . . and the county become liable for their care in whole or in part, but the statutes seem to go no further." Then, after stating that the legislature had "provided certain methods whereby inebriates and habitual drunkards" might be dealt with, and thereby excluded other methods, it was further said: "There was, therefore, no authority resting in any officer or public body to incur the liability here claimed in the first instance. Such being the case, there can be no ratification by the county. A county cannot ratify the unauthorized acts of its agents which are beyond the scope of its corporate powers." See also *Juncua County v. Wood County*, 109 Wis. 330, 333, 334, 85 N. W. 387.

Having thus held that chapter 203, p. 338, Laws 1895, was unconstitutional and void on the ground that the legislature had no power to compel a county to give away its public funds to private parties for purely private purposes, the question recurs whether the legislature has power to give away the public funds of the state to private parties for the same private purpose by the enactment of chapter 468, p. 695, Laws 1901. 61 L. R. A.

The act, in terms, appropriates \$30,000 "for the purpose of paying all innocent purchasers of county orders issued under an invalid law known as chapter 203 of the Laws of 1895 by different county judges of the state of Wisconsin, which are yet unpaid and which were purchased prior to the date of the decision of the supreme court of the state of Wisconsin holding said act [chapter 203, p. 338, of the Laws of 1895] unconstitutional." It appears from the relation that claims which arose under the act, and prior to the decision mentioned,—a period of twenty-one and one half months,—had been filed, proved, and audited to the amount of \$49,658.44. The facts stated sufficiently suggest the importance of that decision without any speculation as to what would have been the effect upon the taxpayers of the several counties in the state, had the court held chapter 203, p. 338, Laws 1895, to be valid instead of being unconstitutional and void. The gravity of the case at bar would seem to be of far greater importance, because more far-reaching in its application. Counsel for the relator contend that "there is nothing in the Constitution providing that the legislature may make appropriations only for public purposes." And then, after admitting "that there are several specific limitations on the power of the legislature to appropriate money," counsel assert that there is "no general limitation confining appropriations either to public purposes or legal obligations of the state." Counsel seemingly realize that it is essential to maintain these propositions in order to maintain this action. If these propositions are sound, then Chief Justice Ryan was in grave error when he made the statement above quoted, from his opinion in the *Eau Claire Case*, cited. If such propositions are sound, then Chief Justice Dixon was wrong in declaring, as he did, that "the legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot, in the form of a tax, take the money of the citizens and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute." *Brodhead v. Milwaukee*, 19 Wis. 652, 88 Am. Dec. 711. See also cases cited from the supreme court of Pennsylvania in the *New Richmond Case*, 114 Wis. 576, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067. Mr. Cooley declares that "it is implied in all definitions of taxation that taxes can be levied for public purposes only." Cooley, *Taxn.* 2d ed. 103-105. And again: "Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and, as all are alike protected, so all alike should bear the burden in proportion to the interests secured." Cooley, *Const. Lim.* 6th ed. 603. Mr. Dillon states the rule thus: "It may be regarded as a settled doctrine of American

law that no tax can be authorized by the legislature for any purpose which is essentially private, or, to state the proposition in other words, for any but a public purpose." 1 Dill. Mun. Corp. 4th ed. § 508. And again: "We may readily conceive of acts of the legislature demanding sacrifices of citizens which could not be sustained as legitimate exercises of the taxing power, although no specific provision of the Constitution should be infringed." 2 Dill. Mun. Corp. 4th ed. § 737. And again: "There can be no legitimate taxation to raise money unless it be destined for the uses or benefit of the government, or some of its municipalities or divisions invested with the power of auxiliary or local administration. A public use or purpose is of the essence of a tax." § 736. In *State ex rel. New Richmond v. Davidson*, 114 Wis. 574, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067, numerous cases are cited from this and other courts, to the effect "that the taxing power of the state can only be exercised for some object of public or common interest." It is there said that "these adjudications, and many others which might be cited, seem to be based upon the broad ground that from the very nature of our state government there is running through our Constitution an implied prohibition against forcing our citizens, by way of taxation, to contribute to any mere private purpose or enterprise, and that the determination of the legislature upon the subject is not absolutely conclusive upon the courts." If the contention of counsel referred to is correct, then the decision of this court in that case is all wrong and ought to be overruled. If the decision is right, then the contention of counsel, in the particular mentioned, is without foundation. The appropriation for the relief from the terrible calamity caused by the cyclone which struck New Richmond June 12, 1899, was sustained only on the ground that the object of the appropriation was public, and such as to subserve the common interest and well-being of the people of the state at large. In that case it was virtually conceded that the object of the appropriation was public. In considering whether the appropriation was repugnant to that clause of the Constitution which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe" (§ 1, art. 8, Const.), it was said that, "if the object of the appropriation in question was purely local to the city of New Richmond, then the rule of uniformity would require the tax to supply the same to be limited to that municipality. If, however, the contribution was to subserve the common interest and well-being of the people of the state, then the appropriation was legitimate." *State ex rel. New Richmond v. Davidson*, 114 Wis. 578, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067, citing *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622, and *Lund v. Chippeva County*, 93 Wis. 647, 34 L. R. A. 131, 67 N. W. 927. In this last case it was said that "this provision manifestly requires such uniformity, in case

of a state tax, to extend throughout the state; in case of a county tax, to extend throughout the county; in case of a city tax, to extend throughout the city; and, in case of a town tax, to extend throughout the town. In other words, the rule of uniformity is not broken merely because a town or city or county raises a special tax for local purposes." To come within the rule of uniformity, as thus defined, it is necessary, not only that the object of the appropriation in question should be public, but also that it should subserve the common interest and well-being of the people of the state.

There is another clause of the Constitution, which declares that "the legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year." Const. art. 8, § 5. Special stress was placed upon that provision in the *New Richmond Case*, 114 Wis. 578, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067. It was there said that "to that language must be applied the well-known maxim, *Expressio unius est exclusio alterius*. That construction limits such annual tax to an amount sufficient to defray such estimated expenses. . . . State taxes are thus only authorized to pay state expenses, or such expenditures as are authorized by the Constitution." The only reference to that provision of the Constitution in the brief of counsel is in stating that that and other sections therein referred to "place limits on the power of the legislature to contract debts;" and from that we are asked to infer that the legislature is at liberty to give away the public moneys for objects concerning which it has no power to contract debts. While the provision quoted, like most of the provisions of the Constitution, is affirmative in form, yet the manifest purpose is to limit the annual tax to an amount "sufficient to defray the estimated expenses of the state for each year." As held in the *New Richmond Case*, in order for an appropriation to be valid, it must be for a public purpose, and such as subserves the common interest and well-being of the people of the state. The act in question does neither. It was solemnly adjudged that chapter 203, p. 338, Laws 1895, was for the sole benefit of private parties and for private purposes. Counsel invoke the rule stated by Chief Justice Dixon, and quoted approvingly in the *New Richmond Case*, wherein it is said that "claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax." *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Cooley*, Taxn. 127, 128; *State ex rel. New Richmond v. Davidson*, 114 Wis. 579, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067. That language was used with reference to the validity of an act of the legislature empowering the qualified electors of each town,

city, or incorporated village to raise, by tax, money to pay bounties to volunteers who might enlist therefrom. The moral obligation of such municipality to pay such bounties to such volunteers was strong, and rested upon the parties required to pay, and was for an object confessedly public; and yet in that case it was expressly held that "the legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. . . . The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute." There was no intention, in the language quoted, to justify a tax for every claim which one private party may have against another private party, though "founded in equity and justice. . . . or in gratitude or charity." Here, numerous private persons were treated, under chapter 203, p. 338, Laws 1895, for a disease, by certain private individuals or corporations, under the supposition that the respective counties where the inebriates lived would pay for such treatment an amount not exceeding \$130 each. The court held the act to be void, and the county under no obligation to pay such private party for such private purpose. The only change in the situation is that such void claims have been transferred by such private parties to "innocent purchasers." Wherein they are any more innocent than the persons or corporations furnishing the treatment it is difficult to perceive. Certainly, such transfer did not change the private purpose into a public purpose,—much less did it make the claim which one private party had against another private party a claim founded in equity and justice, or in gratitude or charity against the whole state. By chapter 203 the legislature only attempted to create claims against the counties. Notwithstanding the transfer, the claim still remains a private claim, founded upon a private transaction. The appropriation is less than the amount of the aggregate claims; but by its terms each claimant is to have a *pro rata* share. It is essentially an appropriation from the general fund to pay numerous private claims growing out of private transactions. All taxpayers of the state are interested in preserving the funds of the state from illegal diversion or spoliation. *State ex rel. Raymer v. Cunningham*, 82 Wis. 39, 51 N. W. 1133.

If the decisions of this court are to be followed, and have the significance above ascribed to them, then there would seem to be no escape from a condemnation of the enactment in question. Counsel for the relator seem to rely with great confidence upon the decision in *United States v. Realty Co.* 163 U. S. 427, 41 L. ed. 215, 16 Sup. Ct. Rep. 1120, where a claim was made for sugar bounty, under an act of March 2, 1895 (28 Stat. at L. 933, chap. 189), appropriating money to certain persons who had incurred expense in the production of sugar on the faith and credit of certain acts of Con-

gress passed five years before, the constitutionality of which had been questioned and the acts afterwards repealed. The court held that "it is within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice; and, having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the judicial branch of the government." It will be observed that the court had expressly declined to determine whether such prior acts of Congress were valid or not; and that question never was determined. 163 U. S. 433, 41 L. ed. 217, 16 Sup. Ct. Rep. 1120, citing *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495. If they were unconstitutional, it was simply because Congress had exceeded its powers upon a subject rightfully delegated to it. The opinion of the court in that case refers to no state adjudication except *Guilford v. Chenango County*, 13 N. Y. 143, 146, 149, 163 U. S. 443, 41 L. ed. 221, 16 Sup. Ct. Rep. 1120. That case involved the validity of an act of the legislature requiring the town to reimburse its officers for moneys expended by them in fruitless litigation. The court decided that the Constitution contained no clause prohibiting such an enactment. On the contrary, both opinions refer to the provisions of the Constitution, then in force, regulating the method of passing such enactments, and, among others, one which declared that "the assent of two thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." N. Y. Const. 1846, art. 1, § 9. And one of the opinions states that such provisions were "not limitations of the absolute power of the legislature over the public moneys, or of the like power in the imposition of taxes, but rules prescribing the manner of its exercise." And Judge Denio said: "There is no question but that this law received the requisite vote." In a later case in New York, that case was distinguished and limited, and the court held that "the legislative power of taxation, at least as regards the purposes for which it is to be exercised, is not without limit, and it is within the province of the courts to examine and to determine whether, in a particular case, the extreme boundary of legislative power has been reached and passed. It must be made quite clear, however, that the legislature has erred before the court can interfere with its action. The legislature has not power to authorize a municipal corporation to issue its obligations for the purpose of raising money wherewith to pay a subscription of said corporation to the capital stock of a private corporation, and to provide for the payment of such obligations by taxation. It has not power to tax for private purposes solely." *Weisner v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586. Such distinctions are not referred

to in the opinion of the court in *United States v. Realty Co.*, 163 U. S. 443, 41 L. ed. 221, 16 Sup. Ct. Rep. 1120, notwithstanding the learned justice who wrote it had long been an honored member of the court of appeals of New York. Probably he deemed such distinctions immaterial to the decision of the case then in hand. Assuming that the decision in that case goes to the extent claimed for it by counsel, and with great respect for the court from which it emanates, yet, in view of the provisions of our own Constitution and the decisions, cited, and

the general trend of authority in this country, we should be unwilling to follow it.

The motion to quash the alternative writ of mandamus is granted, and the relation is dismissed.

Bardeen, J., was present at the hearing of this case, and participated in the decision thereof, which was made December 30, 1902.

Winslow and Dodge, JJ., dissent.

Rehearing denied.

RHODE ISLAND SUPREME COURT.

Forrest A. PECK, by Next Friend,
v.

Walter H. WILLIAMS.

(.....R. I.....)

1. That one bitten by a dog was attempting to climb upon the owner's cart without leave does not relieve the owner of liability for the injury, under a statute making the owner of a dog liable, whether or not he knew of its vicious propensity, if it shall bite any person traveling on the highway or out of his inclosure.
2. One who wilfully provokes a dog to bite him is not entitled to the protection of a statute making the owner of a dog liable in case it injures any person traveling on the highway or out of his inclosure.

(January 20, 1903.)

ON DEMURRER to the plea in an action brought to recover damages for injuries inflicted by a dog. *Sustained.*

The facts are stated in the opinion.

Mr. William M. P. Bowen, for plaintiff in support of demurrer:

In case the dog is vicious, negligence is no defense.

Woolf v. Chalker, 31 Conn. 130, 81 Am. Dec. 175; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6.

While a dog attacked by a person might have a right of self-defense at the time of the attack, yet a mere accidental interference, as where a person inadvertently steps on a dog, constitutes no defense.

Fake v. Addicks, 45 Minn. 37, 47 N. W. 450.

Trespass is not a defense when occurring off the premises of the owner.

Pierret v. Moller, 3 E. D. Smith, 574.

A trivial trespass is no defense.

Sherfey v. Bartley, 4 Sneed, 58, 67 Am. Dec. 597; *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306; *Meibus v. Dodge*, 38 Wis. 300,

NOTE.—As to liability of owner of dog for injuries inflicted by it upon person coming on owner's premises, see also, in this series, *Conway v. Grant* (Ga.) 14 L. R. A. 196, and *note*; *Shultz v. Griffith* (Iowa) 40 L. R. A. 117; and *Deisle v. Bourriague* (La.) 54 L. R. A. 420. 61 L. R. A.

20 Am. Rep. 6; *Hathaway v. Tinkham*, 148 Mass. 85, 19 N. E. 18.

Messrs. Page, Page, & Cushing, for defendant, *contra*:

Defendant is not liable, under the statute, if the plaintiff by his negligence provoked said dog, or if the plaintiff by ordinary care could have prevented the action of said dog.

Kelly v. Alderson, 19 R. I. 544, 37 Atl. 12; *Chickering v. Lord*, 67 N. H. 555, 32 Atl. 773; *Quinby v. Woodbury*, 63 N. H. 370.

Tillinghast, J., delivered the opinion of the court:

This is an action of trespass, and is brought to recover damages for injuries alleged to have been sustained by the plaintiff from the bite of a dog while the plaintiff was traveling upon a highway in the city of Providence. The action is based upon R. I. Gen. Laws 1896, chap. 111, § 3, which provides that "if any dog . . . shall assault or bite or otherwise injure any person while traveling the highway, or out of the inclosure of the owner or keeper of such dog, the owner or keeper of such dog shall be liable to the person aggrieved, as aforesaid, for all damage sustained, to be recovered in an action of trespass on the case, or in an action of trespass, with costs of suit; . . . and it shall not be necessary, in order to sustain any such action, to prove that the owner or keeper of such dog knew that such dog was accustomed to do such damage."

In addition to the plea of the general issue, the defendant has filed a special plea in bar, in which he sets up that the plaintiff ought not to have or maintain his action against him, because, he says that before and at the time when, etc., in the declaration mentioned, a certain cart or vehicle of the defendant was being driven along a certain public highway in the city of Providence, in charge of a servant of the defendant, and that the said dog was then and there in and upon said vehicle. And the defendant avers that the said Forrest A. Peck then and there, without the invitation, leave, or license of the defendant, either by himself or through his servant, suddenly and without right, took hold of and climbed up upon the rear part of said vehicle, whereupon the said

dog attacked and assaulted him as charged, he being then and there a trespasser. And the defendant avers that he was in the exercise of due care in the management of said dog. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him. To this plea the plaintiff has demurred on the ground that the statute upon which the action is based makes the owner or keeper of any dog absolutely liable to any person who shall be assaulted or otherwise injured while such person is traveling on the highway or is out of the inclosure of the owner or keeper of such dog.

The only question raised by the demurrer is whether, under the statute aforesaid, the plaintiff can recover, notwithstanding the fact that he was a trespasser at the time when he was attacked and bitten by defendant's dog. Counsel for plaintiff contends that, the statute being absolute in its terms, and containing no exception whatsoever, the defense set up by said special plea is of no avail, and hence that the plea should be overruled. Counsel for defendant, while admitting that defendant is liable, under the statute, regardless of any question of negligence on his part in the care and management of said dog, claims that the defendant is not liable if the plaintiff by his negligence provoked the dog, or if, by the exercise of ordinary care, he could have prevented the action of said dog.

At the common law the mere fact that the plaintiff was a trespasser at the time of being bitten by a dog was no defense to an action for the recovery of damages for the injury sustained, if the dog was vicious, to the knowledge of the owner or keeper thereof. *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306; *Sherfey v. Bartley*, 4 Sneed, 58, 67 Am. Dec. 597; *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6. See also *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645. But, in order to state a case against the owner, the plaintiff was called upon to allege what was technically called the *scienter* (that is, knowledge of the dog's vicious propensity), and also to prove the same at the trial. And we think it is quite evident that the statute now in question originated in view of the well-known fact that personal injury was frequently sustained from dogs, for which the injured party had no adequate remedy by reason of the practical difficulty of proving the owner's knowledge of the vicious character of his dog. And therefore it was thought best to make the owner or keeper liable for the injuries caused by his dog, regardless of the question as to whether he actually had knowledge of its vicious character. *Kelly v. Alderson*, 19 R. I. 544, 37 Atl. 12. See also *Newton v. Gordon*, 72 Mich. 642, 40 N. W. 921. As the statute thus enlarges the common-law liability of the owner or keeper of the dog so as to include damages sustained by his misconduct by any person while traveling on the highway, or while out of the inclosure of the owner or keeper of the dog, whether the dog is vicious

or not, we are of the opinion that the mere technical trespass set up in the special plea aforesaid is not a bar to the action. The case of *Quimby v. Woodbury*, 63 N. H. 370, which is mainly relied on by defendant's counsel, is not in point, for the reason that the statute upon which that action was based, while it allows any person who has been injured by a dog not owned or kept by him to recover of the person who owns or keeps the dog, yet it expressly excepts from its operation those cases where the injury has been occasioned to the party suffering the damage while engaged in the commission of a trespass or other tort. As our statute contains no such exception, the defense set up by the special plea aforesaid is not available.

If it be claimed that, under the facts set up in the plea, the dog, being in the defendant's cart at the time the plaintiff was attacked by him, was not "out of the inclosure of the owner," within the meaning of the statute, we reply that we do not feel warranted in construing the term "inclosure" as including the cart of the defendant when on the highway. The word "inclosure," in its ordinary legal signification, imports land inclosed with something more than the imaginary boundary line; that is, by some visible or tangible obstruction, such as a fence, hedge, ditch, or an equivalent object, for the protection of the premises against encroachment. Thus, in *Taylor v. Welbey*, 36 Wis. 42, the court held that the word "inclosure," used in the statute of that state relating to damage done by cattle, means a tract of land surrounded by an actual fence together with such fence, "and does not include that part of a public highway of which the fee belongs to the owner of such adjoining inclosure." In *Porter v. Aldrich*, 39 Vt. 326, the term is defined substantially in the same manner. We therefore feel constrained to limit the meaning of said term as thus indicated.

If, however, it shall be made to appear that the plaintiff wilfully provoked the dog, and thereby caused him to attack and bite him, we think he must be considered to have purposely or recklessly brought the injury on himself, and hence should be left to bear it, although the owner of the dog was in the wrong in allowing him to be on the highway, for in such a case it cannot be said, in a legal sense, that the keeping of the animal produced the injury. *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Fake v. Adicks*, 45 Minn. 37, 47 N. W. 450. This was the rule at the common law in cases where the animal was known to be vicious. And we do not think the statute in question was intended to so far modify the common law as to enable a plaintiff to recover where he purposely brings the injury upon himself. But, so far as appears from the plea in the case at bar, the plaintiff was not interfering with the dog, and may not even have been aware of his presence until attacked by him in the manner alleged.

The demurrer is sustained, and case remanded for further proceedings.

GEORGIA SUPREME COURT.

Emma HATCHER *et al.*, *Plffs. in Err.*,
v.
C. T. LORD, Admr., etc., of the Estate of
P. Clay.

(115 Ga. 619.)

*The death of a plaintiff in execution after the execution has been issued and placed in the hands of the levying officer does not prevent such officer from enforcing the same, nor from making any entries thereon that may be necessary to prevent the dormancy of the judgment, even though there be no legal representative upon the estate of the plaintiff in execution, and no request be made by anyone interested in the judgment to have such entries made.

(June 6, 1902.)

*Headnote by COBB, J.

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- V. Death of one of several judgment creditors before issuance, 386.
- VI. Death of one of several judgment debtors.
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 2. Distinction between realty and personality, 389.

ERROR to the Superior Court for Wilkin-son County to review a judgment subjecting property levied on as belonging to the estate of John F. Parker, deceased, to the lien of the execution, as against the claim of plaintiffs in error. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. W. Lindsey, J. S. Davis, and Allen & Pottle for plaintiffs in error.
Messrs. F. Chambers & Son, for defendant in error:

There is no law which exempts a dead man's estate from levy and sale under a judgment obtained against him while in life, on the ground that his estate has not been administered.

Brooks v. Rooney, 11 Ga. 423, 56 Am. Dec. 430.

There is no provision in the Code that the plaintiff in *fi. fa.* shall be alive, or, if

VI.—continued.

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c. After levy, but before sale, 391.

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I. Scope.

This note presents the cases where one of the parties to a judgment died after its rendition, before the issuance or during the progress of execution taken out thereon. The procedure to be adopted under such circumstances is almost entirely regulated by statute in the different states, and the decisions in many of the states, therefore, show an evolution in conformity with the legislative enactments.

Two cases of civil death, in which the question discussed herein arose, have been included.

II. Death of sole judgment creditor.

a. Before issuance.

1. In general.

(a) Necessity of revivor.

The strict common-law rule seems to be that revival of the judgment by *scire facias* is necessary before execution can be issued, after a sole plaintiff's death, in order to bring in his legal representative, who may then issue the writ.

In a note to *Jefferson v. Morton*, 2 Wms. Saund. 6, it is declared that, though the plaintiff die within a year after he has obtained judgment, his personal representative cannot issue execution against the defendant without a *scire facias*.

And in *Earl v. Brown* (1751) 1 Wils. 302, where the plaintiff died after a verdict, but before judgment was entered thereupon, an execution, afterwards taken out without *scire facias* having been issued by the plaintiff's representative, was held irregular, and set aside.

Although in *Mercer v. Lawrence* (1878) 26 Week. Rep. 506, the executors of a plaintiff were, upon their *ex parte* application for leave to issue execution, and upon producing the probate of decedent's will in court, allowed to do so, upon a judgment for costs recovered by the decedent in his lifetime.

But where the plaintiff was suing merely as a public officer on behalf of a company, it was held, in *Todd v. Wright* (1847) 11 Jur. 471, 16 L. J. Q. B. N. S. 811, that the company

dead, that his estate must be represented by an administrator at the time the entries of the officer are made on the execution, in order to give such entries vitality.

Prendergast v. Wiseman, 80 Ga. 420, 7 S. E. 228; *Duncan v. Webb*, 7 Ga. 187.

After a judgment has been rendered and execution has issued thereon, if the plaintiff in execution dies, his administrator or executor, or, perhaps, his heirs at law, may have the execution levied; or any other person who owns such execution, or to whom it may have been transferred, may cause it to be levied.

Rogers v. Truett, 73 Ga. 386; *Juhan v. Juhan*, 104 Ga. 253, 30 S. E. 779.

The dormant judgment statute is not merely a statute of limitation, but is to protect the vigilant creditors and bona fide purchasers.

did not suffer any prejudice in regard to its right to sue out a writ of ca. sa. on account of the death of such representative.

The common-law rule in all its strictness is adopted in a few of the states.

The rule is laid down in *Moore v. Bell* (1848) 13 Ala. 469, that where a plaintiff was dead before an execution was issued, no execution could regularly issue until the judgment was revived in the name of the personal representative by scire facias, for the reason that there was no plaintiff *in rerum natura* to whom satisfaction could be made, who was answerable for an abuse of the process of the law; and the execution so issued was quashed on motion.

If a sole plaintiff dies after judgment, the judgment thereby abates or becomes suspended, so that, until it is revived, it is ineffectual to furnish a warrant for an execution, and an execution issued thereon without revival is absolutely void, as held in *Stewart v. Nuckols* (1849) 15 Ala. 225, 50 Am. Dec. 127.

Citing *Moore v. Bell* (1848) 13 Ala. 469, and *Stewart v. Nuckols* (1849) 15 Ala. 225, 50 Am. Dec. 127. It was held, in *Graham v. Chandler* (1849) 15 Ala. 342, that an execution issued in the name of a sole plaintiff after he was dead was a nullity.

It appearing in *Smith v. Alexander* (1885) 80 Ala. 251, that the plaintiff was deceased at the time of the issuance of execution and the collection of the money thereunder, it was held to be void, as well as all proceedings taken under it.

In *Seeley v. Johnson* (1900) 61 Kan. 337, 59 Pac. 631, whether a sale of real estate, made under a special execution issued on a judgment in foreclosure, after the death of the plaintiff, without revivor, was valid, was decided in the negative, the court stating it to be the policy of the law of Kansas, as evidenced by statutory provision, that proceedings in court should be had only between persons *in esse*, and that executions and orders of sale should be issued and levied, in case of the death of either plaintiff or defendant, only after revivor.

A few early Kentucky decisions seem to be in conformity with the common-law doctrine, but are superseded by later decisions in that state made under later statutes. See *infra*, II. a, 1, (b).

It appears from the record in *Webber v. Kenny* (1818) 1 A. K. Marsh. 345, that a ca. sa. being issued in the name of a dead man, was, in consequence thereof, set aside.

So, in *Breckenridge v. Taylor* (1841) 1 B. 61 L. R. A.

Stanley v. McWhorter, 78 Ga. 38, 1 S. E. 260; *Tanner v. Hollingsworth*, 41 Ga. 134.

The ownership of the fl. fa. is immaterial to the defendant.

Saffold v. Foster, 74 Ga. 752.

The execution having issued on a judgment rendered prior to the act of October, 1885, the entries of the sheriff kept it alive. The act of 1885 does not apply.

Clanton v. Estes, 77 Ga. 361, 1 S. E. 163; *Dozier v. McWhorter*, 113 Ga. 585, 39 S. E. 106.

Cobb, J., delivered the opinion of the court:

Peyton Clay obtained a judgment against Parker, and the execution issued thereon was levied upon a tract of land, and on July 3, 1899, Emma Hatcher and others interposed a claim to the same. Upon the

Mon. 263, it was held that a revivor in the court of appeals in the name of the personal representative of a party to a judgment or decree sought to be reversed will not, on an affirmance, operate as a revivor of the judgment or decree as rendered in the court below, so as to authorize execution from that court in the name of such representative, without a revivor in his name in that court also. It was also held in this case that a statute (1794) authorizing an execution to issue in favor of the personal representative of the obligee in a replevin bond did not apply to a technical execution on a judgment or decree, as, according to the common law, that must conform to the judgment or decree, and be issued in the name of the party in whose favor the judgment or decree was rendered.

In *Trall v. Snouffer* (1854) 6 Md. 308, the plaintiff died after judgment, but before the issuing of a scire facias in his name and judgment thereon for the use of the equitable plaintiffs. A writ of fl. fa. was thereafter issued, but in the name of the deceased plaintiff, and levied, whereupon the debtor made a motion to quash the execution, on the ground, among others, that it was issued and tested on a day when the plaintiff was dead, which was granted and affirmed on appeal, the court stating that it could find no case in which a fl. fa. had been enforced in the name of a deceased plaintiff, when the fact of his death at the date of the writ had been relied upon against its validity at the return of the process.

An execution was set aside in *Harwood v. Murphy* (1832) 13 N. J. L. 193, upon its appearing that the execution was issued after the death of the plaintiff, without revival by scire facias in the name of his representatives.

And the plaintiff in *Warwick v. —* (1843) 20 N. J. L. 116, having died since the entry of judgment, his administrators applied to be substituted plaintiffs in order to issue a testatum fl. fa. but the court held that the remedy was by scire facias, which might issue without a rule.

In *Morgan v. Taylor* (1876) 38 N. J. L. 317, after an execution was issued and returned unsatisfied in the lifetime of a judgment creditor, he died, the fact of his death being unknown to his attorney, who afterwards issued an alias writ, under which a levy was made. On a motion to quash the alias execution, the court held that it was undoubtedly void, and the fact that the attorney did not know of plaintiff's death at the time he issued the writ was of no importance as affecting its validity; that it was not only void at common law, but by the

trial of the claim case the claimants offered an amendment to the joinder of issue, in which they set up that Parker, the defendant in execution, died in 1879; that there never had been any administration on his estate, and that at the time of the levy in the present case his estate was unrepresented; that Peyton Clay, the plaintiff in execution, died on the 11th day of November, 1880; that E. W. Clay was appointed his administrator in January, 1881, and that letters of administration were issued to him, dated February 17, 1881; that he fully administered the estate, and was dismissed as administrator in 1886, at the May term of the court of ordinary; that the estate of Peyton Clay had no representation from the time of the dismissal of E. W. Clay until after the levy in the present case; and that between these dates there was no one au-

thorized to direct the collection of the execution, and all entries made on the execution between these dates are void. The court, upon demurrer, struck this amendment, and to this ruling the claimants excepted. The case proceeded to trial, at which it appeared that Peyton Clay obtained a judgment in the superior court against John F. Parker on October 5, 1874, and that execution issued thereon October 26, 1874. The following entries appear upon the execution signed by the sheriff: February 24, 1875, levy upon land; September 7, 1875, receipt for costs paid by the plaintiff in execution; April 2, 1882, *nulla bona*; September 3, 1885, levy upon personal property (an entry on the execution shows that this property was claimed, and a verdict rendered in favor of the claimants); January 2, 1885, receipt for costs paid by E. W.

statute in force at the time it was rendered, which provided that where a plaintiff died after final judgment the execution could properly issue only in the name of plaintiff's personal representatives, and no other method than proceeding by scire facias would serve to bring them into the writ. It was further held that there was no way to amend the writ by changing its date when that date actually expressed the true time of its issuance.

Center v. Billinghamurst (1823) 1 Cow. 33, is a decision according to common law, holding that an execution tested after the plaintiff's death, without revivor in favor of his representative, was irregular; the court, however, thought it might be amended, as there were no equitable circumstances precluding an amendment.

An execution was set aside for irregularity in *Gansevoort v. Gilliland* (1823) 1 Cow. 218, it appearing to have been issued after the plaintiff's death.

These cases have been superseded by later decisions (*infra*, II. a, 1, (b)), rendered in conformity with the remedy introduced by the adoption of the Code in this state.

A *fi. fa.* was set aside in *Wingate v. Gibson* (1810) 5 N. C. (1 Murph.) 492, where it appeared to have been sued out in the name of a deceased judgment creditor, when he had no representative before the court.

It was briefly held in *Mooring v. James*, (1829) 13 N. C. (2 Dev. L.) 254, that the summary remedy of a plaintiff upon a bond survived to his personal representative, who had caused himself to be made a party to the cause upon the death of the original plaintiff.

In one case in Pennsylvania, *Day v. Sharp* (1839) 4 Whart. 341, 34 Am. Dec. 509 (*infra*, II. a, 1, (b)), *scire facias* appears to be considered necessary, but later decisions in that state adopt a more expeditious remedy.

An execution was declared irregular in *Tucker v. Carr* (1898) 20 R. I. 477, 40 Atl. 1, because issued after the death of the plaintiff without revivor of the judgment by *scire facias*.

It is said, *obiter*, in *Gregory v. Chadwell* (1866) 3 Coldw. 390, that if plaintiff dies after judgment and before execution, it seems to be necessary to revive by *scire facias*. In this case the right of an executrix of a deceased plaintiff to revive the judgment by *sci. fa.* against a part only of the defendants, and issue execution against them, was upheld by analogy, under a statutory provision allowing such a course to be pursued upon the death of one or more defendants, when there are several.

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And, *arguendo*, the court considered, in *Lavell v. McCurdy* (1888) 77 Va. 763, that where a plaintiff had died his executors ought, by *scire facias*, to revive the judgment before issuing execution, setting out in the writ the original judgment, the death of their testator, their qualification as executors of the original plaintiff, and notifying the defendants of their demand, and giving them the opportunity of showing cause, if any they could, against such demand.

On the other hand, some of the states, either practically or expressly, hold that revival by *scire facias*, or in any manner, is unnecessary. This inference is perhaps warranted in *Juhan v. Juhan* (1898) 104 Ga. 253, 80 S. E. 779, where, after an execution had been issued and levied in favor of a surviving partner, it appeared that he was dead, and a motion was thereupon granted, allowing the execution to proceed in the name of the heirs. The court, upon appeal, stated that it would have been decidedly the better practice to have had an administrator appointed on the estate of the plaintiff *in fi. fa.*, and the execution issued by him, as he would be entitled to collect the assets of the firm, and held that it was error to allow the heirs to be made parties plaintiff, and the execution to proceed in their names without administration,—especially when they were not all *sui juris*, and it did not appear that there were no debts against the firm.

In *Armstrong v. McLaughlin* (1875) 49 Ind. 370, the court held that, while the administrator of a deceased judgment creditor was entitled to have the judgment revived, he might have issued execution upon the original judgment without a revivor.

And in *Mavity v. Eastridge* (1879) 67 Ind. 211, the court states that it may be observed that administrators may issue execution upon judgments in favor of their intestate without any revivor thereof.

One of the grounds upon which it was attempted to enjoin an execution in *Legendre v. McDonough* (1828) 6 Mart. N. S. 514, issued by the curator of a deceased judgment creditor, was that the judgment had not been declared executory in favor of the curator. In regard to the contention the court, on appeal, stated that when a defendant dies a judgment rendered against him must be declared executory against his heirs or representatives, because property which has ceased to be his cannot be affected by a judgment to which the new owners are not made parties; but that, on the death of a plaintiff, nothing prevents his heir or representative from taking out execution.

Clay, administrator; May 6, 1891, *nulla bona*; September 7, 1896, *nulla bona*; January 30, 1899, levy on the land in controversy and other lands; July 4, 1899, dismissal of levy on lands other than that now in controversy. On April 2, 1901, an order was passed directing that the case proceed in the name of Charles Lord as administrator *de bonis non* of Peyton Clay, deceased, the plaintiff in execution. The trial resulted in a judgment finding the property subject to the execution. The claimants made a motion for a new trial, which was overruled, and to this ruling they also excepted.

The only assignment of error which was insisted on in this court by counsel for plaintiffs in error in the brief filed was that which complained of the judgment striking the amendment to the joinder of issue. It is contended that under the allegations of

the amendment the judgment is dormant, and that therefore the amendment should have been allowed, and proof admitted which would have caused the trial to result in a verdict finding the property not subject to the execution. If the sheriff had no authority to make entries upon the execution between the date of the dismissal of E. W. Clay as administrator of the estate of Peyton Clay and the appointment of Lord as administrator upon that estate, which was after the levy in the present case, according to the averments in the amendment, then the execution would be dormant, for the reason that the other entries were not made within seven years from the date of the last entry made during the time that E. W. Clay was in office as administrator. It is contended that, as there was no administrator during this period, there was no person au-

In *Rooks v. Williams* (1858) 13 La. Ann. 374, one of the grounds on which a writ of injunction arresting an execution was obtained was that *fi. fa.* was improperly issued in the name of the decedent, instead of his legal representatives, but the court refused to sustain the contention, saying that it could not have injured the debtor, as he might have been relieved of all difficulty as to the legality of the execution by paying the amount of the judgment to the administrator of the decedent or his legal representatives.

After the judgment creditor's death, in *Jenness v. Lapeer County Circuit Judge* (1880) 42 Mich. 460, 4 N. W. 220, his administrator caused an execution in the usual form to be issued on the judgment without revivor thereof. Upon the question whether the execution and sale were void, or merely voidable, the court said that the decisions seem to be influenced largely by local practice or regulations, rather than by any general or leading principle, and therefore held that, as nothing more was required to preface the issuing of the execution than an order to revive the judgment upon affidavit and notice, which would have been granted as a matter of right, the neglect to obtain it was a mere irregularity which could be cured by an order *nunc pro tunc*.

The court stated, in *Ammons v. Whitehead* (1856) 31 Miss. 99, that whatever force there might be to the objection that an execution was issued after a plaintiff's death in the name of his administrator without revivor by *scire facias*, it certainly constituted no ground for coming into equity to enjoin the execution, as the remedy, if any, was ample at law by a motion to quash.

Under the well-settled doctrine, as recognized in the opinion, that a sale of land under execution issued and tested after the death of the defendant in the judgment and without revivor by *scire facias* is not void, but merely voidable; and that a sale under it is valid until regularly set aside in a direct proceeding for that purpose by the heir or terre-tenant, the court, in *Hughes v. Wilkinson* (1859) 37 Miss. 482, holds that *a fortiori* a sale made under an execution in which the plaintiff was dead at the time it was issued or tested could only be voidable because the reason for a revival applies with much less force to a plaintiff than to a defendant; and also could not be attacked by strangers in a collateral proceeding.

But see a later Mississippi decision, *infra*, II. a. 1. (b), in conformity with a statute proposed L. R. A.

viding a more expeditious mode of revival than by *sc. fa.*

A judgment of revivor was held not to be necessary in order that an execution might issue, in *Gaston v. White* (1870) 46 Mo. 486, where, after the plaintiff's death, his administrators without revivor sued out a special execution, an order for which had been obtained by plaintiff in his lifetime, reciting the judgment, the plaintiff's death, and the granting of letters of administration.

In *Simmons v. Heman* (1885) 17 Mo. App. 444, an execution was held to be properly issued in the name of a decedent plaintiff's personal representative, without revival, according to statute.

Executions were issued after the decease of the original judgment creditors, in their names, without any proceedings having been had by *scire facias* or otherwise to revive the judgments in favor of the personal representatives, in *Daisy Roller Mills v. Ward* (1897) 6 N. D. 317, 70 N. W. 271, and the court held that no revivor or substitution was necessary under the prevailing statute providing that "the party in whose favor judgment has heretofore been, or shall hereafter be, given, and in case of his death his personal representatives, duly appointed, may, at any time within five years after the entry of judgment, proceed to enforce the same by writ of execution, as provided in this chapter," and further, that it was evidently the intention of the legislature that the writ issue in the name of the original parties to the judgment.

(b) *Other modes than by scire facias.*

The majority of the states, however, have adopted various modes of procedure aimed to accomplish the results of revivor by *scire facias* without its inconveniences.

Proceedings under an execution were enjoined in *Meek v. Bunker* (1871) 33 Iowa, 169, when it appeared that the judgment creditor had been dead several years when it was issued, and indorsements in the nature of an *ex parte* revivor, provided for by statute, were not properly made thereon.

And an execution issued after the judgment creditor's death without an indorsement by the clerk of the court as required by statute, setting forth the fact of the death and names of heirs or representatives, was held void in *Dunham v. Bentley* (1897) 103 Iowa, 136, 72 N. W. 437, the court stating that, without some kind of revivor, an execution issued after a judgment creditor's death was void for the rea-

thorized to control or direct the progress of the execution, and that the sheriff had no authority to make entries thereon, except at the special instance and request of someone who owned or controlled the execution. What effect has the death of the parties to an execution, or either of them, upon the writ? According to the provisions of Stat. 29 Car. II. chap. 3, § 16, which was of force in England at the time of our adopting statute, an execution which is delivered to the sheriff in the lifetime of the defendant may be levied upon his goods and chattels notwithstanding the death of the debtor before a levy is made. 8 Enc. Pl. & Pr. p. 500. Under the present law of this state, land is placed upon the same footing as goods and chattels, so far as the lien of the judgment is concerned, and the judgment is a lien upon all of the property of the debtor from

the date of its rendition; and our Code declares that on the death of a defendant after final judgment, when no execution has been issued previously to such death, execution may issue as if such death had not taken place. Civil Code, § 5034. See also *Brooks v. Rooney*, 11 Ga. 424 (8), 56 Am. Dec. 436; *Smith v. Lockett*, 73 Ga. 104. See also, in this connection, 1 Freeman, Executions, 3d ed. § 36. It will thus be seen that our Code goes a step farther than the statute of Charles II. Under the Code, the death of a defendant in execution, either before or after the issuance of the execution, will not abate the writ. If the execution has issued, it may proceed; and, if not issued, it will issue notwithstanding the death of the defendant in execution. While the question just discussed was made in the amendment offered by the claimants, it was not insisted

son that, by the death of the plaintiff, the party to whom authority was given to enforce the judgment is withdrawn, and a new party benefited and concerned in the judgment is introduced into the record.

An execution was sued out several years after the death of the judgment creditor, in *Brown v. Parker* (1853) 15 Ill. 307, without first reviving the judgment in favor of the personal representative, or recording in court his letters of administration. It was also issued in the name of the deceased plaintiff, and not in the name of his personal representative. The court held that the execution and the proceedings under it were absolutely void, whether their validity was drawn in question directly or collaterally.

Where the statute declares that a judgment shall be a lien "on the real estate of the debtor for seven years after the last day of the term of the court at which it was rendered, provided that an execution be issued thereon within one year on such judgment," and that "the lien . . . shall not abate by reason of the death of the plaintiff," but "the executor or administrator may cause the letters testamentary or of administration to be recorded in the court in which the judgment exists, after which execution is authorized to issue and proceeding to be had in the name of the executor,"—the court held, in *Fitts v. Davis* (1866) 42 Ill. 391, where execution was not issued within a year after judgment was rendered (during which time the plaintiff died) that the lien was thereby lost as against a mortgagee or person purchasing the equity of redemption, by the failure of the administrator to continue the lien beyond the year by filing a copy of his letters in court and suing out execution as required by statute.

To award execution in favor of complainant after her death was held error in *Dinet v. Eigenmann* (1875) 80 Ill. 274, the court stating that the decree should have been revived in the name of the administrator, and execution ordered to issue in his name, or that it might be an execution could be had upon the administrator's filing a copy of his letters in court.

By reason of the failure either to revive a judgment in favor of the administratrix after the judgment creditor's death, or to record the letters of administration in court, it was held, in *Meyer v. Minton* (1883) 106 Ill. 414, that an execution issued by the administratrix was unauthorized by law, and absolutely void.

It appeared in *Williams v. Staton* (1882) 4 Ky. L. Rep. 225, that the executions in question were issued in the name of the personal

representative without previously filing the order of his appointment in the clerk's office, and without any indorsement on the execution of the fact of the plaintiff's death, the administrator's appointment, etc., as required by statute. The court held that these preliminaries required by the Code, of a personal representative before he is entitled to have an execution in his name on a judgment in favor of a decedent, are imperative, and enjoined the executions.

In regard to an execution issued in the name of an administrator without any indorsement by the clerk, as required by statute, showing the death of the plaintiff and appointment of his administrator, the court held, in *Mulholland v. Troutman* (1888) 10 Ky. L. Rep. 263, that no valid execution could issue after the death of the plaintiff in the judgment, unless it was indorsed by the clerk as provided.

See earlier decisions in this state, *supra*, II. a, 1, (a).

For an intimation of the practice in Michigan, see *Jenness v. Lapeer County Circuit Judge* (1880) 42 Mich. 469, 4 N. W. 220, *supra*, II. a, 1, (a).

It was contended in *Erickson v. Johnson* (1876) 22 Minn. 380, that, by the judgment creditor's death, the statutory period of five years after judgment within which execution could issue thereon, and during which the judgment was a lien upon property of the judgment debtor, was extended; but the court refused to support the contention, holding that the issuance of an original and alias execution and levy and sale thereunder after the expiration of the statutory period was unauthorized.

The proper course for the administrator of a deceased judgment creditor to pursue was held, in *Lough v. Pitman* (1878) 25 Minn. 120, to be by moving the court in which the action is pending (as, until it is satisfied or extinguished in some way it is considered as still pending), to allow it to be continued in his name as the representative of the deceased; and upon the granting of such a motion he may thereupon take out execution.

Under a statutory provision that, when the administrator of any plaintiff who dies before satisfaction of his judgment shall file with the clerk an affidavit of such death and of his appointment, with a copy of his letter duly certified, execution may issue on said judgment as if such death had not occurred, the court held, in *Jackson v. Scanland* (1888) 65 Miss. 481, 4 So. 552, that this did not apply in favor of a foreign administrator who had not complied with a statute requiring him to qualify within the state in order to sue in the courts thereof.

on in the argument, but we have had no difficulty in reaching the conclusion just stated.

The controlling question in the case, and the one which was stressed in the written argument filed for the plaintiffs in error, is, What effect has the death of the plaintiff in execution upon the writ, when it was issued during his lifetime? At common law the death of a plaintiff did not abate the writ, but it was the duty of the officer, notwithstanding such death, to levy the writ. See 8 Enc. Pl. & Pr. p. 499, and numerous cases cited in the notes; 1 Freeman, Executions, 3d ed. § 37; *Oom. v. Whitney*, 10 Pick. 434. In *Rogers v. Truett*, 73 Ga. 386, where the claimant tendered an issue that the plaintiff in execution had died before the levy, and the same was stricken upon demurrer, the judgment was affirmed by this court; and

it was held that after the judgment had been obtained, and execution issued thereon, the death of the plaintiff in execution would not interfere with the progress of the execution, but that the administrator or executor of the plaintiff in execution might have the same levied; and it was said that possibly his heirs at law, or anyone else interested in the execution, as transferee or otherwise, might cause a levy to be made. It was also said that, after the property levied on was claimed, someone who was entitled to control the execution should be made a party to the claim case,—such as executor or administrator of the estate of the plaintiff in execution, or the transferee holding under him. Mr. Justice Blandford, who delivered the opinion in that case, further remarked: "If the sheriff should receive and collect the money due on an execution after the plain-

In *Bellinger v. Ford* (1852) 14 Barb. 250, the court was inclined to the view that, where a plaintiff in a judgment had been dead for years, and it did not appear that there was any executor or administrator, the issuance of an execution by persons not appearing to have any authority in the matter by assignment or otherwise was a nullity.

Upon a subsequent hearing, in (1856) 21 Barb. 311, it was held that, after the plaintiff's death, until the suit should be revived, which the court said was formerly done by *scire facias*, but that the same result could be obtained by motion, no execution could issue, as until a revivor no one had any right to issue it; and also the judgment stood between new parties, who must have a day in court before execution could issue.

But in *Jay v. Martine* (1853) 2 Duer, 654, it was held that leave to issue execution after the death of the plaintiff may not be granted on motion of the executors, but may be obtained only in an action brought by them praying for the same relief that before the Code was granted by *scire facias*.

After recognizing that an execution cannot issue upon a judgment after the death of the judgment creditor without revivor, it was also held, in *Thurston v. King* (1854) 1 Abb. Pr. 126, that the method of revivor under the Code was by action in which the executors of the plaintiff would be entitled to ask for and obtain an execution to be issued in their names, to be levied on any lands which the defendant held when the judgment was docketed.

And the court was of the opinion in *Wheeler v. Dakin* (1856) 12 How. Pr. 537, that where a plaintiff dies after judgment there is no party left who can make a motion for leave to issue execution, and that the only remedy is an action by his legal representatives to obtain the relief formerly reached by the writ of *scire facias*.

So, too, it was stated in *Nims v. Sabine* 22 How. Pr. 78, that the common law formerly in force, that, if a plaintiff died after judgment but before issuing execution, no execution could issue without revivor by *scire facias* at the suit of the personal representatives of the plaintiff, had been changed by the Code, so that the revival formerly had by *scire facias* was now obtained by an action.

So, too, it was stated in *Nims v. Sabine* (1872) 44 How. Pr. 252, that, after the lapse of a year from the death of the plaintiff in a judgment, the remedy presented by the Code for revival of the judgment and for leave to issue execution was by action, not motion; and an execution was held voidable, issued after 61 L. R. A.

plaintiff's death upon leave of the court obtained upon a motion.

But all of these decisions seem to be superseded by the present statute providing that, "where the party recovering a final judgment has died, execution may be issued at any time within five years after the entry of the judgment, by his personal representatives, or by the assignee of the judgment, if it has been assigned; and the execution must be indorsed with the name and residence of the person issuing the same." N. Y. Code Civ. Proc. § 1376.

The lack of an indorsement on an execution issued after the death of the judgment creditor, reciting that it was issued by his personal representatives, was held to be a curable irregularity only, and not to render the execution void, in *Deyo v. Borley* (1892) 43 N. Y. S. R. 638, 18 N. Y. Supp. 300, the court stating that no substantial right of the defendant had been infringed, as the executors of the plaintiff were entitled to issue an execution upon the judgment against the defendant.

In *Delser v. Sterling* (1823) 10 Serg. & R. 119, the court stated that the practice allowed by statute, of substitution in pending actions without *scire facias*, had led to the similar practice in regard to judgments, of allowing a personal representative to have himself substituted without a *scire facias*, and even without application to the court, and then take out execution. The court remarked that it had never known of an instance of *scire facias* in such a case.

One of the questions in *Day v. Sharp* (1839) 4 Whart. 341, 34 Am. Dec. 509, was whether an execution issued and levied in the name of a plaintiff who was dead, without issuing *scire facias* after assignment of the judgment to one of the defendants therein who had satisfied it, was a justification to him for acts committed under it. The court held that it was on the ground that the execution was not void, but voidable, recognizing as the rule, however, that, in the case of a plaintiff's death, it was the duty of the person issuing execution to substitute the names of the executors or administrators, and therefore to issue *scire facias* in order to bring in such new parties.

After the death of a judgment creditor, an execution was issued in the name of his executors, without any suggestion of his death or substitution of the executors upon the record. The court held the execution irregular, but permitted the necessary entries to be made *nunc pro tunc*, and the execution, which in the lower court had been set aside, to be reinstated, upon it appearing that a levy had been made there-

tiff's death, then he would hold the same for the use and benefit of such representative of the deceased person as may have been or may be appointed to manage his estate. The payment by the defendant to the sheriff would be good, and would extinguish the judgment and satisfy the execution." It was argued by counsel for plaintiffs in error that it could be legitimately inferred from what was said in that case that the sheriff had no right to levy an execution after the death of the plaintiff in execution, unless there was someone interested in the execution who directed him to make the levy. The decision just referred to may contain an intimation to this effect, but the only point actually ruled in that case is that, where there had been a direction by someone interested in the execution, a levy is lawful, notwithstanding the death of the

plaintiff in execution, and that the sheriff would hold the proceeds of the levy for the benefit of whoever might be the owner of the execution. While that decision says that anyone interested in the execution may direct a levy to be made notwithstanding the death of the plaintiff in execution, we do not think the authority of the sheriff to collect the sum due on the execution, either by voluntary payment on the part of the defendant in execution, or by a seizure of his property, depends absolutely upon an express direction by someone interested in the execution. The execution is a mandate directed to the sheriff to seize the property of the defendant, and sell the same in satisfaction of the debt upon which the judgment is founded. The execution is a command itself, independent of anything that may be said or done by those who are to

under, and the money paid into court. *Darlington v. Speakman* (1845) 9 Watts & S. 182.

In *Gemmill v. Butler* (1846) 4 Pa. 232, it is held that, if judgment was obtained before the death of the party, the executor or administrator shall proceed to execution upon suggesting the death on the record, in the same manner that the decedent might have done if he had survived.

It appears from *Walt v. Swinehart* (1848) 8 Pa. 97, that an execution may be issued after the death of the plaintiff upon the suggestion of his death and the substitution of the administrator upon the records. The decision, however, was in regard to the right to transfer a judgment after the death of the plaintiff therein from the county in which it was obtained to another county, the court holding that it might be done, and that the recitals above referred to, necessary to be made before taking out execution, might be made either before or after the transfer.

Under the statute providing that in case of the death of a sole plaintiff or one of several plaintiffs after judgment, execution might be issued by the clerk in the name of the legal representative of the deceased sole plaintiff, or in the name of the survivor and the legal representative of the deceased plaintiff upon the filing of an affidavit of such death, and appointment of the representative with the clerk, it was held, in *Holman v. Chevallier* (1855) 14 Tex. 337, that the mere filing of such an affidavit was sufficient, and that the failure of the clerk to indorse thereon the date of receiving it would not prejudice the rights of the party, but that the indorsement would be allowed to be made *nunc pro tunc*.

The attorney for a deceased plaintiff, in *Fowler v. Burdett* (1857) 20 Tex. 34, filed a motion suggesting the death of the plaintiff, and the appointment of administrators, and asked that they be made parties plaintiff to the judgment, whereupon the court made an order to that effect, and that execution issue in the name of said administrators. It was held on appeal that the order so made was without authority, since it was not a formal judgment of revival as authorized by one legislative enactment, neither was it authorized by another providing for an informal mode of revival upon the filing of an affidavit of the death and certificate of the appointment of a representative, since those documents were not filed as required.

It was stated to be the settled law of the state, in *Scott v. Lyons* (1883) 59 Tex. 503, that filing with the clerk an affidavit of the

death of plaintiff and a certificate of the appointment of an administrator are conditions precedent to the authority of the clerk to issue an execution upon the judgment in the name of the administrator, and therefore, it was held that an execution which recited that the plaintiff was dead, and that an administrator had been appointed, would be presumed to have been issued by the clerk after the filing of the affidavit and certificate required by statute, and that he obtained his information therefrom.

After a plaintiff's death subsequent to the recovery of judgment, the administrator filed a suggestion of the death and of his appointment as administrator, whereupon the court ordered that he be admitted as party plaintiff, and have leave to proceed in the case. *Scire facias* was then issued by the administrator, which the defendant moved to quash on the ground, among others, that it was unnecessary, inasmuch as the administrator, having been admitted as party plaintiff, might, without it, have had execution. But the court held that, even if the *scire facias* was unnecessary, that was not a fatal objection, and refused to quash the writ. *Brown v. Chesapeake & O. Canal Co.* (1880) 4 Hughes, 584, 4 Fed. 770.

2. After assignment of the judgment.

The cases present a lack of harmony as to the manner of proceeding to issue execution where the plaintiff, before his death, assigned the judgment.

After assignment of a judgment, and death of the plaintiff therein, an execution was issued in the name of the deceased plaintiff with an indorsement of the assignment thereon. As to its validity, the court stated that without statutory aid there could be no valid execution of a judgment in favor of one not *in esse*, and that the statute authorized executions under such circumstances in the name of the legal representative of the deceased, and not otherwise; so that the assignment of the judgment affected no change as to the person in whose name execution should be issued, and therefore quashed the execution. *Weich v. St. Louis* (1882) 12 Mo. App. 516.

But where a judgment was valid and in full force at the time of its assignment by the judgment creditor his subsequent death was held to in no wise affect the rights of the assignee to enforce the judgment by execution, the same as though the judgment creditor had lived, in *Harris v. Frank* (1883) 29 Kan. 200.

An execution issued in *Duryee v. Botsford* (1881) 24 Hun, 317, by the assignee of a de-

receive the proceeds of the collection or levy. The Code makes it the duty of the sheriff "to execute and return the process and orders of the courts in this state, and of officers of competent authority, if not void, with due diligence, when delivered to them for that purpose according to the provisions of this Code." Civil Code, § 4380. When an execution has been issued during the lifetime of the plaintiff in execution, and delivered to the sheriff, it constitutes a command to the sheriff to seize the property of the defendant in satisfaction of the writ; and this command is not withdrawn or impaired by the fact that the plaintiff in execution dies after the execution is delivered to the sheriff. It is the duty of the sheriff to levy the writ, and collect the debt upon which the judgment is founded, without any express direction from anyone interested in

the judgment. If he collects the amount due on the writ, and no one appears who is authorized to receipt him for the amount so collected, he holds the same for the benefit of the owners of the judgment, whoever they may be. The writ is a continuing command to him, and he has authority to execute and return the same at any time, without express direction to that effect from anyone. It is the command of the court, and, when the amount is collected, if no one appears to receive it, upon his making return to the court proper direction will be given as to what disposition to make of the funds in his hands. The command contained in the writ may be withdrawn by the execution being taken away from his possession by someone authorized to control the same, or by direction from such person that the progress of the execution be suspended. See

ceased judgment creditor, without its appearing upon the face thereof to have been issued by the party as assignee, and for that reason, and also because the writ was issued without any previous application by him for leave to issue the same, as required by statute, was declared irregular and void.

And in *Christ v. Flannagan* (1896) 23 Colo. 140, 46 Pac. 683, under a statute providing that, upon the death of a judgment plaintiff his personal representative may proceed to collect the amount of the judgment, it was contended that an execution sued out upon a judgment previously assigned in the name of the plaintiff was void; but the court held that this section did not apply to a case where the plaintiff had parted with all his interest in the judgment by assignment; that, while it would have been proper to have substituted the assignee for the judgment plaintiff, a failure so to do did not render the sale under the execution subject to a collateral attack.

But, although the judgment had been assigned in the lifetime of the judgment creditor, it was held, in *Holmes v. McIndoe* (1866) 20 Wis. 657, that his name was still requisite to the process of execution issued on the judgment after his death, under the act declaring that, after the death of a person in whose favor a judgment was rendered, execution may issue thereon in the same manner and with like effect as though he were still living.

In *Scammon v. Swartwout* (1864) 35 Ill. 826, a claimant to a piece of real property traced his title from a judgment upon which executions were issued within a year, after which the judgment creditor died, and his wife, who was appointed executrix, assigned the judgment nearly twenty years after its entry to another, who made affidavit of the debtor's death, which had occurred in the meantime,—that he died intestate, without heirs in the state, and that there was no administration of his estate within the state,—and issued execution in the name of the executrix, under which a levy was made upon the property in question, which, at the sale, was purchased by claimant. The court held the execution thus issued and proceedings under it were void, and the claimant's title therefore invalid, for the reason that by statute a lien by judgment on real estate exists for seven years only, and, while execution may be issued at any time during the seven years, provided an execution was issued within one year of the entry of judgment, this lien cannot be extended beyond the statutory period; but that, if that time had not passed, by causing her letters testamentary to be recorded in 61 L. R. A.

court, an execution might have been issued in the name of the executrix as provided by statute, upon the death of the creditor; but that after the lapse of seven years that statute did not apply.

b. After issuance, but before levy.

Where an executor sued out execution by elegit, but died intestate before the debt was levied, it was held, in *Harrison v. Bowden*, 1 Sid. pt. 1, p. 29, that the administrator *de bonis non* might take advantage of the execution because it was a thing vested; *scous*, if execution had not been sued at the time of the death of the executor.

An arrest under a ca. sa. issued before the death of the plaintiff, but not executed until afterwards, was held regular, and the defendant was not allowed to be discharged, in *Ellis v. Griffith* (1846) 16 Mees. & W. 106, 10 Jur. 1014, 4 Dowl. & L. 279, 16 L. J. Exch. N. S. 66.

The American cases, almost without exception, go on the same theory, *viz.*: That an execution is an entire thing, and, once begun, is not affected by the plaintiff's death.

Where an execution and decree of foreclosure were put into the hands of proper officers to be executed during the lifetime of the plaintiff, and he died before the execution was completed, it was held, in *Pace v. Rust* (1872) 28 Ark. 71, to be unnecessary to revive the action and bring in the representatives of the deceased plaintiff as parties.

In *Rogers v. Smith* (1879) 63 Ga. 172, where it appears from a very brief memorandum of decision that the plaintiff in *fi. fa.* was dead before the levy, and no change of parties had been made, the court dismissed a writ of error. No further facts are given.

An issue that the plaintiff in execution had died before the levy was held properly stricken upon demurrer, in *Rogers v. Truett* (1884) 73 Ga. 386, the court stating that, after judgment and execution issued thereon, if the plaintiff in execution die, the administrator of such decedent, his executor, or, it may be, his heirs at law, may have the execution levied; or any other person who owns the execution, or to whom it may have been transferred, may likewise cause it to be levied.

HATCHER v. LORD is in accord with the almost uniform doctrine of the American cases, as well as the prior Georgia decisions, and is of value, especially in regard to its discussion of the officer's duty or authority to execute the writ, because of the infrequency with which that question arises.

Smith v. Martin, 54 Ga. 600. But until the execution is lawfully withdrawn from his possession, or direction is given by an authorized person that the progress of the execution be suspended, the officer to whom it is directed has authority to execute and return the same, and make any entry thereon which the law authorizes. If property of the defendant in execution can be seized and sold in satisfaction of the execution, it is the duty of the officer to make such seizure and sale. If no property of the defendant can be seized and sold, it is the duty of the officer to make entries to this effect from time to time, in order to prevent the execution from becoming dormant. Whether an officer would be liable for failure to make entries for the sole purpose of keeping the execution alive, when the defendant has no property to be levied on,

need not now be decided; but certain it is that the officer has authority to make these entries, whether it is his absolute duty to do so or not. It appears from the entries on the execution that it had been delivered to the sheriff during the lifetime of the plaintiff in execution. The fact that the sheriff who made the entries after the death of the plaintiff in execution, and before the administrator *de bonis non* was appointed, was a different individual from the sheriff who received the execution from the clerk during the lifetime of the plaintiff in execution, does not affect the right of the successor of the sheriff who received the execution to execute the same and make entries thereon. The Code declares that it is the duty of the sheriff "to receive from the preceding sheriff all unexecuted writs and processes and proceed to execute the same."

If the plaintiff dies after fieri facias is issued, but before a levy is made, the writ may still be executed; and the act of a justice in ordering its return upon the death of the plaintiff, thereby causing a loss to decedent's estate, was held to be sufficient cause for action in *Murray v. Buchanan* (1845) 7 Blackf. 548.

The question involved in *Wing v. Hussey* (1880) 71 Me. 186, was whether an execution issued and put into the hands of an officer for service during the life of the plaintiff in the execution was abated by his death before service. The court referred to the well-settled common-law rule that the death of the plaintiff does not abate the execution, and held that that rule prevailed in Maine, not having been changed by statute, and that it was the legal duty of the officer to serve the execution put into his hands for that purpose before the death of the plaintiff.

After the issuance of an execution, the plaintiff therein died, and the following day the debtor was committed to prison under the writ. In habeas corpus proceedings it was contended that, after the death of the plaintiff, no right of commitment in execution existed. The court, however, refused, in the exercise of its discretion, to discharge the prisoner, as an unreasonable time had not yet elapsed since the death of the creditor without the appointment of an administrator, who, the court seems to imply, would be the proper person to have charge of the matter when he should be appointed. *Com. v. Whitney* (1830) 10 Pick. 434.

Under the common-law rule that, with a *f. fa.* in the sheriff's hands at the time of plaintiff's death, the sheriff may proceed without revivor to execute the writ against the personal or real property of the defendant, notwithstanding the death, it was held, in *Lynde v. O'Donnell* (1861) 21 How. Pr. 34, 12 Abb. Pr. 289, that, if the plaintiff die after a decree of foreclosure of specific property mortgaged, the power of the referee to go on and make a sale of the premises and execute a deed to the purchaser is not affected by such death.

The death of a judgment creditor while an execution was in the officer's hands was held not to suspend its operation, in *Jones v. Newman* (1885) 36 Hun, 634.

The court states, in *Craig v. Fox* (1847) 16 Ohio, 563, as a well-settled rule, that "an execution at law, once begun, is not abated by death, but may be proceeded on as an entire thing, until the object is effected by a sale of the property."

The effect of a plaintiff's death upon an execution

issued or tested prior thereto came up for the first time in Tennessee in *Nell v. Gaut* (1860) 1 Coldw. 396, and the court held that it might be executed notwithstanding the death, and the money paid to his personal representative, or deposited in court to await the appointment of one.

It is said, *obiter*, in *Gregory v. Chadwell* (1866) 3 Coldw. 390, that, if an execution issues, or is tested, before the death of the plaintiff, it may be levied and the property sold as if the death had not occurred.

The plaintiff died after delivering execution to the sheriff, but before the levy, in *Turnbull v. Claiborne* (1831) 3 Leigh, 392. The court held that the plaintiff acquired a lien on the property from the date of the execution, and, an execution being an entire thing, that the sheriff might proceed to levy and sell notwithstanding the death of either party.

The only exception to the prevailing rule appears to be in *Wagon v. McCoy* (1810) 2 Bibb, 198, where the rule laid down is that, if the plaintiff dies after the delivery of an execution to the sheriff, but before it is levied or replevied, the process abates, because otherwise the debtor would have his privilege of replevying the goods taken away from him, as there would be no one *in rerum natura* to whom a replevin bond could be executed.

And a writ sued out by an executor upon a statute staple acknowledged to his testator, after which, and before the return, the executor died, was held void in *Cleve v. Veer* (1837) Cro. Car. 459, as well as all proceedings under it, for the reason that it abated upon the death of the executor.

c. After levy, but before sale.

In *Clerk v. Withers* (1705) 1 Salk. 322, 2 Ld. Raym. 1072, 6 Mod. 290, the execution had been issued and levy made before the death of the judgment creditor, which it was held did not abate the execution, as the sheriff after receiving the writ had nothing more to do with the plaintiff, but must go on and levy and bring the money into court irrespective of the plaintiff's death. "Besides, an execution is an entire thing, and cannot be superseded after it is begun."

The above doctrine appears as one of the grounds of decision in *Egbert v. Mercer* (1879) 66 Ind. 305, where, during the lifetime of the judgment creditor, an execution was issued under a judgment, and levied, but, in consideration that an execution be continually kept in the sheriff's hands so as to continue the original lien, more

Civil Code, § 4380 (6). When an execution once reaches the sheriff, the fact that different persons occupy that office does not affect the rule above laid down; the statute, in terms, providing how an unexecuted writ shall pass from an officer to his successor. The sheriff had authority to make the entries on the execution, the same was not dormant, and the court did not err in striking the amendment of the claimants. It was necessary to the maintenance of the claim case that a duly appointed adminis-

trator should be made a party to that case. *Ellis v. Francis*, 9 Ga. 325 (2); *Rogers v. Smith*, 63 Ga. 172; *Ray v. Anderson*, 114 Ga. 975, 41 S. E. 60. This having been done in the present case, the case was properly before the court, and a judgment finding the property subject to the execution could be lawfully rendered.

Judgment affirmed.

All the Justices concur except **Lewis, J.**, absent on account of sickness.

time was given on the execution. Subsequently the creditor died leaving no debts and only his widow, who continued the above arrangement and received several payments upon the execution, but finally issued a vend. ex. for the sale of the property originally levied upon. This sale was sought to be enjoined. The court, however, refused to interfere on the ground that a vend. ex. may issue after the death of the creditor, and that in this case the widow owned the judgment, and no administration of the estate nor revival of the judgment was necessary.

And it is said, *obiter*, in *Beatty v. Chapline* (1806) 2 Harr. & J. 7, at page 8: "After seizure of goods on a fieri facias, the death of the plaintiff will not prevent the sheriff's going on with the execution, but he may sell the goods and bring the money into court, which will be paid over to the executor. The death of the defendant, after the seizure, will not prevent the sheriff from going on with the execution."

The original fi. fa. had been executed, and one or more writs of venditioni exponas had issued thereon in the lifetime of the plaintiff, in *Buckner v. Terrill* (1808) Litt. Sel. Cas. 20, 12 Am. Dec. 269; therefore, the court held that the writ did not abate by the subsequent death of the plaintiff, and that other writs of vend. ex. issued after his death were only in the nature of a continuance of the original execution, so that revival by scire facias was unnecessary.

Whether the death of the judgment creditor after the issuance of execution on the judgment, and levy, will authorize a quashal of the writ and levy was discussed, but not decided, in *Kennedy v. Holloway* (1831) 6 J. J. Marsh. 322, the court only going to the extent of holding that at least a stranger to the execution would have no right to avoid it.

But the remaining decisions present a different doctrine, as in *Huey v. Redden* (1835) 3 Dana, 488, where the judgment creditor and one of the judgment debtors died after issuance of execution and levy. It was contended, in bar of scire facias, prosecuted by the creditor's personal representatives, that the levy bound the property. The court held that, by the death of one of the debtors, the liability survived against the other, and the execution did not abate so far as the survivor was concerned, although the creditor would have had the right, the court said, to revive the judgment and execution as against the decedent's representatives in order to increase his security; but the death of the creditor, it was held, operated to abate the writ because it deprived the debtors of the benefit of replevying the debt, and therefore scire facias to have a judgment of revivor in the name of the creditor's personal representative was properly maintainable.

After the issuance of the execution and a levy, in *Morgan v. Winn* (1856) 17 B. Mon. 244, the plaintiff died, and the sheriff returned the execution, stating that the property levied

on had not been sold because the plaintiff had died before the day of sale. The administrator, upon his appointment, filed in the clerk's office out of which the execution issued an affidavit of his appointment, whereupon the clerk issued a venditioni exponas directing the sheriff to sell under the levy. In regard to the legal effect of the levy thus made, the court referred to the statutory provision that the death of one or all of the plaintiffs in a judgment does not prevent an execution being issued thereon, but on such execution the clerk is required to indorse the death of the plaintiff and name of his personal representative, and stated that, by this change in the law, the death of the plaintiff in the execution does not actually abate either the judgment or execution, but merely suspends their operation until an administrator be appointed, and, upon a filing by the administrator of the required affidavit, no scire facias is required to enable the clerk to issue an execution, and held that where plaintiff, as in this case, died after the issue of execution and levy, if, without unreasonable delay, an administrator was appointed, and the proper steps were taken which enabled the clerk to make the proper indorsements upon the execution, the lien previously acquired remained in full force.

It did not appear whether the plaintiff in an execution was alive at the time of its issuance or not, in *Venable v. Smith* (1864) 1 Duv. 195, but it did appear that he was dead at the time of the issuance of a replevin bond to the sheriff, whereupon the court held that the replevin bond should be quashed, stating that while, since the adoption of the Civil Code, the death of the plaintiff does not actually abate either the judgment or the execution, nevertheless, it suspends all further proceedings on the execution until administration is granted, so that the clerk may make the proper indorsements on the executions, and the defendant may have his right to replevy the debt.

In *Hewgly v. Johns* (1873) 3 Baxt. 85, after a levy on land, the plaintiff in the execution died, and afterwards a vend. ex. issued without any revivor of the judgment in the name of the administrator, and the land was sold thereunder. This, the court held, could not be done without revivor of the judgment in the name of the deceased plaintiff's personal representative.

III. Death of sole judgment debtor.

a. Before issuance.

1. In general.

(a) Necessity of revivor.

The common-law rule is, beyond question, that, after the death of a sole defendant, no execution tested after his death can be issued upon a judgment recovered against him in his lifetime, unless the judgment is revived against his personal representatives; by means

of scire facias, as appears by the following English cases:

When an execution is issued after the death of the defendant without scil. fa. it is declared to be absolutely void, in *Harwood v. Phillips* (1683) O. Bridg. 473.

In *Heapy v. Parris* (1795) 6 T. R. 368, it was held that, upon the death of a debtor, the rights of his creditors are fixed, and, before an execution can thereafter issue, the judgment must be revived by scil. fa. against the debtor's executor.

In case of the death of defendant within a year of the rendition of judgment, it is declared, in a note to *Jefferson v. Morton*, 2 Wms. Saund. 6, that no execution can be issued against the lands of decedent, without a scire facias against the heir and terre-tenants or personal representatives, under the principle that where a new party becomes chargeable to the execution, there must be a scil. fa. to make him a party to the judgment.

In *Chick v. Smith* (1840) 8 Dowl. P. C. 837, 4 Jur. 86, the debtor died between 11 and 12 o'clock, and a scil. fa. issued and was tested between 1 and 2 o'clock on the same day. The court set aside the execution for irregularity, holding that it should have issued before the death, and that in such a case fractions of a day would be considered.

In *Re Oriental Inland Steam Co.* (1874) 22 Week. Rep. 810, L. R. 9 Ch. 557, 43 L. J. Ch. N. S. 699, 31 L. T. N. S. 5, it was held that, after an act of Parliament enacting that a company be wound up, its property ceases to be liable to be taken by execution creditors of the company.

Where the debtor died after taking out a writ of error on the judgment, it was held, in *Kinnaird v. Lyall* (1806) 7 East, 296, 3 Smith, 280, that the execution could not thereafter be issued on the judgment without leave of the court, where a new term had intervened, on account of the incongruity that would appear upon the record.

In the great majority of the American states, the necessity of revivor of the judgment by scire facias, or in some other appropriate manner, against the representatives or heirs, or both, of a deceased sole defendant before issuing execution after his death, is recognized and regulated very largely, by statute, in various ways, as will appear by the subdivisions following, but the cases showing no special mode, but merely recognizing the necessity and in a few instances the non-necessity, of revivor of the judgment in some manner, have been collected under this division.

An execution was quashed, and sale under it set aside, in *Bentley v. Cummins* (1849) 9 Ark. 487, for the reason that it was issued after the death of the defendant, and before the administrator had been made a party.

A writ of execution issued and bearing teste after the death of the judgment defendant, without a revivor of the judgment against his representatives, was held absolutely void in *Cunningham v. Burk* (1885) 45 Ark. 267.

But see, further, an Arkansas decision, — *Powell v. Macon* (1883) 40 Ark. 541 (*infra*, III. a, 3), — to the effect that no execution can in any event issue against realty unless a specific lien is created thereon by a levy made in the debtor's lifetime.

Arguendo, in giving examples of executions probably void, the court, in *Hunt v. Loucks* (1869) 33 Cal. 372, 99 Am. Dec. 404, includes an execution issued when the judgment debtor has died.

After a debtor's death, permission was granted to the judgment creditor to have one or more executions against the estate of deceased L. R. A.

dent, notwithstanding his death. The court held, in *Smith v. Reed* (1877) 52 Cal. 345, without giving its reasons, that an execution which was subsequently issued under such permission was void, and the sale afterwards made thereunder was also void, so that the title to the land did not thereby pass from the estate.

While the statement of the court in *HATCHER v. LORD* in regard to the statutory right to issue execution after a debtor's death after judgment is in the nature of a *dictum*, it will be seen therefrom that Georgia stands as an exception to the almost uniform requirement of some preliminary proceeding or application, before taking out execution after the debtor's death.

A judgment creditor, it was held, was not prevented from collecting a judgment obtained against a decedent in his lifetime by the levy of execution issued thereon within twelve months of the date of letters of administration, by a statute providing that no suit or action shall be issued against any executor or administrator on account of any matter against the intestate until the expiration of twelve months after the granting of letters of administration. *Ingram v. Hurt* (1851) 10 Ga. 568.

In *Boyle v. Maroney* (1887) 73 Iowa, 70, 85 N. W. 145, the doctrine is upheld, that the right to issue an execution against a judgment debtor's property terminates at his death, in the absence of any order or proceeding establishing such right.

See also *Welch v. Battern* (1877) 47 Iowa, 147, and *Bull v. Gilbert* (1890) 79 Iowa, 547, 44 N. W. 815 (*infra*, III. a, 3), holding that the rule is no different in the case of execution issued upon judgments in attachment proceedings.

But a judgment may not be revived after the death of the debtor except in the court where it was rendered, and none but that court has power to award execution against one deceased since the rendition of the judgment, or against his real estate in another county. *Hansen's Empire Fur Factory v. Teabout* (1898) 104 Iowa, 360, 78 N. W. 875.

In *Lafin v. Herrington* (1855) 16 Ill. 302, an execution was held void without other reason being given than that it was issued after the death of the judgment debtor.

But in Illinois executions may be issued as provided by statute, after the lapse of a year from the death, and upon a three months' notice to the heirs and personal representatives, as will appear by reference to *infra*, III. a, 1, (c).

Two other Illinois decisions in regard to executions against realty will be found, *infra*, III. a, 2.

The question for decision in *State v. Michaels* (1847) 8 Blackf. 436, was whether, if a sole defendant to an action of ejectment died after judgment but before execution, it was necessary to revive the judgment against the heirs and terre-tenants before issuing execution for the possession of the land recovered. The court held that it was a general rule of law that a revivor of judgment must take place where a sole defendant dies after judgment and before execution, either against the personal representatives or the heirs or terre-tenants, so that an execution tested subsequently to such decease, without revivor, is void, and that an action of ejectment is no exception to the above rule.

An execution issued on a judgment after the death of the defendant therein was held to be void in *Whitehead v. Cummins* (1850) 2 Ind. 58.

But in *Kellogg v. Tout* (1879) 65 Ind. 151 (*infra*, III. a, 3), it was held that a decree

of foreclosure upon which nothing was to be done except what was adjudicated in the lifetime of the parties might be executed after the debtor's death without revivor of the judgment.

It was held in *Faulkner v. Larrabee* (1881) 76 Ind. 154, that a party may not have execution after a judgment debtor's death by summary proceedings upon mere notice and motion, but that steps must be taken to revive the judgment against the heirs and administrator, resulting in an order that the money be made out of the assets in the hands of the administrator if they be sufficient; if not, then out of the lands of decedent.

In *Halsey v. Van Vleet* (1882) 27 Kan. 474, after the debtor's death two executions were issued before there was any revivor of the judgment. It was contended that these executions were nullities, and would not even serve to keep alive the judgment until the issuing of executions after a revivor subsequently had, when more than five years had elapsed since the date of the judgment and the issue of the latter executions. As to this question the members of the court were divided, the writer of the opinion stating that while he considered it doubtful whether a sale under these executions could be upheld, even when collaterally attacked, and conceding that such a sale would be voidable upon a direct proceeding, he nevertheless thought that they were a sufficient affirmation by the plaintiff of the vitality of the judgment to keep it alive, and that it was immaterial whether they were enforceable or not. But the associate judges differed, holding that the executions were absolute nullities, and a sale under them, being absolutely void, could be challenged in any collateral way, and thus, being absolute nullities, they were powerless, not only for upholding a sale, but for keeping alive the judgment in favor of the plaintiff.

The court says, in *Seeley v. Johnson* (1900) 61 Kan. 337, 59 Pac. 631, that no distinction is made, under the Kansas statutes, between a revivor in the case of the death of a defendant and that of a plaintiff; that in both instances a revivor is necessary.

Execution was held to have been erroneously sued out against the representatives of a deceased judgment debtor, in *Handley v. Fitzhugh* (1821) 3 A. K. Marsh. 561, when, although an appeal from the decree was revived in the appellate court, the decree itself, upon affirmation, was not revived by scire facias against the administrators in the lower court.

So, in *Davis v. Young* (1825) 2 T. B. Mon. 60, the court held that a sheriff's sale on execution was certainly void if, at the time the execution was issued against the judgment debtor, he was dead.

It is stated in *Walden v. Craig* (1840) 14 Pet. 147, 10 L. ed. 393, as the rule of practice in Kentucky, that, where a defendant in ejectment dies, the judgment must be revived by scire facias against both his heirs and terre-tenants.

An execution, issued more than three years after judgment rendered and after the death of the defendant, without revival by scire facias, under which lands of the decedent were levied upon and sold to the judgment creditor at the sheriff's sale, was held voidable only, and not absolutely void, in an action of ejectment brought many years afterward by the decedent's heir at law, who was an infant at the time of the execution and sale, in *Elliott v. Knott* (1859) 14 Md. 121, 74 Am. Dec. 519, and the court therefore refused to disturb the title of the purchaser at the sale, stating that 61 L. R. A.

the titles of purchasers, acquired under judicial sales, are guarded with jealous vigilance.

Where a sole defendant dies after judgment, the court states, in *Polk v. Pendleton* (1869) 31 Md. 118, that the judgment may be revived and execution had against his lands by suing out a scire facias against the heirs and terre-tenants without proceeding against the personal representatives, and that terre-tenants include all who are in possession deriving title under the judgment debtor, such as heir, devisees, or alienees, after the judgment.

But no necessity for revival by scire facias or in any manner appears to be recognized in *Weeks v. Gibbs* (1812) 9 Mass. 74, as the court holds that the goods of deceased persons, until accounted for by debts to the amount at least of their appraised value, are liable to be seized under execution issued by a judgment creditor of the decedent, as long as they are distinguishable in the hands of the executor or administrator.

Where execution was issued against an administrator after the death of the judgment debtor, without any revival by scire facias, it was held, in *Hicks v. Murphy* (1818) Walk. (Miss.) 66, that without doubt the execution was wrongfully issued, but that the remedy was by motion to the court out of which the execution issued, or by writ of *audita querela*, and not by writ of error to a higher court.

So, in *Wilson v. Kirkland* (1824) Walk. (Miss.) 155, where, after judgment, execution was issued and levied, and after the giving of a forthcoming bond, which was forfeited, an execution was issued thereon after the debtor's death against his effects, without revivor; the court held that it should have been quashed on motion, under the rule laid down by it in *Kendricks v. Snodgrass and Nanchies v. Rabb*, that an execution cannot go out against a deceased person's estate until his representatives have been brought into court. The decisions referred to are not otherwise reported.

Likewise, in *Hubert v. Williams* (1824) Walk. (Miss.) 175, it was held that execution issuing after a party is dead and before revival is irregular for the reason that without notice of a judgment a defendant's legal representative might be paying inferior claims, and thereby become liable under a devastavit and scil. fa. to pay such debts *de bonis propriis*.

A sale made under an execution which issued without a revival of the judgment was held not absolutely void, but voidable only, in *Drake v. Collins* (1840) 5 How. (Miss.) 256, the court also stating that it could not be attacked collaterally, but must stand until regularly set aside.

An execution was issued against the administrator of a deceased debtor without revival of the judgment, in *Davis v. Helm* (1844) 3 Smedes & M. 17. It was held, in conformity with the earlier decisions in the state, that a scire facias was necessary, the rule and reason of it being that whenever a new party who was not a party to the judgment is to be charged or benefited by the execution, it must be revived for or against him, so that, if a defendant, he may have an opportunity of pleading a release or payment; and that an administrator or executor falls within the reason of the rule.

So, in *Harrington v. O'Reilly* (1848) 9 Smedes & M. 218, 48 Am. Dec. 704, it was held that an execution the teste of which bore date after the death of the debtor, should be quashed on motion of a purchaser prior to the debtor's death, of the property levied upon. The court stated that such executions were only voidable, not void, and could not be attacked by one not a party to the proceeding, to the

prejudice of a purchaser under it; but as to the administrator's right there was no doubt, and this prior purchaser of the decedent's interest in the property levied upon stood in privity of estate with the deceased debtor to the extent of that interest, so as to give him a right to interpose any obstacle to the levy which the administrator could.

Expressly following the decision in *Doe ex dem. Sheldon v. Hamilton* (1852) 23 Miss. 497, 57 Am. Dec. 149 (*infra*, III. a, 5), it was held, in *Hodge v. Mitchell* (1854) 27 Miss. 564, 61 Am. Dec. 524, that a sale of land under execution issued and tested after the death of a defendant, without a revival, is not void, but merely voidable, and that a sale under it is valid until regularly set aside in a direct proceeding for that purpose by the heir or tenant.

While it was recognized in *Harper v. Hill* (1858) 35 Miss. 63, that an execution issued and tested after the death of the defendant without revivor of the judgment was voidable, the court held that it was valid until quashed or avoided; so that the title of a purchaser at execution sale, who had no notice of the defect in the execution, could not be defeated at the instance of the heirs on the ground that it was voidable, if it appeared that the judgment was unsatisfied and a valid claim, and that there was no real injury on account of the want of revivor.

A later Mississippi decision, *Alsop v. Cowan* (1889) 66 Miss. 451, 6 So. 208, under a statute providing that after a year from the death of a defendant in a money judgment execution thereon may be had by leave of the court against any property upon which the judgment was a lien at the time of the defendant's death, will be found, *infra*, III. a, 1, (b).

A scire facias to revive judgment against an administrator was demurred to in *Beauchamp v. Best* (1826) 1 Mo. 661, on the ground that it was wrong in praying judgment of execution upon the lands in the hands of the administrator, but the court held that such execution might issue.

But this decision is not in harmony with later Missouri cases, which see under *infra*, III. a, 1, (e).

Two years after the death of a judgment debtor, an execution was sued out and levied upon premises devised, which were sold and conveyed by the sheriff. The court stated that such a proceeding against a person after he was dead and gone was without principle, precedent, or example; that the moment the debtor died his right and title to all worldly possessions departed from him and vested in his executors, heirs, or devisees, against whom proceedings on the judgment ought to have been brought in order to take away their title; that an execution against a person two years after his death was an execution against nobody. *Den ex dem. Sharp v. Humphreys* (1837) 16 N. J. L. 25.

The issuing of execution against the debtor after his death was held an irregularity, in *Butler v. Haynes* (1823) 3 N. H. 21, which would be set aside upon direct application, but could not be called in question collaterally.

The rule laid down in *Morton v. Croghan* (1822) 20 Johns. 106, was that, as, under the existing statute, the lands and tenements of a debtor, as well as his personality, were subject to sale in order to satisfy a judgment claim, where the judgment creditor proceeded to enforce his claim against the real property of a deceased debtor, thereby rendering a revival of the judgment necessary, he was bound to make every person having a fee in the land parties to the scire facias, so as to render them

all contributory to the payment and satisfaction of the judgment.

It was intimated in *Dox v. Backenstose* (1834) 12 Wend. 541, that the former practice of proceeding by scire facias to issue execution against executors and administrators of deceased persons had, perhaps, been superseded by a statute transferring to the surrogate authority to order the issuance of such executions; but as to this question no decision was made, the court only holding that, until an order was obtained from the surrogate allowing the execution to issue, no proceeding by scire facias to obtain the execution could be taken.

The court stated, in *Campbell v. Rawdon* (1858) 18 N. Y. 412, at page 422, in regard to a statutory enactment as to revival by scire facias, that it thought that the legislature, in passing the statute, intended that execution should not be had upon the lands of a deceased judgment debtor without a scire facias to which all persons having an interest and intended to be affected thereby must be made parties by service of the writ upon them.

The necessity for proceedings in the nature of scire facias before issuing execution after the death of a judgment debtor was regarded as not superseded by the statute directing that permission to issue execution after the death of the debtor must be obtained from the surrogate after the expiration of a year from such death, in *Frink v. Morrison* (1861) 13 Abb. Pr. 80, for the reason, as the court stated, that the end or object to be attained for the purposes of justice, by scire facias, had not ceased to be required in some form.

But later enactments prescribe the necessary procedure, and do away with scire facias, as will be seen by reference to the cases under *infra*, III. a, 1, (d).

That an execution against real property issued after the death of the judgment debtor is absolutely void as against those who are not made parties to proceedings authorized by law for the revival of the judgment against their property, and making them parties to the judgment, was declared in *Wallace v. Swinton* (1876) 64 N. Y. 188, and *Flanagan v. Tinen* (1868) 53 Barb. 587, and *Wilgus v. Bloodgood* (1867) 33 How. Pr. 289, are overruled so far as they deny the necessity of applying to the court in which a judgment was recovered for permission to enforce the same after the death of the debtor.

See also *Harrison v. Simons* (1840) 3 Edw. Ch. 394 (*infra*, III. a, 3), holding no revivor necessary in order to execute a decree of sale where a mortgagor died after it was rendered.

After judgment, but before the issuance of execution and levy upon lands formerly belonging to the judgment debtor but conveyed by him, he died. An application to set the sale aside, by the grantee of the lands, was granted, the court stating that, if the judgment was rendered before the conveyance of the land, the sale under execution could nevertheless be avoided because the execution was issued after the death of the debtor without scire facias; and that, if the judgment was rendered after the conveyance, then any execution levied upon it was void. And the rule was recognized that a fieri facias affects lands in this country from its teste, and not from the judgment, in consideration of which it was doubted whether lands conveyed previous to the revival would be affected, since the fi. fa. which would issue, would issue upon a new judgment. *Perkins v. Bullinger* (1796) 2 N. C. (1 Hayw.) 367.

After the issuance of execution and levy thereof on slaves, the debtor's death occurred, after which several writs of vend. ex. were is-

sued, under one of which a sale was had which did not, however, satisfy the judgment. Thereafter a new *fi. fa.* was issued against the goods and chattels, land, and tenements of the decedent, and levied upon realty previously devised, which was sold. The sale was held to pass no title whatever, as the *fi. fa.* was issued and bore teste after the debtor's death without revival of the judgment by *sci. fa.* against the heirs and devisees. *Den ex dem. Bowen v. McCullough* (1818) 4 N. C. (Term Rep.) 261.

The question in *Doe ex dem. Wood v. Harrison* (1835) 18 N. C. (1 Dev. & B. L.) 356, was whether land could be sold upon a *fi. fa.* which issued and bore teste after the death of the debtor. It was held that it could not under the doctrine that the lien of a judgment upon land exists only from the teste of the *fi. fa.*, so that if the writ is issued after the debtor's death his heirs must be brought in by *sci. fa.*

Harrison v. Wood (1836) 21 N. C. (1 Dev. & B. Eq.) 437, is based upon the doctrine that an heir is entitled to the lands of his ancestor until a judgment against him, so that a sale of such lands under execution issued upon a judgment against the ancestor, without revival against the heir, is wholly inoperative, as, until that time, the judgment creditor can have no higher equity than the general one belonging to creditors of the ancestor.

A sale of land under a *fi. fa.* which bore teste after the death of the debtor, without any *sci. fa.* against the heirs, was held void in *State use of Jordan v. Pool* (1846) 28 N. C. (6 Ired. L.) 288.

A judgment obtained in the lifetime of a testator, and which therefore was a lien upon the lands, thus burdening them even in the hands of the heirs if the personality was not sufficient to satisfy it, could, however, as held in *Isler v. Murphy* (1874) 71 N. C. 436, be enforced against the land by execution only after the heirs were given an opportunity to be heard in court as to any defense they might have in reference thereto.

Aycock v. Harrison (1874) 71 N. C. 432, was an application to issue execution after the debtor's death, and more than three years since the last execution issued was returnable. The application was denied because no notice of motion was given to the administrator, the court stating that when a party to an action dies after judgment the action abates, just as it would by his death before judgment, unless it is revived by or against the personal representatives, and that all executions tested after abatement and before revival would be irregular.

A *vend. ex.* issued without notice or *sci. fa.* to the heirs of a deceased defendant, in a decree for the partition of land, which charged a payment upon the land of the decedent, was held void in *Halso v. Cole* (1880) 82 N. C. 161.

Executions issued after the death of the judgment debtor were held irregular, inoperative, and void, in *Williams v. Weaver* (1886) 94 N. C. 134.

But from later North Carolina decisions set out under *infra*, III. a, 1, (e), it appears that, after the death of a judgment debtor, all claims against his estate must be settled in the due course of administration, and that the right of issuing executions against the decedent's property is, for a limited time at least, suspended.

An execution was declared void in *Arnold v. Fuller* (1824) 1 Ohio, 458, which was issued after the death of a defendant, in his name, without revival by *sci. fa.* against the personal representatives.

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In *Massie v. Long* (1826) 2 Ohio, 288, 15 Am. Dec. 347, a sale under an execution issued and levied after the death of the judgment debtor was held inoperative.

To the same effect is *Cartney v. Reed* (1831) 5 Ohio, 221.

But see a later Ohio decision, *Platt v. St. Clair* (1833) 6 Ohio, 227 (*infra*, III. a, 1, (e)), holding that the right of having *sci. fa.* and execution against the heirs of a deceased judgment creditor no longer exists in that state, as by the administration laws the lands of a decedent must be converted into personality, and the debts paid therewith.

Brown v. Webb (1833) 1 Watts, 411, is more a decision as to the parties necessary to a *sci. fa.* upon the death of a judgment debtor, rather than the effect of the death upon the issuance of execution, the court holding that the heir, devisee, or tenant could not be called upon to show cause why execution should not be had against lands in their possession which belonged to the judgment debtor at the time judgment was rendered without joining the executors or administrators in the *sci. fa.*, and warning them at the same time for that purpose.

The opinion in *Speer v. Sample* (1835) 4 Watts, 367, presents an exhaustive and interesting discussion of the specific question of the validity of an execution sued out after the death of a judgment debtor upon a judgment obtained against him in his lifetime, which thus became and continued to be a lien upon the land levied upon; and the court comes to the conclusion that such an execution, sued out without a previous *sci. fa.*, is not absolutely void, but voidable merely.

An execution issued on a judgment entered by agreement after a defendant's death was held bad for want of *sci. fa.* as to his executors, although the judgment was held rightly entered up, in *Webb v. Wiltbank* (1842) 1 Clark (Pa.) 324.

A sale of land under an execution issued after the death of the defendant therein, without revival by *sci. fa.* against his personal representatives, was held good in *Colborn v. Trimpey* (1800) 36 Pa. 463, but for the reason that, prior to the decedent's death, he had aliened the land to a *terre-tenant*, who, upon a revival of the judgment, rendered necessary on account of the lapse of more than five years from its rendition, was made a party to the *sci. fa.* and made no defense, and, therefore, the court held the judgment from then on was a valid and subsisting one against the *terre-tenant*, unaffected by the death of the original debtor.

While recognizing that the issuance of execution upon a judgment after the death of the judgment debtor without a *sci. fa.* against the legal representatives was illegal, it was held, in *Diese v. Fackler* (1868) 58 Pa. 109, that the vice might be cured by the voluntary appearance of the personal representative, before the title of the purchaser at the sale had become complete.

An execution issued upon a judgment after the death of the judgment debtor, without revival by *sci. fa.* against his personal representatives, was held illegal, in *Bomberger v. Raymond* (1893) 12 Pa. Co. Ct. 460, 2 Pa. Dist. R. 280,—and the fact that a foreign administrator had given his consent thereto was held of no avail when a domestic administrator refused his assent.

But see, also, *Warder v. Tainter* (1885) 4 Watts, 278 (*infra*, III. a, 3), holding that *sci. fa.* is not necessary in order to issue execution upon a judgment decreeing that specific mortgaged premises be sold.

Hodges v. White (1897) 19 R. I. 717, 36 Atl. 838, was the first case in which the question of the validity of an execution issued on a judgment without revivor after the death of the judgment debtor arose in Rhode Island, and the court held that such an execution was voidable only, and not void, and might be attacked by the heirs by a motion to quash, or for its stay or proceedings in equity to enjoin it, to which the judgment plaintiffs should be made parties.

An execution was tested and issued as of a date subsequent to the death of one of the defendants, in *Gwin v. Latimer* (1833) 4 Yerg. 22, and levied upon a negro belonging to the decedent. The court held the whole proceeding wholly void. It was said, however, that the executor had waived the necessity of a *scire facias*; but it was held that he could, by waiver, authorize the issuance of execution against himself, but not against the decedent.

In order to subject the real estate of a deceased judgment debtor who died after judgment to execution thereon, it was held, in *Frierson v. Harris* (1867) 5 Coldw. 146, 94 Am. Dec. 220, that the heirs must first be summoned by *scire facias* to show cause why execution should not be issued against the real estate, and that, in order to authorize the issuance of a *sci. fa.*, suggestion must be made on the record of the fact that real estate descended to the heirs.

That an execution against land, tested after the death of the judgment debtor, is void without revivor against the heirs was held in *Puckett v. Richardson* (1880) 6 Lea, 40, and, the execution herein having been enjoined, it was held not to be revived after the debtor's death, by the mere revival of the injunction suit against the personal representatives and heirs of the debtor, when he died pending the litigation.

See also *McMahon v. Glasscock* (1833) 5 Yerg. 304 (*infra*, III. a, 1, (e)), holding that the personality of a decedent being vested in the administrator after the death, no execution issued after that event can constitute a lien thereon. And other Tennessee cases under III. a, 2, *infra*, discussing the necessity of first exhausting the personality before proceeding against the realty. Also *Preston v. Surgoine* (1823) Peck (Tenn.) 71 (*infra*, III. a, 2), holding that realty, although having descended to the heir, is bound by a judgment rendered against an ancestor in his lifetime; so that until a year and a day from his death an execution may issue against the land without *sci. fa.* against the heir.

Webb v. Mallard (1863) 27 Tex. 80, holds that an execution issued after a debtor's death, upon a judgment recovered prior thereto, is not an absolute nullity, and may not be questioned by one not in possession of the property and seemingly having rights to it, for the mere purpose of obtaining a right thereto, and thus affect the validity of the judgment upon which it was rendered.

As stated in the opinion, the question in *Cain v. Woodward* (1889) 74 Tex. 549, 12 S. W. 319, was, "whether an execution issued and levied upon land subsequent to the death of the defendant in execution upon a judgment rendered against him during his lifetime is void." The court followed the rule of *Taylor v. Snow* (1877) 47 Tex. 462, 26 Am. Rep. 311, that such an execution was relatively void, rather than the earlier one of *Conkrite v. Hart* (1853) 10 Tex. 140 (*infra*, III. c), holding that it was absolutely void, stating that the earlier case had, after a thorough consideration, been overruled.

Conkrite v. Hart (1853) 10 Tex. 140 (*infra*, III. c.), is later expressly approved again, how-

ever, in *Hooper v. Caruthers* (1890) 78 Tex. 432, 15 S. W. 98, and *Taylor v. Snow* (1877) 47 Tex. 464, 26 Am. Rep. 311, is limited; the court holding that a sale made under execution against a deceased person after his death, he being alive at the time judgment was rendered, is void in the sense that it is wholly inoperative to pass title to or as against anyone, and therefore may be attacked directly or collaterally.

And in *Bynum v. Govan* (1895) 9 Tex. Civ. App. 550, 29 S. W. 1119, it was held to be well settled in Texas that a sale under execution issued after the death of a sole defendant, where the judgment was for money, is void. The same conclusion was arrived at upon a subsequent hearing of this case reported in (1897) 17 Tex. Civ. App. 180, 43 S. W. 319, the court further holding that no execution is authorized in such a case, except upon the enforcement of the judgment in a suit to which the executor is a party, and that the clerk of the court certainly has no authority, by statute, to issue execution against an independent executor of a party who has died since judgment.

Other Texas cases from which it more clearly appears that judgments rendered before a decedent debtor's death are collected in this state in the due course of administration of his estate rather than by execution will be found under *infra*, III. a, 1, (e).

It appeared in *Jones v. Davis* (1869) 24 Wis. 229, that execution was issued upon the judgment after the death of the judgment debtor, and premises sold to satisfy the same. The court said that all that this amounted to was that execution had been issued upon a dormant judgment without reviving the same against the representatives, or without leave of court, and that such an execution was voidable merely, and a sale of property under it was void.

But see *Harteaux v. Eastman* (1857) 6 Wis. 410 (*infra*, III. a, 1, (b)), holding that previous revival by *sci. fa.* is unnecessary in order to issue execution under the statute providing for a suspension of the right for a year after the debtor's death, although the later case of *Eaton v. Youngs* (1877) 41 Wis. 507 (*infra*, same division), holds that no execution should be awarded after the required statutory lapse of one year from the debtor's death, unless it shall appear that the heirs and administrators have been afforded an opportunity of paying the judgment without execution, that they fail so to do, and that property of the debtor came into their hands charged with the payment of the decedent's debts.

The judgment was revived by a thirty-day rule, instead of by *sci. fa.* in order to issue execution, in *Griffith v. Frazier* (1814) 8 Cranch, 12, 3 L. ed. 472. This was held objectionable, the court stating that the thirty-day rule was substituted for *sci. fa.* to revive judgments only in cases of lapse of time, and not in cases of the death of a party.

The court, *arguendo*, in illustrating the proposition that a nominal plaintiff in actions of ejectment is sometimes considered to be the real plaintiff, says, "as in the case where the lessor of the plaintiff dies after judgment, the execution may issue in the name of the lessee, without the necessity of a *scire facias*." *Penn v. Klyne* (1817) Pet. C. C. 446, Fed. Cas. No. 10,930.

(b) Suspension of right of issuance for specified period.

As appears from the decisions, a number of states have provided by statute for the suspension of the right to issue execution for a specified time after the debtor's death, in place of the common-law revival by *scire facias*.

In Illinois the rule is that execution may issue only after the expiration of a year from the debtor's death, and after a three months' written notice of the judgment to the heirs and personal representatives. Decisions to this effect will be found in *infra*, III. a, 1, (c).

After the death of the debtor the claim of the judgment which was a lien upon the real property of decedent was presented to the probate court as a claim against the estate, and allowed as such. The land was afterwards sold at private sale, and subsequently the judgment creditor proposed to sell the same land under an execution issued on his judgment. This he was allowed to do under the statutory provision authorizing the issuing of an execution against the property of a deceased judgment debtor, only providing that it shall not be issued within a year after his death, and another provision forbidding an execution against an estate until after the expiration of the time fixed for the payment of debts,—and, as those periods had passed, the court held that the execution might issue, and that the creditor's right to it was not affected by the formal presentation and allowance of the judgment as a claim against the estate in the probate court. *Fowler v. Mickle* (1888) 39 Minn. 28, 38 N. W. 634.

But in *Byrnes v. Sexton* (1895) 62 Minn. 135, 64 N. W. 155 *infra*, III. a, 2), this statute was limited, in regard to real property, to those cases, only where an execution issued on a money judgment which was a lien upon the property prior to the death, and held that it did not apply when the judgment was not docketed in the county where the realty was situated, at the time of the debtor's death; and, therefore, the only way in which the judgment could be collected would be as a claim against the estate in the due course of administration.

A petition for execution under a statute providing that after a year from the death of a defendant in a money judgment execution thereon may be had, by leave of the court, against any property upon which the judgment was a lien at the time of the death of defendant, was held insufficient, in *Alsop v. Cowan* (1889) 60 Miss. 451, 6 So. 208, which failed to allege that the judgment was a lien in the only way by which it could become such, *i. e.*, by enrollment, and which showed that the lien of a former execution was destroyed by the quashing of the levy.

It appears from some early Missouri cases that, until 1826, execution might issue in that state upon a judgment recovered against a debtor in his lifetime after the expiration of eighteen months from his death.

In regard to a contention that after the death of the judgment debtor execution could not regularly issue before the judgment had been revived by *sci. fa.*, the court held, in *Finley v. Caldwell* (1825) 1 Mo. 512, that it might, according to law, after the lapse of eighteen months from the time administration was granted, as there could then arise no presumption of payment to make a *sci. fa.* necessary.

It was declared in *Scott v. Whitehill* (1826) 1 Mo. 691, that, after the expiration of eighteen months from the time of granting letters testamentary, or of administration, an execution might issue on a judgment obtained against either a testator or the intestate in his lifetime, or against his executor or administrator after his death.

The court states, in *Landes v. Perkins* (1848) 12 Mo. 238, that prior to 1826, and according to the administration law of 1825, the sale of lands of deceased persons under executions against their personal representatives was expressly allowed after the expiration of eighteen months from the time of granting letters testamentary, or of administration, an execution might issue on a judgment obtained against either a testator or the intestate in his lifetime, or against his executor or administrator after his death.

that the right to an execution against a deceased's real estate was never doubted.

In *Carson v. Walker* (1852) 16 Mo. 68, it was declared that, 'until 1826, under existing statutes, courts had the power and authority to enforce judgments by execution against the estate of a testator or intestate by selling the real estate belonging to the estate, after the expiration of eighteen months from the granting of letters testamentary or of administration; and the court held that, although it appeared that an execution was issued within that period, since the sale did not take place until after the expiration of eighteen months, it was valid. It appears from the opinion that in 1826 a statute was passed, taking effect in 1827, declaring that thereafter executions should not issue upon judgments against decedents, but such demands should be classed and proceeded upon in probate court.

Decisions showing the later rule in that state, that judgments must be classified as are other demands against a decedent's estate, and paid in the due course of administration, will be found under *infra*, III. a, 1, (c).

A temporary suspension of the right to issue execution after the debtor's death is enforced by the Code in New York also, with the additional prerequisites of permission of the surrogate's court and of the court in which the judgment was rendered. The practice in this state, being, thus, somewhat different from that in any other, will be treated separately under *infra*, III. a, 1, (e).

Under a Code provision conferring upon a judgment creditor the right, after three years from the issue of letters testamentary or of administration, in case of the death of the judgment debtor after judgment, to proceed and enforce his lien, it was held, in *Sawyers v. Sawyers* (1885) 93 N. C. 321, that, until that time at least, no execution could issue after the debtor's death, but that the creditor must collect his debt in the due course of administration.

But see, further, North Carolina decisions under *infra*, III. a, 1, (e), showing more plainly the attachment of probate-court jurisdiction upon a debtor's death to the extent of excluding the right of issuing execution.

In *Knott v. Shaw* (1875) 5 Or. 482, it was held that the only effect of the death of a defendant upon a lien of the state against him for costs was to prevent the issuance of execution thereon within six months of the granting of letters testamentary, unless leave were obtained from the county court or judge.

The only question decided in *Bower v. Holaday* (1889) 18 Or. 491, 22 Pac. 553, was that a judgment creditor was entitled, under the statute, to have execution against a decedent upon a judgment recovered against him in his lifetime at any time after the expiration of six months from the granting of letters testamentary or of administration; but the court strongly indicated as its opinion that it was very doubtful whether the sheriff, by virtue of such a writ, would have a right to interfere with the property and assets of an estate in the hands of an executor or administrator for the purpose of being administered upon, unless the judgment had become a lien upon the property, or established a paramount right against it.

A similar decision is *Barrett v. Furnish* (1891) 21 Or. 17, 26 Pac. 861, holding that when a judgment becomes a lien upon real property during the life of the judgment debtor such lien cannot be displaced or affected by his death, except that plaintiff's right to issue execution is deferred for six months after

the granting of letters testamentary or of administration.

Under the Michigan statutes in force in the territory of Wisconsin in 1838, enacting that the remedy of a person in whose favor a judgment had been rendered should not be suspended by reason of the death of the judgment debtor, except that execution should not be issued thereon for a year thereafter, it was held, in *Harteaux v. Eastman* (1857) 6 Wis. 410, that a previous revival of the judgment by *scire facias* against the personal representatives before issuing execution was unnecessary.

On a motion for leave to issue execution after the lapse of the required statutory period of a year from the death of the debtor, it was held, in *Eaton v. Youngs* (1877) 41 Wis. 507, that no execution should be awarded unless it appeared that the heirs and administrator had been afforded an opportunity to pay the judgment without execution, and, upon their failing so to do, that property of the debtor had come into the hands of the heirs or administrator chargeable by law with the payment of the debts of the deceased.

(c) *Issuance on notice to heirs and personal representatives.*

The importance of the statutory three-months' notice to the heirs and personal representatives of a deceased judgment debtor before issuing execution on the judgment is made so prominent in the Illinois decisions that they are treated separately under this division, notwithstanding that in this state, also, a temporary suspension of the right to issue execution after a debtor's death is prescribed by statute, as well as in those referred to under *supra*, III. a, 1, (b).

It was held in *Fickett v. Hartsock* (1853) 15 Ill. 279, under the statute providing that on the death of a party against whom a judgment has been obtained it is lawful for execution to issue against his lands and tenements without a revival of the judgment against his heirs and personal representatives, provided plaintiff gives them three months' notice in writing, of the judgment before issuance of execution, that, where plaintiff gave notice of a judgment rendered in a certain year, that did not authorize the issuance of execution on a judgment recovered in a subsequent year; that the provisions of the statute must be substantially complied with.

The bill in *Finch v. Martin* (1857) 19 Ill. 105, showed that the execution upon which a sale of land was made, was not issued till after the death of the judgment debtor, and that no notice was served upon his representatives as required by statute. The court held that while *prima facie* such an execution was good, it was void upon proof of the facts stated above.

An execution was issued in the lifetime of a debtor, and returned unsatisfied. After the debtor's death, after notice to his personal representative as required by statute, an alias writ was issued and levied, and land sold thereunder. This was held to be a valid sale. From this sale, however, the property was redeemed, and thus became, by operation of law, again the property of decedent, vested in his heirs, and the court stated that, in order to divest them of their title, it was first necessary that they have some notice of a proceeding directly against them for that purpose, and held that another judgment, revived against the administratrix by *scire facias*, did not create a lien against the redeemed real estate so vested in the heirs, on which a *f. fa.* could issue to sell it. *Turney v. Young* (1859) 22 Ill. 253.

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After a judgment creditor has, subsequent to the death of the debtor, given the personal representative of the latter notice, as required by statute, of the existence of the judgment, upon which he wishes to take out execution, he may, as held in *Letcher v. Morrison* (1862) 27 Ill. 209, take out execution, and also alias and pluries writs, without any further notice.

Where the statute declares that, if the defendant die after the judgment has become a lien and before execution has been issued, the lien shall not be thereby impaired, only execution shall not be issued until a stay of one year after the death of defendant, and until after a three months' notice to his representatives, the court held that where, after the debtor's death, four executions were issued and returned *nulla bona*, and the execution upon which the levy and sale were made was sued out one year and two days subsequent to the death of the debtor, and after three months' notice to the administrator, plaintiff did not lose his lien because an execution was not issued within a year from the date of the judgment, as required by statute to preserve the lien of a judgment, but that, as the execution was issued within one day of the earliest period allowed by law, it was sufficient to preserve the lien. It was also insisted that it was irregular to issue the execution against the debtor after his death; but the court held that, while it would have been better to recite the recovery of judgment, death of defendant, and notice to the administrator, and then specially command that the levy be made out of lands owned by defendant at the time of his death, nevertheless that was formal only, and, if the writ was sufficient in substance, it was enough. *Wight v. Wallbaum* (1864) 39 Ill. 554.

In *Ransom v. Williams* (1864) 2 Wall. 313, 17 L. ed. 803, arising in the northern district of Illinois, it appeared that an execution was issued after the death of one of the debtors, without notice to his legal representatives as required by the state statute providing that execution may issue against the lands and tenements of a deceased judgment debtor if the plaintiff give to the administrator or executor, if there be any, "at least three months' notice in writing of the existence of said judgment before the issuing of execution." To obviate the lack of notice, it was shown that a prior execution had been quashed with the direction that another one issue. The court held, however, that such fact did not relieve the judgment creditor from complying with the statute, which, being in contravention of the common law, requiring revival by *sci. fa.* in such a case, should be strictly complied with, and that, by the failure to do so, the execution was a nullity.

The deceased debtor, in *Littler v. People* (1867) 43 Ill. 188, had no executor or administrator to whom the plaintiff might give the three months' notice of the judgment before issuing execution, as required by statute, whereupon the court said that the inference would be that, if there is no executor or administrator, then the judgment must be revived against the heirs before execution can issue.

And so, in *Coran v. Pittenger* (1879) 92 Ill. 241, where no administrators were appointed over the estate of a deceased debtor upon whom notice could be served of the existence of a judgment against decedent prior to issuing execution thereon as required by statute, it was held that the judgment must be revived by *scire facias* against the heirs.

As held in *Fitch v. Gray* (1896) 162 Ill. 337, 44 N. E. 726, under a published notice to non-resident heirs of a deceased debtor of the existence of a judgment, and the intention to

issue execution thereon at a certain date, an execution may issue at a later date than the one specified.

(d) *Surrogate's permission a prerequisite.*

The procedure prescribed by statute in New York for the issuance of execution after a debtor's death includes a suspension of the right for a stated period, similar to the practice of the states shown in *supra*, III. a, 1, (b), and also vests the surrogate's court with a control over the matter, more or less extensive, therefore partaking somewhat of the nature of the statutory enactments as they appear by the decisions found in *infra*, III. a, 1, (e), but does not entirely fall within either class.

It is difficult to reconcile the cases rendered under the statute, which has been construed with varying effect in the different decisions, which are so few as to justify the inference that the actual practice in this regard is usually to discontinue further efforts to enforce a judgment by execution when the debtor has died, and instead to present it as a claim against his estate, to be classed and passed upon with the other demands, as provided by statute, in the due course of administration.

The relevant part of the statute (N. Y. Code Civ. Proc. § 1380) is as follows: "After the expiration of one year from the death of a party against whom a final judgment for a sum of money, or directing the payment of a sum of money, is rendered, the judgment may be enforced by execution against any property upon which it is a lien, with like effect as if the judgment debtor was still living. But such an execution shall not be issued, unless an order granting leave to issue it is procured from the court from which the execution is to be issued, and a decree to the same effect is procured from a surrogate's court of the state which has duly granted letters testamentary or letters of administration upon the estate of the deceased judgment debtor. Where the lien of the judgment was created as prescribed in § 1251 of this act, neither the order nor the decree can be made until the expiration of three years after letters testamentary or letters of administration have been duly granted upon the estate of the decedent, and for that purpose such a lien existing at the decedent's death continues for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll," etc.

Section 1251, referred to, is to the effect that a judgment docketed in the county clerk's office is a charge upon the defendant's real property in that county for ten years.

This statute (§ 1380) was amended in 1894 in particulars not necessary to be noticed here, but prior thereto, and from 1879, the portion quoted has existed in the same form. And previous to that time there was, as appears from *Alden v. Clark* (1855) 11 How. Pr. 209, a somewhat similar provision to the effect that one year after the death of the judgment debtor, upon permission granted by a surrogate having jurisdiction over the estate, execution was permitted to issue in the same manner and with the same effect as if the judgment debtor were still living. It was held that in no case could execution issue without leave of the court upon proper notice to all interested and after having obtained the surrogate's permission, and especially where, as in this case, more than five years had elapsed since the recovery of judgment. These prerequisites not appearing, leave to issue execution was denied.

Wilgus v. Bloodgood (1867) 33 How. Pr. 61 L. R. A.

289, is a decision under the same statute (1850), but holds, directly contrary to the last decision, that application to the court which rendered the judgment, and from which the writ is to issue, for leave to issue execution after the debtor's death, in addition to the surrogate's permission, is unnecessary.

Flanagan v. Tinen (1868) 53 Barb. 587, held to the same view, and expressly disapproves of *Alden v. Clark* (1855) 11 How. Pr. 209.

These last two decisions are expressly overruled in *Wallace v. Swinton* (1876) 64 N. Y. 188 (*supra*, III. a, 1, (a)).

And *Marine Bank v. Van Brunt* (1872) 49 N. Y. 180, held with *Alden v. Clark* (1855) 11 How. Pr. 209, that an execution could not issue, under such circumstances, without the order and permission of both tribunals.

After a review of the statutory provisions in regard to the issuance of execution after the death of the debtor, the surrogate granted permission so to do more than eight years after the entry of judgment, stating that application must also be made to the court in which judgment was rendered, which application must be made upon notice to the heir at law. It appeared herein that execution had been issued in the lifetime of the judgment debtor and within five years of the rendition of judgment, but was returned unsatisfied. *Re Mott* (1867) Tucker, 346.

The issuance of execution upon real property after the death of the judgment debtor, without proceeding by action to revive the judgment, as provided by the Code in place of the former remedy by scire facias, was held absolutely void in *Beard v. Slinnott* (1875) 6 Jones & S. 536, as the execution must be issued upon the new judgment entered upon the action so had against the heirs of the decedent, and upon that alone, after leave being obtained from the proper surrogate.

Upon the amendment of the statute in 1879, it was expressly provided that leave must be procured from the court from which the execution is to be issued, as well as from the surrogate; and, in conformity therewith, *Kerr v. Kreuder* (1882) 28 Hun, 452, held that execution might be issued after a year from the death of a judgment debtor, upon obtaining leave from the surrogate's court, and from the court out of which the execution was to issue; and that there was no requirement that the application to the surrogate must be made first.

But a more difficult question, and one upon which the cases do not yet seem clear, is as to when the one-year, and when the three-year, specified periods apply.

After a discussion of the statutory enactments, the court came to the conclusion, in *Duell v. Alvord* (1886) 41 Hun, 196, that an order authorizing the issuance of an execution against the real property of a deceased debtor could not be allowed until after the lapse of three years from the granting of letters testamentary or of administration upon his estate; and it is said, *obiter*, that "effect may be given to the limitation contained in the earlier provision of the section by assuming that it deals with executions already issued in the hands of the sheriff at the time of the death of the judgment debtor," but the court expressly declined to pass upon that point.

Smith v. Reid (1890) 19 N. Y. Civ. Proc. Rep. 363, 11 N. Y. Supp. 739, construes the three-year restriction to apply to all judgments docketed in the county clerk's office, and thereby made a charge upon realty; but that provision was held not to apply to cases where, as in this instance, the judgment debtor died

prior to 1879, the date when the amendment took effect.

Re Boyle (1891) 16 N. Y. Supp. 51, held that, after the lapse of three years from the decease of the judgment debtor, the surrogate might permit execution to issue against the real property if the judgment became a lien upon the land pursuant to § 1251, and the debtor left no personalty, and no letters of administration had been taken out upon his estate.

But a new construction is presented in *Re Phelps* (1894) 6 Misc. 397, 26 N. Y. Supp. 774, which holds that execution on a justice's judgment docketed in the county clerk's office might be issued against realty after one year from the judgment debtor's death, and that the three-year restriction applied only to judgments originally rendered in courts of record.

It is impossible to reconcile these different views, which were perhaps unavoidable on account of the lack of clearness in the language of the statute and its failure to meet varying circumstances.

The right conferred by the Code upon the judgment creditor to enforce the judgment against the real property of the debtor in his hands, or, in the event of his death, in the hands of his heirs or devisees, after the expiration of ten years from the filing of the judgment roll, was held not to be taken away by the section regulating the issuance of executions after a debtor's death, but that the latter section merely prescribed the manner of enforcing the judgment when its lien had not expired, and, therefore, was not inconsistent with the other section prescribing the method of enforcing an execution when the lien of the judgment had expired. *Atlas Refining Co. v. Smith* (1900) 52 App. Div. 109, 64 N. Y. Supp. 1044.

Permission to issue an execution after a debtor's death, upon a judgment recovered against him in his lifetime, was refused by the court in the exercise of its judicial discretion, in *Kenny v. Geoghegan* (1886) 9 N. Y. Civ. Proc. Rep. 379, for the reason that decedents' estates are to be administered under the direction of the surrogate's court without outside interference or control, as far as possible, and that execution may be permitted only when the judgment upon which it issues is a lien upon the property sought to be levied upon,—the term "lien" being construed by the court to mean, in this instance, a right, vested in a creditor, to control the enjoyment, or forbid the disposition, of some property until its owner has discharged the debt; and, there being no lien in such a sense in the case at bar, execution was not allowed.

An execution issued, levied, and returned on the day of the debtor's death, but about five hours thereafter, was held void in *Prentiss v. Bowden* (1894) 8 Misc. 420, 28 N. Y. Supp. 666, the court stating that the fact that the judgment debtor had died was decisive that an execution could not issue, and, there being conflicting rights, the rule that courts do not notice fractions of a day would not apply.

This case was affirmed in (1895) 145 N. Y. 342, 40 N. E. 13, where the court declared that an execution against the property of a dead man without first obtaining the leave of the court which rendered the judgment, and the proper surrogate, was wholly unauthorized.

(e) *Right of issuance superseded by attachment of probate-court jurisdiction.*

It is prescribed by statute in a number of the states that the probate court shall assume control of decedent's estates to the exclusion of § 1 L. R. A.

a creditor's right to issue execution upon a judgment recovered by him in a debtor's lifetime, and that judgments, as well as all other demands against the estate, shall be passed upon and settled in the due course of administration.

It appeared in *Blount v. Traylor* (1843) 4 Ala. 667, that plaintiff had omitted to sue out an execution until after the defendant's death, whereupon the court held that he then had no claim which was entitled to preference over the other creditors, but that the right of the administrator to apply the property in the due course of administration was paramount to that received under the execution.

In regard to an execution issued after the death of a sole judgment debtor, the court held, in *Holloway v. Johnson* (1845) 7 Ala. 680, that it was entirely void, and of no more effect than waste paper; that if the debtor at the time of his death owned any real estate, it, upon his death, passed at once to his heirs at law or devisees, and, in like manner, his personal estate, if there was any, passed to the person afterwards to be appointed his administrator, or vested in his executor.

So, in *Jones v. Swift* (1847) 12 Ala. 144, it is held that an execution cannot be issued against the estate of a deceased debtor where one was not previously issued in his lifetime on the same judgment; that no levy made under such a mandate will prevail against the claim of the administrator, as no lien attaches by virtue thereof upon the personal estate of the deceased debtor in the hands of the administrator.

After the issuance of an execution against an administrator, but before it was returned *nulla bona*, one of the sureties of the administrator died, whereupon *scire facias* was issued to revive, as to his administrator, the statutory remedy given against him; but it was held in *Kirby v. Anders* (1855) 26 Ala. 466, that the statutory remedy was given only against the surety, and did not extend to his administrator, and that no power was given to render a judgment against the surety upon the return of *nulla bona* upon the original execution, but that, had there been, as there was no execution issued against him before his death, no proceeding by *scire facias* would lie, under the Code, providing that, where a judgment had been rendered against decedent before his death and no *fieri facias* was issued thereon during his life, no execution thereon can issue against the personal representatives; nor can the judgment be revived against them except by suit on the judgment.

The court held, in *Powell v. Macon* (1883) 40 Ark. 541, that no execution may issue against lands of a decedent vested in his heirs, upon a judgment recovered against the decedent in his lifetime, when no levy was made on the land prior to his death; and that such a judgment becomes subject to the administration system of the probate court.

In *Carlton v. Davant* (1877) 58 Ga. 451, the court says, *arguendo*, that, if there had been no administration of the estate of a deceased judgment debtor, the sheriff might have sold that which was decedent's land before his death, and that the act of administration would not stop the final process of the court; and therefore held that a sheriff might levy upon lands under a judgment against decedent, at any time before the administrator had actually sold the land to a purchaser.

After the recovery of a judgment no execution was sued out thereon within a year. After the debtor's death plaintiff sued out a *scire facias* to revive the judgment against the administrator, and obtained an order that he have

execution against the goods, chattels, lands, and tenements of the intestate. Upon appeal, it was held, in *Turney v. Gates* (1850) 12 Ill. 141, that the order was erroneous for the reason that plaintiff lost his lien on the lands of the intestate by failing to sue out execution within a year, and that the proper order would have been that the judgment be revived against the administratrix, to be paid by her in the due course of administration.

The filing of a justice's transcript in the circuit court after a judgment debtor's death was held to create no lien upon which an execution could be issued and levied on real or personal property of the decedent. *Clingman v. Hopkie* (1875) 78 Ill. 152, for the reason that it was no more, in effect, than a recovery against the administrator, and could be collected only in the due course of administration.

These cases, however, are not representative of the rule in Illinois, which will be found under *supra*, III. a, 1, (c).

The sale of the property of a deceased debtor under a *fi. fa.* was held to be an absolute nullity, in *Houston v. Childers* (1872) 24 La. Ann. 472, on the ground that courts of probate have exclusive power to liquidate and enforce debts from property of successions administered by curators.

It was held in *Byrnes v. Sexton* (1895) 62 Minn. 135, 64 N. W. 155, that an execution could not issue against land when the judgment was not docketed in the county where the land was situated prior to the debtor's decease, and was, therefore, not a lien thereon; and that the only way such a judgment could be collected would be as a claim against the estate, to be settled in the due course of administration.

It appears from *Sweringer v. Eberius* (1842) 7 Mo. 421, 38 Am. Dec. 463, that an execution cannot issue against a judgment debtor after his death, for the reason that the judgment must then be classed as a claim against the estate according to the provisions of the administration law.

In the course of deciding that the lien of a judgment is extinguished by the death of the judgment debtor, the court, in *Frewitt v. Jewell* (1846) 9 Mo. 732, said that from 1826 the estates of deceased persons were freed from execution.

An execution was quashed in *Miller v. Doan* (1854) 19 Mo. 650, which issued after the death of the judgment debtor, the court stating that, since May 1st, 1827, and prior to the taking effect of the Revised Code of 1845, no execution was allowable against a dead man's estate, and that the lien of the judgment was extinguished by the death of the judgment debtor.

Based upon the same opinion, was *Doan v. Lisle* (1854) 19 Mo. 651. The change of procedure is also recognized in *Carson v. Walker* (1852) 16 Mo. 68 (*supra*, III. a, 1, (b)).

It was briefly held in *Brown v. Woody* (1877) 64 Mo. 547, that, since 1827, executions have not been allowed to issue against the estates of deceased persons, but that judgments against them or their representatives must be classified as other demands are against the estate.

In New York (*supra*, III. a, 1, (d)), the probate court is given control over the enforcement of judgments against decedents' estates to the extent that the surrogate's permission is one of the prerequisites to the issuance of execution.

In the words of the court in *Murchison v. Williams* (1874) 71 N. C. 135, "when a debtor dies against whom there is a judgment docketed his land descends to his heirs or vests in his devisees, and his personal property vests in his administrator or executor, just as if there were no judgment against him, and the whole

estate is to be administered just as if there were no judgment. . . . And the administration of the whole estate is placed in the hands of the administrator or executor as best it should be, instead of allowing a creditor to break in upon it with an execution and sale for cash at a probable sacrifice." The latter part of this quotation is given in the opinion in *Mauney v. Holmes* (1882) 87 N. C. 423, a decision to the effect that, under the statute enacting that the personal representative may pay "judgments of every court of competent jurisdiction within this state, docketed and in force, to the extent to which they are a lien on the property of the deceased at his death," the order of priority is determined by the date of docketing.

Under a Code provision conferring upon a judgment creditor the right, after three years from the issue of letters testamentary or of administration, in case of the death of the judgment debtor after judgment, to proceed and enforce his lien, it was held in *Sawyers v. Sawyers* (1885) 93 N. C. 321, that, until that time at least, no execution could issue after the debtor's death, but that the creditor must collect his debt in the due course of administration.

It was held in *Cowles v. Hall* (1893) 113 N. C. 359, 18 S. E. 329, that a judgment creditor was not entitled to leave to issue execution upon a judgment rendered against the debtor, since deceased, for the reason that provision was made by statute for the settlement of decedents' estates, and for the collection of debts therefrom.

It is declared in *Platt v. St. Clair* (1833) 6 Ohio, 227, at 238, that the right of having *scire facias* against the heirs of a deceased judgment debtor no longer exists, as by the administration laws the lands of the decedent must be converted into personalty, and the debts paid therewith; and further, it is stated that the lien of a creditor upon the land of a deceased debtor is limited to five years after the death of decedent, or from the time the estate is settled, if it is not settled within five years, after which time the heirs hold the land free of the debtor's lien.

Ambrose v. Byrne (1899) 61 Ohio St. 146, 55 N. E. 408, lays down the doctrine that the death of a judgment debtor stops ordinary process, and administration becomes the appropriate remedy for the payment of his debts.

An execution tested after the death of the judgment debtor was held to constitute no lien upon the personalty of the decedent, which, having vested in the administrator upon the debtor's death, the sheriff could not seize, as held in *McMahon v. Glasscock* (1833) 5 Yerg. 304.

But see a number of other and later Tennessee cases under *supra*, III. a, 1, (a), which, as to realty at least, seem to allow an execution to issue after appropriate proceedings in the nature of *scire facias*.

An execution was declared to improperly include and be issued against the estates of two deceased judgment debtors, in *Turner v. Smith* (1853) 9 Tex. 626, since liability as to them could be enforced only through the probate court in the due course of administration.

An execution issued against the administrator of a deceased party and a sale held thereunder were held void in *Emmons v. Williams* (1866) 28 Tex. 776, upon the ground that there is no statute authorizing the real estate of a deceased party to be sold under execution issued against his legal representatives, but that the manner of collecting debts due from decedent's estates has been otherwise provided by law.

About fourteen years after the recovery of a judgment against two, upon which no execution was ever issued, an execution was issued on the judgment against the goods, chattels, lands, and tenements of the executors of the will of one of the judgment debtors. The court held that the judgment did not support the execution, as it did not refer to the judgment as the authority for its issuance, nor in any way connect itself with it; and that, if there was a revivor of the judgment, it should have been shown, and even that would not have been sufficient unless it was further shown that issuance of execution was authorized by the terms of the judgment of revivor, or that, under the terms of the will, the executors were authorized to administer the estate free from the control of the probate court. *Hart v. McDade* (1884) 61 Tex. 208.

In *Thompson v. Jones* (1889; Tex.) 12 S. W. 79, after reviewing earlier decisions, the court settled on the doctrine announced in *Taylor v. Snow* (1877) 47 Tex. 466, 26 Am. Rep. 311, that a sale of land, made after the death of a debtor, under an execution issued upon a judgment rendered against him in his lifetime, was not absolutely, but only relatively, void, and could not be collaterally attacked, when there had been no action of the probate court on the estate.

2. Distinction between personality and reality.

In *Lucas v. Doe* (1843) 4 Ala. 679, it appears that, previous to the judgment debtor's death, an execution was issued against him, but before its return he died and it was returned unsatisfied; subsequently, after an alias *fi. fa.* was issued and returned unsatisfied, a pluries *fi. fa.* was issued and levied upon land. The court held that, while it was competent to levy an execution on the goods of a defendant after his death, if previously issued, that doctrine had no application to real property when the original writ originated no lien upon it, and could not, therefore, impart an energy which it did not possess to the alias and pluries writs; and by the debtor's death his lands vested in his heirs or devisees, and were not, therefore, subject to execution upon judgment against decedent.

The proposition whether an original or alias *fi. fa.* issued after a judgment debtor's death is a nullity as to the lands of which he died seised, is discussed in *Mansony v. United States Bank* (1843) 4 Ala. 735. Decisions are reviewed holding that such a writ cannot be executed because, by the death of defendant previous to its issuance, all the real estate of which he was possessed vested *eo instanti* in his heirs, who could not be divested of it without an opportunity of being heard; that it is the judgment, not the execution, which gives the lien upon real property; and that, while an execution originally issued before defendant's decease is permitted to continue as a lien upon the personality after his death, the judgment does not survive as to reality. No conclusion was arrived at, however, the court stating that, as no decision was necessary, the proposition would be left open for further examination when it should again arise.

The decision in *Lucas v. Doe* (1843) 4 Ala. 679, and the intimation in *Mansony v. United States Bank* (1843) 4 Ala. 735, are referred to and followed in *Abercromble v. Hall* (1844) 6 Ala. 657, where, after a writ of *fi. fa.* issued against him had been enjoined, the judgment debtor died, and an execution was subsequently issued, upon the dissolution of the injunction, against his lands. The court held, in the language of *Lucas v. Doe* (1843) 4 Ala. 61 L. R. A.

679, that, "by the death of the defendant, his lands descend to his heirs, or vest as he may devise by will, and the mandate of an execution which directs the sheriff to make of them the amount of a judgment must be wholly inoperative and void. In fact, such a writ could never be executed in consequence of the death of the defendant, which has cast his estate upon other proprietors."

The court, in *Burk v. Jones* (1848) 13 Ala. 167, recognizes the distinction between personal estate bound after the debtor's death by executions regularly kept up, and real estate bound by the judgment by virtue of the right of satisfaction by *elegit*, which right, as against the debtor, is destroyed by his death; so, while the execution is permitted to continue as to the personality, the judgment does not survive as to the realty. It is stated that, upon the death of the judgment debtor intestate, the land immediately descends to his heirs, and their title cannot be divested without a proceeding instituted for that purpose to which they must be made parties; and the court stated the law to be settled that an execution issuing after the death of a defendant is, as to his lands, a nullity.

In *Hurst v. Weathers* (1849) 15 Ala. 417, after the issuance of an execution, the debtor died, and subsequently an alias execution was issued on the judgment and levied upon lands sold by decedent under a fraudulent deed. The court held that upon the death of the debtor the title to the lands in him was determined and vested in the grantee, charged in equity with the payment of plaintiff's judgment by reason of the fraud in conveyance, but that no right to sell the land upon the execution against the debtor, which issued after his death, could exist by virtue of any supposed lien of the judgment.

No execution was issued until after the death of the debtor, in *Beach v. Dennis* (1872) 47 Ala. 262, and then three were issued successively, the last of which was levied on land. Upon a motion by an heir to have the sale set aside, it was held, mainly upon the authority of *Lucas v. Doe* (1843) 4 Ala. 679, that the execution, having been issued after the death of the debtor, was void, and conferred no authority on the sheriff to sell.

The court, in *Hendon v. White* (1875) 52 Ala. 597, refers to the earlier cases in the state under former statutes making a distinction as to the lien attaching to lands and that attaching to personality by virtue of an execution issued in the lifetime of the debtor, but holds that later statutes have obliterated the distinction, and authorize the levy and sale of lands, as well as goods and chattels, under an alias or pluries *fi. fa.* issued after the debtor's death, which is a regular continuance of execution issued to the sheriff while the debtor was living.

To the same effect, and citing *Hendon v. White* (1875) 52 Ala. 597, is *Clark v. Kirksey* (1875) 54 Ala. 219, holding that a valid sale of lands of a deceased judgment debtor may be made under an alias or pluries execution issuing after his death, in continuation of a lien created during his life by the issuing of execution, without any revivor against his heirs. The court herein also recognizes the obliteration of the distinction as to the lien of an execution between lands and personal property by the Code, and states that the departure was wrought by legislation, not by judicial decision, and is in conflict with the principles of the common law.

Prior to the death of the debtor, it appeared in *Dryer v. Graham* (1877) 58 Ala. 623, that an execution issued and levied against his land

was stayed by the order of the plaintiff. After the debtor's death, without the lapse of a term, an alias execution was issued and levied, and then, after its return, a venditioni exponas was issued commanding the sheriff to sell the land. It was insisted that the lien of the execution, issued and levied before the death of the debtor, was lost by plaintiff's order to stay it, and also that the statute does not authorize a venditioni exponas to issue for the sale of the lands of a deceased person, but requires a lien by execution obtained in his life to be continued in no other way than by an alias fieri facias. In regard to the first contention, the court held that the lien of an execution could not be lost against the defendant therein or his personal representatives by the mere suspension of the execution. In regard to the second contention, it was held that it was within plaintiff's option to sue out, either an alias writ, or a venditioni exponas; that the latter continues the lien of the execution which has been levied as to the property on which the levy was made, whether real or personal, and is in its nature and operation an alias execution commanding and authorizing the sale of the real estate, and thus completing the execution previously begun.

A judgment against the lands and credits of a testator in the hands of his executor, to be administered, was held to be wrong in *Greenwood v. Spiller* (1840) 3 Ill. 502, the court stating that it should have been only against the goods and chattels of the testator, as the credits of a deceased person cannot be reached by execution, nor can his lands be sold by virtue thereof; the only mode of selling real estate after the executor or administrator has ascertained that the personal estate is insufficient to pay the debt being to apply to the court for an order permitting the sale thereof.

In *Faulkner v. Larrabee* (1881) 76 Ind. 154, it was held that a party may not have execution after a judgment debtor's death by summary proceedings upon mere notice and motion, but that steps must be taken to revive the judgment against the heirs and administrator, resulting in an order that the money be made out of the assets in the hands of the administrator, if they be sufficient; if not, then out of the lands of decedent.

The question involved in *Mendenhall v. Burnette*, (1897) 58 Kan. 355, 49 Pac. 93, was whether a judgment rendered against a person in his lifetime may be enforced by execution against his lands after his death and after revivor against his executors. It was contended that the jurisdiction of the probate court over the estate of a deceased person is exclusive, except as to property subject to specific lien; but this contention was not upheld, the court holding that an execution might issue against all the real property bound by the lien of the judgment at the time of the debtor's death, but not, however, against personalty not seized or subject to any specific lien, nor against lands upon which the judgment was not a lien prior to the debtor's death.

In *Boyd v. Armstrong* (1821) 1 Yerg. 40, it appeared that, subsequently to the death of the judgment debtor, after two writs of scire facias had been issued against the heirs and returned *nilhil*, judgment by default was rendered against them, and execution issued thereon without scire facias against the personal representatives, there being no will, and administration of the estate. The question for decision was, briefly, whether the real estate in the hands of the heirs could be subjected to the satisfaction of the judgment without first having recourse to the personal estate. After an extended discussion, reviewing the controlling statutes and English decisions, it was held that a scire

facias cannot be maintained against the heir in any case until it is shown, by the return of scire facias against the personal representative, that the personal estate is insufficient for the satisfaction of the demands, and that this is so even though, when there is no administrator, the creditor himself should thereby be compelled to take upon himself the duties of administration. The scire facias herein was, therefore, held void as to the heirs, and insufficient to support execution against them.

Two days after the death of the judgment debtor, in *Preston v. Surgoine* (1828) Peck (Tenn.) 72, a *fi. fa.* was issued upon a judgment recovered against him in his lifetime, under which the sheriff seized lands and personalty. The prevailing opinion was to the effect that, as to the personalty, the *fi. fa.*, tested as of the term preceding the defendant's death, bound the goods, which were therefore *in custodia legis*, and not in the hands of the executor. And, as to the realty, it was held to be bound by the judgment so rendered before the death of the debtor, and to descend to the heir; and that, until the expiration of a year and a day from the rendering of judgment, execution might issue without scire facias against the heir. To this decision there is an elaborate dissenting opinion, based on the ground that, on a debtor's death, his goods and chattels passed respectively to the administrator and heirs, and therefore that *sci. fa.* was necessary before taking out execution, under the rule that, when any new person is to be charged by the execution, in order to prevent undue advantage by surprise, he must be warned by *sci. fa.* before proceeding to execution.

The case of *Ward v. Southerland* (1823) Peck (Tenn.) Appx. 1, turned on whether an execution obtained on *sci. fa.* against an heir upon a judgment against his deceased ancestor, without revivor against the executor, was void. The judge writing the opinion, after discussing the relevant statutes, was personally of the opinion that such an execution was valid because, the judgment being a lien on the land, the creditor should not be put to new trouble after his debtor's death on account of the rule that judgments should be satisfied out of the personalty as far as possible, but should be allowed to have satisfaction out of the realty upon which his judgment was a lien, and the burden of getting recompense from the executor be put upon the heir, rather than the creditor. These views, however, the court pointed out, were not in harmony with an earlier decision (*Boyd v. Armstrong* [1821] 1 Yerg. 55), and the decision herein was therefore made in submission to the authority of that case.

3. Where a specific lien exists.

(a) In general.

As held in *Powell v. Macon* (1888) 40 Ark. 541, a judgment may not be revived and execution issue against the heirs of a deceased judgment debtor, as they are not personally liable, and no execution may be issued against lands descended to them from the judgment debtor, because the judgment at his death was but a general, and not a specific, lien, upon his lands and such a judgment is subject to the administration system of the probate court. The court stated, however, that, had execution been taken out in the lifetime of the debtor, and levied upon lands, then a specific lien would have been created, and, after the debtor's death, the judgment might have been revived and the land sold.

In *Mendenhall v. Burnette* (1897) 58 Kan. 355, 49 Pac. 93, it was held that an execution might issue, notwithstanding the probate juris-

diction of decedent's estates, against the real property bound by the lien of the judgment at the time of a debtor's death, but not, however, against personalty not seized or subject to any specific lien, nor against lands upon which the judgment was not a lien prior to the debtor's death.

In *Knott v. Shaw* (1875) 5 Or. 482, the state had a lien for costs upon a judgment of conviction of crime recovered against a decedent in his lifetime, upon all the land held by him at the time he committed the crime, as provided by statute. The executrix of the decedent made sales of the land to different parties. Upon an attempt by the state to enforce its lien, it was held that the only effect of the death of the defendant upon the state's lien was to prevent the issuance of execution thereon within six months of the granting of letters testamentary upon his estate, unless leave were obtained from the county court or judge, and that the land so sold by the executrix was subject to the lien according to the inverse order of its alienation.

A judgment for the payment of alimony was held not to be within the terms of a statute providing that execution may issue on a judgment notwithstanding the death of the judgment debtor after judgment, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon. *Weaver v. Pickard* (1891) 7 Utah, 296, 26 Pac. 581.

(b) *By attachment.*

Under a Dakota statute providing that, "where any judgment has been rendered for or against the intestate in his lifetime, no execution shall issue thereon after the death, except . . . the judgment be for the recovery of real or personal property or for the enforcement of a lien thereon," it was held in *Yankton Sav. Bank v. Gutterson* (1902) 15 S. D. 486, 90 N. W. 144, that, even though personal property had been attached prior to the recovery of the judgment, an execution could not be issued thereon after the debtor's death, since the attachment was dissolved by the death; and it could not be claimed that an action to recover judgment upon an ordinary money demand in which an attachment had been issued and levied upon the property was an action to enforce a lien on the same.

This decision was made upon the authority of *Myers v. Mott* (1866) 29 Cal. 359, 89 Am. Dec. 49, which construed a statute of California from which the one in Dakota was modeled. The debtor died before judgment in the California case, but the court said that, whether the death occurred before or after judgment was immaterial; that the death after the attachment, but before the issuance of execution, dissolves the lien of the attachment; and that the attached property passes into the hands of the administrator, to be administered on in the due course of administration.

A decision strictly in conformity with the common-law rule is *Mitchell v. St. Maxent* (1866) 4 Wall. 237, 18 L. ed. 326, which turned on whether a writ of fieri facias tested and issued after the death of the party against whom the judgment is rendered confers power on the ministerial officer to execute it. The court held that an execution tested after the death of the debtor is void, without a revivor of the judgment against the heirs, devisees, and terre-tenants of the deceased; and it was further held that the rule was not changed by the fact that property had been attached at the commencement of the action. This case arose in the northern district of Florida, and the court, in making its decision in conformity with the common law, states that such is the law in Florida 61 L. R. A.

by reason of its failure to make any legislative enactments on the subject of the test of process.

So, the court held, in *Welch v. Battern* (1877) 47 Iowa, 147, that the common-law rule, that an execution cannot be issued upon a judgment after the decease of the defendant therein, and that sales of land and deeds made in pursuance of executions so issued are void, has not been changed by statute in Iowa; and that the rule is no different in the case of executions issued upon judgments in attachment proceedings.

And the common-law rule, that the right of a judgment creditor to issue an execution on the property of his debtor terminates with the death of the debtor, was upheld in *Bull v. Gilbert* (1890) 79 Iowa, 547, 44 N. W. 815, the court also stating that the fact that the property levied on under the execution was already held by the sheriff by writ of attachment levied before the death of the judgment debtor would not affect the rule, as there was no distinction between an execution on a personal judgment and one *in rem* in this regard.

Swerlingen v. Eberlus (1842) 7 Mo. 421, 38 Am. Dec. 463, holds, likewise, that the lien created by the issuing of an attachment is lost when the defendant in the attachment dies, but for the reason that an execution cannot then issue, as such judgment must be classed against the estate according to the provisions of the administration law.

To the contrary is *Smith v. Jones* (1867) 15 Mich. 281, where the defendant died during the pendency of an action in which plaintiff had an attachment, and before judgment. After judgment was obtained against the administrator, the plaintiff obtained an order from the court allowing him to issue execution. Upon an attempt to obtain a reversal of this order, the court held that, under the statute, where a claimant obtains a lien upon the real or personal estate of a decedent before his death he may, upon obtaining judgment, have execution against his estate. While the debtor here died before judgment, it does not appear that the rule would have been any different had he died after.

So, also in *Passumpsic Bank v. Strong* (1869) 42 Vt. 295, a creditor was allowed to enforce a judgment by execution after the death of the judgment debtor, where the real estate levied on had been attached at the commencement of the action, and the levy was made within five months after prior attachments, which were also on the property, had been discharged, but after the debtor's death.

c. *Actions in ejectment and sales under decrees.*

The court, in *State v. Michaels* (1847) 8 Blackf. 436, held it to be a general rule of law that a revivor of judgment must take place where a sole defendant dies after judgment and before execution, either against the personal representatives or the heirs and terre-tenants, so that an execution tested subsequently to such decease without revivor is void; and that an action of ejectment is no exception to the rule.

In *Kellogg v. Tout* (1879) 65 Ind. 151, a copy of a decree of foreclosure was issued and placed in the sheriff's hands after the judgment debtor's death, and sale was made thereon. The court held that this was proper without any revivor of the judgment, as judgments *in rem*, where nothing can be done except what was adjudicated in the lifetime of the parties, may be executed after the death of a sole defendant.

It is stated in *Walden v. Craig* (1840) 14

Pet. 147, 10 L. ed. 393, as the rule of practice in Kentucky, that, where a defendant in ejectment dies, the judgment must be revived by *scire facias* against both his heirs and terre-tenants.

A sale of mortgaged property, made under an alias order of sale issued after the debtor's death without making his heirs and legal representatives parties, was held a nullity in *Surgi v. Colmer* (1870) 22 La. Ann. 20. There were also, however, some serious objections to the manner in which the judgment and original order of sale were obtained.

A writ of seisin upon a judgment in an action of assumpsit for the use and occupation of real estate was issued after the death of the defendant, in *Hildreth v. Thompson* (1819) 16 Mass. 191. The writ was held void, the court stating that it knew of no authority in England or this country for issuing an execution where a party to a judgment was dead, when that fact was made to appear by comparing the time of the death with the teste of the writ of execution. It seems from the opinion that, had the judgment been for a certain parcel of land, a peaceable entry might have been made thereunder without the aid of the sheriff; but the court stated that this could not be done where the judgment was for an uncertain portion of, or interest in, land.

The rule is laid down in *Smith v. Winston* (1837) 2 How. (Miss.) 601, as follows: "When a new person is to be benefited or charged by the execution of a judgment, a *scire facias* is necessary to make him a party; but where an execution is neither to be beneficial nor chargeable to one who is not a party to the judgment, a *scire facias* is unnecessary." In conformity with this rule, it was held that *scire facias* was unnecessary against heirs of a deceased debtor, where, previous to an execution issued against the real estate, a sale of it had been ordered by decree, thereby divesting the heirs of any interest therein, and it had thereafter been sold to a purchaser; but the court held that *scire facias* was necessary against the purchaser, and that a failure to so issue it rendered the execution voidable, although it could not, however, be attacked collaterally, but might, in a regular proceeding, be set aside.

Revivor was held to be unnecessary in *Harrison v. Simons* (1840) 3 Edw. Ch. 394, where a mortgagor died after a decree of sale but before enrollment, the court stating that it could be executed notwithstanding the death, as no act was required to be done except to advertise and sell the mortgaged premises and execute a deed to the purchaser; that revivor might be necessary in actions *in personam*, was recognized.

A decree of foreclosure made and entered before the death of the mortgagors, it was held in *Hays v. Thomae* (1874) 56 N. Y. 521, could be executed notwithstanding their death, as it was to be enforced only by a sale of their interest in the property, and not *in personam*.

In *Beaumont v. Herrick* (1873) 24 Ohio St. 445, it was held that a decree ordering the sale of specified real estate might be executed after the death of the defendant without revivor as against his heir.

It was said, *obiter*, in *Warder v. Tainter* (1835) 4 Watts, 278, that it had always been unnecessary in Pennsylvania, until a late legislative change, to sue out *sci. fa.* against the heirs, devisees, and terre-tenants, in order to have execution against the lands of a deceased defendant under a judgment obtained against him in his lifetime; that a *sci. fa.* against the executors or administrators for the purpose of reaching the personal estate had always been deemed sufficient to authorize the taking of the 61 L. R. A.

real estate; and the court further said that, where an execution was sued out after the debtor's death upon a judgment obtained in his lifetime, decreeing specific mortgaged premises to be sold, there was little objection to its being issued without a previous *sci. fa.* to the heirs, devisees, and terre-tenants.

The doctrine of *Whiting v. Bank of United States* (1839) 13 Pet. 6, 10 L. ed. 33, is that, upon the death of the debtor after a decree of foreclosure of a mortgage, but before the sale, no revival of the suit as to the heirs was necessary before the confirmation of the sale.

4. Execution tested prior to death, but issued after.

The distinctive feature of the common-law rule was the right which it gave to issue execution after a judgment debtor's death if he died during the term at which judgment was rendered or the vacation following, as the writ might then be tested as of the first day of the term, and treated as if actually issued of that date, by a fiction of the law, and thus prior to the debtor's death.

The following English decisions illustrate this doctrine:

It was held in *Anonymous* (1724) 8 Mod. 225, that an execution sued out before the testator's death might be executed afterwards without a *sci. fa.*

Waghorne v. Langmead (1796) 1 Bos. & P. 571, held that a *fi. fa.* tested previous to a debtor's death is regular, although it was delivered to the sheriff and levied afterwards.

An execution against the goods of a defendant, tested in his lifetime, although issued after his death, was held regular in *Bragner v. Langmead* (1797) 7 T. R. 20.

A judgment on a cognovit after the death of the debtor, but relating to the first day of the term, and thus prior to the defendant's death, was held regular in *Calvert v. Tomlin* (1828) 5 Bing. 1, and the teste of a writ of execution corresponding with the judgment in being anterior to the death of the party, the proceedings had under it were held regular.

A judgment was signed, and a *fi. fa.* issued, after the debtor's death, but tested as of the first day of the term and prior thereto. The court refused to set aside the writ for irregularity in issuing after the death of the defendant without a *sci. fa.*, but because it was warranted by the judgment, which was not attacked by the rule. *Watson v. Maskell* (1834) 4 Moore & S. 461.

Following *Heapy v. Parris* (1795) 6 T. R. 368 (*supra*, III. a, 1 (a)), a *fi. fa.*, tested before the death of a defendant, but taken out afterward, was held bad, in *Walker v. Drawater* (1796) 3 Anstr. 680. This case seems to be an exception to the rule, and decided under a misconception of the extent of the decision which it assumes to follow.

In order to remedy the evils which accrued under the rule above shown, a statute was passed (29 Car. II., chap. 3, § 16) providing that writs of *fi. fa.* or other executions should bind the property of the goods against which they were issued only from the time of the delivery of the writ to the sheriff to be executed, and that, for the purpose of determining that time, the officer receiving the writ should indorse thereon the day, month, and year of receiving the same.

The following cases show the manner in which this statute was construed:

Farrer v. Brooks (1688) 1 Mod. 188, goes on the theory that the goods are bound from the teste of the writ as between the parties, but, as to a stranger, are bound only from the de-

livery of the writ to the sheriff; and so held a levy good, made upon the goods of a deceased debtor under an execution tested prior to his death.

It was attempted to invalidate an execution in *Houghton v. Rushby* (1687) *Skinner*, 257, 2 Show. 485, on the ground that it was issued after the debtor's death, and therefore, under the statute, the property being bound only from the delivery to the sheriff, the writ was inoperative. But it was held that that act was designed only to aid a purchaser in market overt, and, as to the parties, the rule at common law still prevailed.

Also, in *Needham's Case* (1692) 12 Mod. 5, it was held that an execution tested before a debtor's death may issue afterwards, as, between the parties, the goods are bound from the teste of the writ, and only as to purchasers are the goods bound from the delivery of the writ.

In *Anonymous* (1691) 2 Vent. 218, a *fi. fa.* tested in the lifetime of the debtor was, however, issued and levied after his death. The court said the writ would be good at common law, but that the statute provided that the property of the goods should be bound from the delivery of the writ to the sheriff. While not definitely so holding, the court was of opinion that the writ was good as to the parties, and that the statute was made for the benefit of strangers acquiring title between the teste of the writ and delivery thereof to the sheriff.

In a note to *Waghorne v. Langmead* (1796) 1 Bos. & P. 571, is a memorandum of *Gill v. Parsons*, Mich. 13 Wm. III. B. R., as follows: "Judgment was entered between *Hilary* and *Easter* terms, after which defendant died. Execution was taken out, tested the first day of *Hilary* term, and the goods in the hands of the executor were taken, and, on motion, it was holden that, though a judgment in respect of purchasers binds only from the signing, yet as to the party and his representatives it binds as it did before at common law, and that the execution so tested was therefore regular."

In *Brocher v. Pond* (1834) 2 Dowl. P. C. 472, the statute providing that "all writs of execution may be tested on the day in which the same are issued," was held not to prevent an execution creditor from availing himself of the common-law right of testing an execution of the first day of a preceding term, and thus in a debtor's lifetime, although the writ is issued after his death. This was another statute.—3 & 4 Wm. IV., chap. 87, § 2.

Until the adoption of statutes providing otherwise, in many of the states the rule of the English cases was adopted.

The correct rule of the common law is said, by way of *obiter*, in *Collingsworth v. Horn* (1833) 4 Stew. & P. (Ala.) 237, 24 Am. Dec. 753, to be that an execution bearing a regular date, anterior to the death of the defendant (though the date be by relation back), may be received by the sheriff, after the death of the defendant, levied on the goods of the estate, and the same may be legally sold, without making the personal representative a party. But that, if such representative be made a party to the execution, without a revival of the judgment by a *scire facias* against him, the process may be void, when it would have been regular had it been taken only against the goods of the deceased as though he had been living.

But, under a later statute in Alabama, it is provided that an execution must be tested on the day on which it is issued.

The common-law rule is adhered to in *Graham v. Wilson* (1854) 5 Harr. (Del.) 435, where it is held that the goods of a testator in the hands of his executors may be taken on a

fi. fa. against the testator, issued after, but bearing teste before, his death.

And to the same effect, see also *Cooper v. May* (1826) 1 Harr. (Del.) 18 (*infra*, III. a, 5).

But in Delaware, also, it is provided by a later statute that the date of issue must be indorsed on the writ.

An attempt by *audita querela* to avoid a *ca. sa.* tested before the death of the debtor, but issued afterwards, was not allowed to succeed, as briefly reported in *Docura v. Henry* (1718) 4 Harr. & M'H. 480.

It is asserted in *Den ex dem. Rickey v. Hillman* (1824) 7 N. J. L. 180, on the authority of both ancient and modern decisions, that, if an execution be tested in the defendant's lifetime, it may be taken out and executed after his death, although that such an execution will not bind the goods so as to defeat bona fide purchasers before the delivery to the sheriff.

It is later provided by statute, in New Jersey, that goods shall be bound only from the delivery of the execution to the sheriff, which date must be indorsed on the writ.

An execution issued after the debtor's death, but tested before as of date of a judgment also rendered afterward but tested before by relation, was held irregularly issued and set aside, in *Nichols v. Chapman* (1832) 9 Wend. 452, under an existing statute providing that, if a party die after judgment rendered against him, but before execution issued thereon, no execution shall issue on such a judgment until the expiration of a year after the death of the party against whom it is rendered.

The court says, *obiter*, in *Woodcock v. Bennet* (1823) 1 Cow. 711, at 740, 13 Am. Dec. 568, that when a sole defendant dies after judgment an execution may not issue in his name unless tested in his lifetime.

In regard to *Stymets v. Brooks* (1833) 10 Wend. 210, *Freeman on Executions*, § 37, says: "As this decision is not supported by any local statute, it must be conceded to be contrary to a strong and overpowering current of authorities." The decision in question holds that, after the death of a defendant, no execution can issue against his personal representatives, heirs, or terre-tenants without a *scire facias*, for the reason that the new parties are entitled to a day in court to show cause against the application of the property to the discharge of the judgment. It appears from the facts that the execution in this case was issued after the debtor's death, but tested before, and therefore, by deciding as above, the doctrine that an execution may issue after death, provided it is tested before, was overruled. The court referred to this practice, stating that it was well settled, but that it had been long contested, and its justice and propriety seriously questioned.

In a very brief opinion in *Hay v. Fowler* (1845) 1 How. Pr. 127, the court held the law to be well settled that an execution tested before the death of a judgment debtor, although issued afterwards, is regular.

For New York decisions under later statutes, see *supra*, III. a, 1, (d).

An execution issued after a debtor's death, but tested prior thereto, was held to take precedence over a widow's claim to personality assigned to her for her year's support, in *Grant v. Hughes* (1880) 82 N. C. 216.

But this case is overruled in *Sawyers v. Sawyers* (1885) 93 N. C. 321, which holds that under the Code an execution tested before a death, but issued afterwards, confers no authority on the sheriff to sell, since the reason for the rule no longer exists, as judgments now by statute become a lien upon land from the time of being docketed; and thus the debtor

cannot transfer his property, and so defraud the creditor who does not make haste to enforce his judgment.

To the same effect, and expressly approving of *Sawyers v. Sawyers* (1885) 93 N. C. 321, is *Williams v. Weaver* (1886) 94 N. C. 134.

The practice of issuing an execution after the death of a defendant, tested by relation to the first day of the preceding term, was held to apply only to solvent estates, in *Leiper v. Lewis* (1827) 15 Serg. & R. 108; and in the case of insolvency it was held that resort must be had to *scire facias*.

A *fi. fa.* tested before the death of a defendant, with an alias and a venditioni exponas issued and tested subsequently to his death, without revival of the judgment against the personal representatives, was held regular in *Springer v. Brown* (1848) 9 Pa. 305, for the reason that an execution when commenced is entire, neither the debtor nor his personal representative being entitled to a day in court in the progress of it.

The old rule which carried back the effect of an execution to its teste was declared, in *Cadmus v. Jackson* (1866) 52 Pa. 295, to be changed by the prevailing statute enacting that no execution shall issue upon a judgment obtained in the lifetime of a decedent until the personal representatives (who are the administrators) have been warned by *scire facias*, notwithstanding the teste of the execution bears date antecedently to the death; and the court held that such an execution, issued without a previous *sci. fa.*, was not merely irregular, but void.

In a note to *Fox v. Lamar* (1810) 2 Brev. 417, the doctrine appears that an execution tested the first day of the term preceding a debtor's death may be sued out after; but it did not clearly appear in this case that the judgment had in fact been rendered prior to the death.

Upon the rising of court at the term at which an entry of a decree was made, which the court held a sufficient rendering thereof to base execution upon, an execution was issued, although in the meantime the debtor had died. The court held that no *sci. fa.* is necessary in order to have execution against a deceased judgment debtor who died after judgment, during the vacation after the judgment term. *Dibble v. Taylor* (1844) 2 Spears L. 308, 42 Am. Dec. 368.

The rule is again laid down in *Black v. Planters' Bank* (1843) 4 Humph. 367, that a *fiel facias* issued after the death of a party, but tested before, upon a judgment rendered previous to his death, binds his goods; and it was held that a statute providing that no action brought, judgments, notes, etc., should have precedence over unliquidated accounts against estates of decedents did not apply to an execution so issued as aforesaid.

An execution was held to bind the goods from the date of the teste, in *Harvey v. Berry* (1872) 1 Baxt. 252, and therefore an execution tested previous to the sale by the debtor of goods subsequently levied on under the execution after his death was held to bind the goods so levied on from its teste, and to create in the sheriff a title superior to that of the vendee.

Scire facias and revivor against the heirs was held unnecessary in *Montgomery v. Realhafer* (1887) 85 Tenn. 608, 5 S. W. 54, where the execution bore teste at a time when the debtor was in life, but was issued after his death.

So, in *Nashville Trust Co. v. Weaver* (1899) 102 Tenn. 66, 50 S. W. 763, it was held that an execution properly tested of a day anterior to 61 L. R. A.

the death of the judgment debtor might be levied upon his personality after his death, and sale thereof had as though he were living; that, being in fact alive at the date of the teste, he is, in law, assumed to be alive at the date of the levy.

In Tennessee, court executions may still be tested as of the first day of the term next before the date of issuance, but justices' executions must be tested as of the date of issuance.

In *Kane v. Love* (1823) 2 Cranch C. C. 429, Fed. Cas. No. 7,608, the court refused to quash an execution because it was issued after the defendant's death, when the judgment was rendered in his lifetime, and the execution bore teste before his death.

5. After issuance of original writ, but before alias or pluries.

During the confinement of a judgment debtor in prison under a *capias utlagatum*, he died before satisfaction. In regard to whether a new execution might issue, the court held that it could not, but that the plaintiff might have an action of debt against the administrator upon the judgment. *Shaw v. Cutteris* (1599) Cro. Eliz. pt. 2, p. 850.

In *Foster v. Jackson* (1646) Hobart, 52a, it was held that, if a debtor die while confined under a *capias ad satisfaciendum*, it is nevertheless a satisfaction of the debt, and his administrators are not further chargeable therefor.

Where the conusee of a statute merchant sued out a *capias* against the conusor, but died before the return thereof, it was held that his executors could not have an alias *capias* or *fi. fa.*, but must commence entirely *de novo*. 2 Dyer, 180, pl. 49.

The earliest case in Alabama is *Collingsworth v. Horn* (1833) 4 Stew. & P. (Ala.) 240, 24 Am. Dec. 753. The judgment debtor died after execution had been regularly issued against him and returned *nulla bona*. Subsequent to his death a pluries execution upon the subsisting judgment, without revival by *scire facias* against his personal representative, was issued and levied. The court held that where, after execution had been regularly issued and returned *nulla bona* in the lifetime of the judgment debtor, further writs were sued out after the judgment debtor's death, without a revival of the judgment against the administrator, such writs, while they might be irregular, were not void, and could not be questioned by a stranger, as by means of the original execution issued in the lifetime of the debtor, and the execution subsequently issued without any dormant interval,—the lien was established, and continued thereafter so as to prevent the title to the property from vesting in the personal representative.

The point for decision in *Fryer v. Dennis* (1841) 3 Ala. 254, was whether, before the return of a first execution, a second one could be issued after the death of the defendant. The court distinguished this case from *Collingsworth v. Horn* (1833) 4 Stew. & P. (Ala.) 240, 24 Am. Dec. 753, saying that herein, the second execution being issued before the return day of the first, it was not issued to preserve the lien of the former, but was itself an original execution, which there was no authority to issue after the death of defendant without a renewal of the judgment.

The question in *Boyd v. Dennis* (1844) 6 Ala. 55, was whether, in the event of the death of defendant in execution, after an execution had issued against him, a pluries might be issued after the lapse of more than a year, without reviving the judgment against the adminis-

trator. It was held that, there being a chasm by the intervention of two entire terms, unlike *Collingsworth v. Horn* (1833) 4 Stew. & P. (Ala.) 240, 24 Am. Dec. 753, there was no continuity between the original and alias executions, and the latter, being issued after the death of the defendant, was irregular without a scire facias against the personal representative to revive the judgment.

An alias execution issued by a justice of the peace after the death of the judgment debtor was held to be an absolute nullity, in *Henderson v. Gandy* (1847) 11 Ala. 431, under which no rights could be acquired.

In *Whitlock v. Whitlock* (1854) 25 Ala. 543, an alias execution was declared void, the debtor having died previous to its issue, and more than a term having elapsed since the original execution was sued out.

The facts in *Collier v. Windham* (1855) 27 Ala. 291, 62 Am. Dec. 767, show that, after an execution was issued in the lifetime of decedent, a "chasm intervened," and that after his death an alias writ was issued and levied. The court held that the latter writ was no more than mere waste paper, the seizure of property under it a trespass, and the sale an unlawful act. The general rule was stated to be that an execution issued after the death of the debtor therein, without a revival of the judgment, was a nullity, with an exception where an alias or pluries is issued after debtor's death, to continue a lien acquired by a former execution issued before his death, which has not been lost by a chasm or otherwise.

In *Hurt v. Nave* (1873) 49 Ala. 459, the court stated that while at common law an execution issued after the death of defendant was void, this was not so under the Alabama statutes, where an execution had been issued during the lifetime of defendant, as was done in this case, and levied upon lands but no sale made for want of bidders. That, under such circumstances, the issuance and levy of alias and pluries writs after the debtor's death was proper if there had not been a lapse of an entire term so as to destroy the lien originally created; and that a sale under such a levy was authorized unless the estate of decedent had been declared insolvent.

It was decided in *Childs v. Jones* (1877) 60 Ala. 352, that a writ of execution in the hands of the sheriff before the death of the debtor operated as a lien upon his property from the time it was received by the sheriff, which was not destroyed by the death of the defendant when it was kept alive by the reissue of executions, without the lapse of an intervening term, until the levy was made.

Where there was no execution in the sheriff's hands at the time of a debtor's death, and none was placed in his hands for more than three years afterward, being a lapse of much more than an entire term, it was held, in *Brown v. Newman* (1890) 66 Ala. 275, that a state of facts as provided for by statute, which entirely controls the authority of a sheriff to levy on and sell lands after the death of a defendant in execution, was not shown, and a sale of lands, and deed made in pursuance of the alias execution so issued, was void. And the fact that the original execution had been issued more than a year prior to the debtor's death, but that bankruptcy of the debtor had intervened a few days after the return of the original writ without a levy, was held not to affect the principle.

The execution against the debtor having been issued in his lifetime, and the lien thus created having been preserved after his death by not permitting the lapse of an entire term without the continuous issue and levy of an alias, 61 L. R. A.

It was held, in *Keel v. Larkin* (1882) 72 Ala. 493, that, under the statute the sheriff was authorized to make a sale of land levied on, in the same way as if the defendant in execution were still living.

The rule is recognized in *Sims v. Eslava* (1883) 74 Ala. 594, that a sale of lands under execution issued after the death of the defendant therein is a nullity, unless it be issued in pursuance of the statute in continuation of a lien acquired and kept alive in the lifetime of defendant, for the obvious reason that there must be real parties to all writs, original or final, and, upon the death of the defendant, the title to his lands vests in his heirs or devisees, and the sale, in consequence, affects the title of new parties who are entitled to a day in court that they may show cause against it. The facts show, however, that after an original, alias, and pluries executions were issued in the lifetime of the debtor, the latter contested the lien on property levied upon under a claim of exemption, and, during the contest, died, after which a venditioni exponas was issued and sale of lands made under it. The court held that the statute providing that the lien on property levied on and claimed as exempt shall not be impaired or destroyed by the pendency of the contest, nor by its termination, if found in favor of plaintiff, does not embrace the abatement of the contest by the death of defendant, and that the sale of the lands under the venditioni exponas subsequently issued was a nullity, as the lien had not been kept alive by the issuance of writs during the contest without the lapse of a term.

The judgment upon which execution was issued was rendered against the defendant after his death, in *Meyer v. Hearst* (1883) 75 Ala. 390, and was therefore void; but the court said that, independently of that fact, the principle was settled that an execution issued, even on a valid judgment, after defendant's death, was void unless there was a revival of the judgment, or the execution was issued in order to continue a lien already acquired by a previous execution.

A debtor died while an execution was in the sheriff's hands, in *Carlisle v. May* (1883) 75 Ala. 502. After its return term, four terms were allowed to elapse without the issue of any execution. The court held that the execution lien was thereby lost, under the statute providing that a writ of execution which has been issued and received by the sheriff during the life of the defendant may be levied after his decease, or an alias issued and levied if there has not been the lapse of an entire term so as to destroy the lien originally created.

Previous to the debtor's death an execution was issued and levied upon land. After her death, but without the lapse of a term, another execution was issued, by virtue of which the levy was renewed and the land sold. The court held that, the lien having attached during the lifetime of the debtor, her death did not impair it or destroy the sale, there being no lapse of a term between the executions. *Caldwell v. Pollak* (1890) 91 Ala. 353, 8 So. 546.

The court says, in *Enslin v. Wheeler* (1892) 98 Ala. 200, 13 So. 473, that, notwithstanding the broad language of the statute, that execution may issue at any time within ten years of the rendition of the judgment, whether one has been previously issued or not, nevertheless, the issue of the execution must be within the lifetime of the judgment debtor, unless, as provided by the Code, a writ was issued during the lifetime of the debtor and writs were subsequently issued without the lapse of an entire term, so that the lien originally created was not destroyed.

A very similar decision to *Enslen v. Wheeler* (1892) 98 Ala. 200, 13 So. 473, is *Reddick v. Long* (1899) 124 Ala. 260, 27 So. 402. After the death of the debtor, but not before, executions were issued upon a judgment against him, and the property levied upon and sold. The court held that, under the Code, the writ was unauthorized, and conferred no authority to levy and sell, as no execution had issued on the judgment in the debtor's lifetime.

The question to be decided in *Cooper v. May* (1832) 1 Harr. (Del.) 18, was whether an alias *fi. fa.* could be issued several years after defendant's death without any *sci. fa.* against the administrator. The court stated, *arguendo*, that, if judgment is recovered, and the defendant dies in one month afterward, if a term is suffered to elapse, so that the execution must be tested after his death, such an execution would be irregular without a *sci. fa.*; and while, where chattels and other property are seized in execution, you may proceed to complete the execution at any time after, and the death of neither plaintiff nor defendant will stop the execution, you cannot take out execution which must be tested after the death of the defendant without a *scire facias*. Further, it was held that such a writ was not void, but voidable merely by writ of error.

To the same effect, is *Farmers' Bank v. Reynolds* (1834) 1 Harr. (Del.) 513, where the facts were very similar. The court held that an alias *fi. fa.* could not be issued on a judgment after a term had elapsed after the death of the defendant, without a previous *sci. fa.*

A charge that "a purchase made under an execution tested and issued after the death of the defendant, whose property was sold, and without revival, though previous executions may have been issued in his lifetime, did not create any title," was held error in *Doe ex dem. Shelton v. Hamilton* (1852) 23 Miss. 497, 57 Am. Dec. 149, the court stating that the doctrine, according to the former state decisions, was that such an execution was not void, but only voidable, and that a sale under it was good until regularly set aside, in a direct suit for that purpose by the heir or terre-tenant, and not a collateral proceeding.

It appearing in *Davis v. Helm* (1844) 3 Smedes & M. 17, that an execution was issued in the lifetime of the debtor, but returned after his death without a levy, it was insisted that, as one execution was issued in the lifetime of the debtor, it was not necessary to revive the judgment in order to issue an alias after his death, but the court refused to sustain the contention, stating that the point might have been urged as to the execution in existence at the time of the debtor's death, but that the subsequent executions which issued and bore teste after his death were, as to his administrator, new executions, subject to the operation of all the reasons which exist in favor of reviving the judgment.

Where it appeared that, shortly after an execution was issued on a judgment which was a charge upon real estate, it was returned unsatisfied when there was in fact real estate sufficient to have satisfied it, the court held, upon a motion made subsequent to the death of one of the defendants, for leave to issue another execution, that leave of the court was not necessary, when, as in this case, an execution had been issued within five years and returned unsatisfied in whole or in part; further, the court said that the proper relief, under the circumstances, would be to cancel the return of *nulla bona*, take the *fi. fa.* off the files, and return it to the sheriff to the end that he might proceed and sell the real estate by virtue of it. *Flanagan v. Tinen* (1868) 53 Barb. 587, Over-61 L. R. A.

ruled by *Wallace v. Swinton* (1876) 64 N. Y. 188.

An alias execution, levy, vend. ex., and alias vend. ex., all issued and had after a debtor's death, were set aside on motion, in *Aycock v. Harrison* (1871) 65 N. C. 8; the court holding that, if the sheriff for any cause return an execution issued in the debtor's lifetime, without a sale, no alias can issue, tested after his death, without a *sci. fa.* against the heir. In an appeal from an order granting a motion made in the same cause ([1874] 71 N. C. 432), for leave to issue vend. ex., it was held that notice of the motion should have been given to the personal representative as well as the widow and heirs; and further, that no lien by execution existed on which to base a vend. ex., for the reason that the execution in question was issued after the death of the judgment debtor without revival, and was therefore irregular.

Under a statute providing that the time of active energy in an execution should be four years, and that the period of renewal should be three years after such four years, it was held, in *Fishburne v. Verdier* (1843) 1 Speers L. 347, that the right to such renewal was not affected by the death of the debtor.

While recognizing the rule that an execution valid at the time it is placed in the hands of the sheriff cannot be suspended by the death of either of the parties, the court, in *Bennett v. Gamble* (1846) 1 Tex. 124, held that, if the process is returned unsatisfied, and an alias has to be resorted to; or if a lien was acquired by the first execution, but lost by want of due diligence in renewing the execution,—then the judgment would have to be revived in the name of the personal representative, before proceeding further.

A *fi. fa.*, levy, and vend. ex. were quashed in the lifetime of the judgment debtor, in *Wilson v. Hurst* (1815) Pet. C. C. 140, Fed. Cas. No. 17,808. Subsequent to his death, another *fi. fa.* was issued, without *scire facias*, whereupon it was ordered quashed, the court stating that, had it been an alias and continued down from the first execution, the case would have been different; but, being a new *fi. fa.*, it could be issued only after revival of the judgment against the executors of the decedent.

b. After issuance, but before delivery to sheriff.

In *Springer v. Sommerville* (1729) Bunb. 271, the debtor shot himself upon learning that a *fi. fa.* had been issued against him. Thereafter the writ was delivered to the sheriff and executed upon the goods of the debtor. The execution was held regular as to the executors of the decedent, on the ground that it bound the goods from its teste, which was in the debtor's lifetime.

Another case holding that the goods of a debtor are bound from the teste of the writ of execution, except as against purchasers in market overt, is *Ranken v. Harward* (1846) 10 Jur. 794; and the creditor was held to have title paramount to the executor, when the debtor died in the interval between the issuance of the writ and delivery of it to the sheriff.

But *People v. Kelly v. Bradley* (1856) 17 Ill. 485, is a directly contrary decision. In the evening of the day in which an execution was issued and bore date the debtor died. The writ was delivered to the sheriff the following day. The court held that it could not be executed, as no lien exists upon a debtor's goods until the execution is placed in the sheriff's hands, and in this case, at the time the writ reached the sheriff the judgment debtor was

dead and other rights had intervened, which could not be affected by a subsequent delivery of the execution to the sheriff.

c. After delivery, but before levy.

There are a few decisions, based on varying grounds, to the effect that the death of the defendant after the issuance and delivery of an execution to the sheriff suspends further proceedings under it.

In *Thoroughgood's Case*, Noy, 73, after the issuance of execution the debtor died, and the writ was levied against his executors; but the court held that it was no levy, as the writ was a *fi. fa.* out of the goods and chattels of the debtor, which the court held they could not be after his death. Had it been the plaintiff who died after the award of execution, it was said that the sheriff might have still gone on and made the levy, and, if no administrators or executors were appointed, the money made might be deposited in court until such appointment was made.

Where the debtor died after the issuance of a writ of *fi. fa.* a request to amend the writ by the insertion of a *testatum* clause, omitted from the writ by inadvertence, was disallowed on the ground that the rights of the administrator might be affected by such insertion. *Phillips v. Tanner* (1829) 3 Moore & P. 562.

Although a *fi. fa.* comes to the hands of the sheriff before the death of the defendant, and thereby becomes a general lien upon all his personal property, yet, inasmuch as it does not become a specific lien upon any particular property until the officer makes a levy and seizes the property into his custody, the death of the defendant suspends the execution of the process, and it is not regular for the officer to make a levy and sell the property after his death, as argued in *Davis v. Oswalt* (1857) 18 Ark. 414, 68 Am. Dec. 182. But in this case the execution was a special one under a decree condemning certain slaves to be sold, wherefore the court held that its issuance into the hands of the sheriff created as specific a lien as though the slaves had been actually levied on before the defendant's death, and the process of execution having commenced in her life, and being, according to the common-law theory, an entire thing, it might be completed by levy and sale after the debtor's death.

Similarly, in *James v. Marcus* (1857) 18 Ark. 421, after a *fi. fa.* was put in the sheriff's hands, but before a levy, the defendant died. The court held, in regard to a levy subsequently attempted to be made, that, as laid down in *Davis v. Oswalt* (1857) 18 Ark. 414, 68 Am. Dec. 182, the death of the defendant suspended the execution, except where the judgment was *in rem* and the execution a special one for the sale of particular goods. The court said, however, *obiter*, that, had the sheriff levied upon the personality of the debtor before his death, he would have acquired a special property therein not to be defeated by the widow's claim of dower.

A delivery of an execution to the sheriff previous to the debtor's death, when he had not begun to execute it, was held to constitute no lien which would justify a levy after the debtor's death, in *Jewett v. Smith* (1815) 12 Mass. 308.

The question of the validity of a sale made under an execution issued in the lifetime of the defendant, but levied upon the property of the estate and sale made after his death, came up directly for the first time in Texas, in *Conkrite v. Hart* (1853) 10 Tex. 140, and it was there held that the common-law rule on the subject had been abrogated by the probate law, §1 L. R. A.

and that judgment liens on the estates of deceased persons, like mortgage liens, could be enforced only by an application to probate court, and not by execution, and that a sale had thereunder conveyed no title. The correctness of the ruling herein, to the effect that such a sale was absolutely void, is questioned in *Webb v. Mallard* (1863) 27 Tex. 83.

But the great weight of authority goes on the theory that an execution is an entire thing, and, having been once begun by the delivery of the writ to the sheriff, the goods are bound from that time, and it is the sheriff's duty or privilege to execute it, irrespective of the debtor's death thereafter.

After the award of a *fi. fa.*, but before levy, the debtor died, in *Vincent v. Dale* (1553) 1 Dyer, 76b, but it was held proper to levy it upon the debtor's goods in the hands of his administrator.

Parke v. Mosse (1590) Cro. Eliz. pt. 1, p. 181, held that, where an execution was delivered to the sheriff before the debtor's death, it might be executed afterwards upon goods in the hands of his executor, for the reason that the goods are bound from the award of execution, so that the sheriff need not take notice of the debtor's death.

In *Horton v. Ruesby* (1687) Comb. 33, it was briefly held that an execution might be executed after the death of the party, on the ground that the executor, being privy, was bound as well as the testator. It does not appear, other than by the language used above, whether the execution was issued in the lifetime of the debtor.

It appearing that a *fi. fa.* was delivered to the sheriff before the death of the debtor, it was held to bind the goods from such delivery, so that levy and sale could be made afterwards, in *Eaton v. Southby* (1738) Willes Rep. 131.

Executions were in the hands of the sheriff, wholly unsatisfied and alive at the time of the debtor's death, in *Hullett v. Hood* (1895) 109 Ala. 345, 19 So. 419, and were afterwards paid by the administrator. The court held that in so doing the administrator committed no error, as, under the statute, the executions might have been levied and the money made on them after the death of the intestate.

It appearing that the defendant in execution died after judgment, and after the *fi. fa.* had issued, but before the levy, the court held, in *Brooks v. Rooney* (1852) 11 Ga. 424, 56 Am. Dec. 430, that the execution could be proceeded with notwithstanding the death of the defendant, and the fact that his heirs at law were minors, and no administration had been granted on the estate.

And the same doctrine appears from the *dictum* in *HATCHER v. LORD*.

Whether the death of the defendant in execution, after a delivery of the writ to the sheriff, but before a levy, will prevent a levy and sale under the execution, was decided in the negative in *Dodge v. Mack* (1859) 22 Ill. 93, upon the theory that placing the execution in the sheriff's hands, which perfects a lien on the property of the debtor subject thereto, is the mere commencement of the execution, which, being an entire thing, may be completed by levy and sale after the debtor's death, as the death of the debtor does not discharge the lien.

If an execution is in the hands of a sheriff at and before the death of the debtor, it was held, in *Logsdon v. Spivey* (1870) 54 Ill. 104, that a levy made subsequent to his death was binding upon his representatives and creditors.

A statute which provided that no proceeding should be instituted before the end of one year from the death of a debtor to enforce the lien

of any judgment was held not to apply to an execution issued in the lifetime of a debtor, when another statute provided that the death of a defendant after an execution was placed in the hands of the sheriff should not affect proceedings thereon. *Blumenthal v. Tibbits* (1903; Ind.) 66 N. E. 159.

One of the questions in *Hanson v. Barnes* (1831) 3 Gill & J. 359, 22 Am. Dec. 322, was whether, if the debtor died after the issuance of a *fi. fa.* to the sheriff, the writ was thereby suspended until *scire facias* had been had against the heir and terre-tenants. The court, while recognizing as a general principle the rule that where a new person is to be benefited or charged by the execution of the judgment there ought to be a *scire facias* to make him a party, held that it did not apply where the new party became interested after the process was regularly in the hands of the officer for execution, as otherwise by successive alienations and descents the plaintiff might be defeated *ad infinitum* in the satisfaction of his judgment.

An execution was issued after judgment upon goods previously attached. Subsequent to the issuance of execution the debtor died. Afterward the goods were taken under the execution and sold. An action of trover for the goods, by the subsequently appointed administrator of the debtor, was not sustained, the court stating that, leaving out of consideration any statutory provisions, nothing could be more clearly settled than the principle that, if a defendant dies after execution and before service, it is the duty of the sheriff to proceed to execute the writ, because the debtor's goods are bound by the teste, and held that in this instance the goods were as much bound by the previous attachment as, under the common-law rule, they would be bound by the teste of the writ. *Grosvenor v. Gold* (1812) 9 Mass. 214.

An execution was issued in the debtor's lifetime, and after his death levied on a slave as his property. His executors gave a forthcoming bond, which was forfeited, and an execution thereupon issued against them and was levied upon the same slave. Upon an attempt to quash the execution, the court stated the rule to be that if an execution is sued out in the lifetime of the debtor, but he dies before a levy, no *scire facias* is required to renew the judgment, but execution may be perfected forthwith by his personal representatives, and held that the giving of the bond did not change the situation, as it was but a step in the proceedings, and the usual course of the law, which the executors had the privilege of taking, and did not render necessary, either a judgment or execution in form against the executors, although the execution on the bond operated against them individually, and not in their capacity as executors. *Thompson v. Ross* (1853) 26 Miss. 198.

A sale under an execution issued prior to the death of the judgment debtor, but not executed until afterwards, was held lawful. In *Wait v. Savage* (N. J. Eq.; 1888), 13 Cent. Rep. 348, 15 Atl. 225, the court stating that in New Jersey the law is well settled against the contention that such a sale would not be effectual without first reviving the judgment by *scire facias*.

The statute providing that, "where any execution shall be issued by a justice of the peace, and levied on personal property, such property shall be . . . bound, by and from the levy of such execution, and not from the teste thereof," was held, in *McCarson v. Richardson* (1836) 18 N. C. (1 Dev. & B. L.) 561, to be for the protection of innocent purchasers, and not to apply to the defendant in the execution and his representatives, as to whom goods were still bound by the teste of the writ; so that, if a

debtor died after the issuance of execution, but before a levy, levy and sale might be made on the goods in the hands of the administrator without *sc. fa.* against him.

At the time of a debtor's death justice's executions against him were in the hands of a constable. Subsequent to the death of the debtor, no personalty being available, the executions were finally levied upon real estate, with notice to the heirs of such levies. Afterwards vend. ex. was issued and the property sold. The levy and sale were held good as against executions subsequently issued from a court of record, and revival against the heirs by *scire facias*. *Parish v. Turner* (1844) 27 N. C. (5 Ired. L.) 279.

A *sc. fa.* warning the widow and heirs of a deceased judgment debtor was held unnecessary in *Davey's Estate* (1890) 9 Pa. Co. Ct. 125, where the *fi. fa.* was issued before the death of the debtor, although levy was made afterwards, when inquisition was waived in a note upon which judgment was entered.

An execution is held to be pending from the moment it issues, in *Deering v. Wisler* (1898) 21 Pa. Co. Ct. 156, and the statute requiring *scire facias* against the personal representatives of a deceased judgment debtor before the issuance of an execution for the levy and sale of his real or personal estate, declared not to apply.

The lien of an execution upon a debtor's choses in action, issued in his lifetime but not enforced, continues after his death as against the other creditors of the debtor, as held in *Trevillian v. Guerrant* (1879) 31 Gratt. 525.

d. After levy, but before sale.

The doctrine that the death of the debtor after a levy suspends proceedings under the execution has a numerous following, although the decisions are based on various grounds, some holding that a revivor is necessary before proceeding further, while in other states the attachment of probate-court jurisdiction upon a debtor's death prevents the enforcement of a judgment except under the administration system prescribed by statute; and this rule is held not to be affected by the fact that a levy had previously been made. Other reasons are also given, as will be seen by a reference to the cases following.

In *Fry v. Branch Bank* (1849) 16 Ala. 282, an execution was issued and levied, but no sale made before the death of the debtor. The court held that a levy on real estate, under the prevailing statute, unlike a levy on personalty, did not divest the debtor of the title until the sale and execution of the deed by the sheriff, and therefore the land remained in the debtor until his death, and then passed to his heirs.

But a later Alabama case, *Jones v. Ray* (1874) 50 Ala. 590 (*infra*, this division), held that a sale of land was valid after the debtor's death, when a levy had been made in his lifetime, and the lien thus acquired not allowed to lapse.

Revivor seems to be a prerequisite in Arkansas, as held in *State Bank v. Etter* (1854) 15 Ark. 268, where, after an execution was issued to another county and levied upon land situated therein, but returned without a sale, the debtor died. More than two years after, the plaintiff, without revival of the judgment against the administrator, sued out a writ of vend. ex. The court held that this could not be done without reviving the judgment against the administrator, or heir, whether the former levy created a lien or not. Further, it was held, as the statute is silent on the subject, that, it appearing that after the levy was made the writ

was returned without a sale of the property by the order of the plaintiff, and no further steps were taken for over two years, such delay was sufficient to displace the lien of the levy and render it of no effect as a defense to an after-acquired title.

Before the death of the debtor, in *Barber v. Peay* (1876) 31 Ark. 392, an execution was issued and levied upon real property, but no sale made. After his death the judgment was revived against the administrator, and a venditioni exponas issued to sell the premises previously levied on. It was contended that the judgment creditor must look to the general assets of the estate of decedent for payment and could not issue vend. ex. after the death of the debtor, but the court held to the contrary on the ground that the levy of the original *fi. fa.* on the lots segregated them from the rest of the estate, and created a specific lien upon them which could be enforced by a sale upon vend. ex. after the death of the debtor, upon a revival of the judgment against his administrator.

The court stated, in *Powell v. Macon* (1883) 40 Ark. 541 (*supra*, III. a, 1), that, had execution been taken out in the lifetime of the debtor, and levied upon lands, then a specific lien would have been created, and after the debtor's death the judgment might have been revived and the land sold, but, no execution having been so issued, that the judgment was, after the debtor's death, subject to the administration system of the surrogate's court.

So, in *Hare v. Hall* (1883) 41 Ark. 372, it is held that where the levy of an execution under a judgment was made in the lifetime of the judgment debtor a writ of vend. ex. is permissible after revivor against the administrator.

After the death of the sole judgment debtor, it was held irregular, in *Bristow v. Payton* (1825) 2 T. B. Mon. 91, 15 Am. Dec. 134, for the sheriff to have proceeded further under the execution, without revivor, although several executions had been issued in the lifetime of the debtor, and levies made.

The death of the owner of land after a levy, but before the sale, was held, in *Huston v. Duncan* (1866) 1 Bush, 205, to pass the whole title to his heirs; and that without a revivor against them there was no title subject to sale by the levying officer, which he could pass to a purchaser; and that such a sale would, therefore, be void.

The question in *Holeman v. Holeman* (1886) 2 Bush, 514, was whether the power of the sheriff to enforce his levy by a sale of the land did or did not cease by the death of the defendant in the execution. The court decided that the sheriff's power did cease in such an event, mainly for the reason that the statute confers certain rights upon the defendant in an execution without making any provision for their exercise by another in the case of his death; the court further held, however, that the lien of the levy upon the land was not discharged by the death of the debtor, but might be enforced in equity against the estate.

Where a debtor died after levy of execution, but before sale, it was held, in *Burge v. Brown* (1869) 5 Bush, 535, 96 Am. Dec. 369, that a revivor of the judgment against the heirs was necessary in order to give a valid title to a purchaser at the execution sale; the court further stated, however, that the execution creditors by their levy in the debtor's lifetime obtained a legal lien on the property which was not destroyed on his death, and could be enforced in equity.

From a brief memorandum of decision in *Howe v. Lane* (1887) 8 Ky. L. Rep. 783, it appears to have been held that the death of the defendant in an execution which has been 61 L. R. A.

levied upon personal property does not discharge the levy, but, until it is revived, suspends all power in the sheriff except to maintain the status existing under the levy when the defendant died.

In determining whether a levy made in the lifetime of the debtor was valid, the court said, in *Campau v. Barnard* (1872) 25 Mich. 381, that, if it was not, it could not be cured of any radical defect by proceedings after his death.

Land was sold after the death of the debtor under an execution issued and levied in his lifetime, in *Barden v. M'Kinne* (1826) 11 N. C. (4 Hawks) 279, 15 Am. Dec. 519, without further writs or proceedings of any kind. The case turned, however, not on the death of the debtor, but on the sheriff's omission to issue vend. ex. before making the sale, which the court held was fatal to the validity of a sale of land.

A vend. ex. issued without *scire facias* against the heirs of a deceased debtor was held void in *Samuel v. Zachery* (1844) 26 N. C. (4 Ired. L.) 377, although *ieri facias* had been issued and levied upon the land of the decedent in his lifetime. The court said that the rule would, of course, be different in the case of personal property levied upon in the lifetime of the defendant, but that land on the death of the ancestor descends to the heir *cum onere*.

Lee v. Eure (1880) 82 N. C. 428, held that leave granted by the clerk upon motion before him to issue a writ of vend. ex. more than three years subsequent to the death of the judgment debtor, after notice to his administrator and heirs at law, but not to a grantee of the land who had purchased it in the lifetime of the debtor, when execution had been issued and the land levied upon previous to his death, was without authority and sale under it a nullity, for the reason that the proceeding, being regulated by statute, should have been in the form of an action, and not before the clerk.

A sale of land made under a writ of vend. ex. issued several years after the death of the debtor without *scire facias* against his heir was held null and void in *Barfield v. Barfield* (1893) 113 N. C. 230, 18 S. E. 505.

But in *Renners v. Rhinehart* (1890) 107 N. C. 705, 12 S. E. 456 (*infra*, this division), the purchaser at such a sale was held to acquire a good title, although in this instance the purchaser was the judgment creditor.

In *Wood v. Colwell* (1859) 34 Pa. 92, it was held that, under the prevailing statute, a venditioni exponas could not issue after the defendant's death without a *scire facias* against his executor or general representative, although a *fi. fa.* was issued and levy made in his lifetime. The *fi. fa.* herein, however, was a *testatum fi. fa.*

But a later Pennsylvania decision, *Connell v. O'Neil* (1893) 154 Pa. 582, 26 Atl. 607 (*infra*, this division), is apparently in conflict. In the latter case, however, the levy was upon personality.

In *Overton v. Perkins* (1837) 10 Yerg. 328, a venditioni exponas issued several years after the death of the judgment debtor, without revivor, was declared void although execution was issued and a levy made in the lifetime of the decedent. In so deciding, the court makes a distinction between personality and realty, holding that in the former the sheriff, by levying and taking the goods into his possession, acquires a special property therein, so that he may sell them after the return day of the execution is passed, but that, by levying upon land, no special property is acquired therein by him, and he cannot sell it after the execution has spent its force. The creditor suggests that the true ground upon which to have put this decision

was the laches of the judgment creditor in pursuing his right to sell after the lien of the levy was obtained, but this ground is not directly relied upon in the opinion.

A venditional exponas tested after the death of the judgment debtor, upon which sale was had, was held void in *Stockard v. Pinkard*, (1845) 6 Humph. 119, although executions were issued and levied, and a vend. ex. issued, but returned without sale, in the lifetime of the debtor. The court stated that the land descended to the heir upon the ancestor's death, and was not liable to his debts until it should appear, by proceedings against the administrator, that the personal assets were exhausted, after which the lands of the heirs might be rendered liable by *scire facias*, and, as this was not done, that the sale was void.

Overton v. Perkins (1837) 10 Yerg. 328, *supra*, was approved of, *arguendo*, in *Rutherford v. Read* (1846) 6 Humph. 423, the court stating that it approved of the doctrine that, when the death of the owner of land previously levied on took place before the sale, the inheritance descended to the heirs, and the sheriff, with or without a vend. ex. could not make a valid sale until *scire facias* had been had against the heirs.

The question in *Chandler v. Burdett* (1857) 20 Tex. 42, was, What is the effect of the death of a judgment debtor after a levy under execution but before sale? It was held that, under the statute, the execution abated upon the death of the debtor, and the whole estate came under the control of the probate court to be distributed in the order directed by statute.

The identical question arose in *McMiller v. Butler* (1857) 20 Tex. 404, and was decided on the same grounds as *Chandler v. Burdett* (1857) 20 Tex. 42, *supra*, except that it was further held that an execution creditor having levied upon the property before the death of the debtor, may have a sale of the same afterwards under certain statutory conditions by order of the county court, obtained after the appointment of an administrator.

And so, in *Burdett v. Chandler* (1858) 22 Tex. 14, it was held that, where a judgment creditor had issued execution and levied upon property of a deceased judgment debtor in his lifetime, the county court might authorize a sale of the property subject to such lien, after the death, upon a six months' credit, in satisfaction of the debts and liens of the judgment creditor.

The execution, in *Cook v. Sparks* (1877) 47 Tex. 28, was issued and levied in the lifetime of the judgment debtor, but no sale was had thereunder until after the debtor's death and about nine years after the original levy, when vend. ex. was issued and sale had. The court held such an execution voidable rather than void, and, although it appeared that the debtor's estate was being administered by his wife according to a will, and without the control of the probate court, it was held that the executrix could set aside the levy and sale, as the judgment had not been revived against her.

In the words of the court in *Taylor v. Snow* (1877) 47 Tex. 462, 26 Am. Rep. 311, it is held that, "while a sale of property under execution after the death of the defendant is relatively void, and that the title acquired by the purchaser at such sale cannot be maintained against the administrator, or parties acquiring their title under and through the administration, and that such sale may be avoided by any party having an interest in the property if he should seek to do so in the proper time and manner,—this cannot be done where there has not been, and cannot be, any administration upon the estate, in a collateral proceeding, 61 L. R. A.

... upon grounds going to the validity of the judgment itself, rather than the execution."

Where the debtor was alive at the time execution was issued, but was dead when the sale was had, it was held that the sale was not absolutely void, and so not liable to attack in a collateral proceeding by the heir. Upon rehearing the court explained that, when administration has been opened upon an estate, the probate laws apply, so that a sale under execution would be, as to the administrator, absolutely of no effect; but that, there being no administration in this instance, the heir took the inheritance burdened with the debt of his ancestor, and hence a sale under execution would be, as to him, only irregular and voidable, in a direct proceeding within a reasonable time. *Pierce v. Logan* (1883) 2 Posey Unrep. Cas. (Tex.) 355.

But a majority of the states favor the theory that a levy in the debtor's lifetime creates a blinding lien upon the property levied upon which is not affected by the debtor's death subsequently, but before the sale.

It seems to have been held in *Sutcliff v. Saunderson* (1868) 3 Keble, 395, that where, after the levy of an execution upon a cow, the testator died, the lien of the levy was binding upon the very property levied upon, which was thenceforth *in custodia legis*, and exempt from being administered upon by the executors.

From *Caperton v. Martin* (1843) 5 Ala. 220, it appears that, where execution upon a judgment is begun by a partial levy, the lien upon the personal estate is fixed and absolute, and is not destroyed by the subsequent death and insolvency of the defendant.

Under a statute providing that a writ of fieri facias issued and received by the sheriff during the life of the defendant may be levied after his decease, or an alias issued and levied, if there has not been the lapse of an entire term, so as to destroy the lien originally created, it was held, in *Jones v. Ray* (1874) 50 Ala. 509, that a sale of land was valid, made after the debtor's death, but under an execution issued and levied in his lifetime.

The right of a wife to dower in slaves under a claim that they belonged to her husband at the time of his death was denied in *Arnett v. Arnett* (1853) 14 Ark. 57, where it appeared that prior thereto they were levied upon under an execution by virtue of which they were sold after his death.

But from later Arkansas cases, *supra*, this division, revivor seems to be regarded as a prerequisite before proceeding to sell.

In *Hudgins v. McLain* (1902; Ga.) 42 S. E. 489, the court refused to set aside a sheriff's sale made after the judgment debtor's death but under an execution issued in his lifetime, although at the time of the sale no legal representative had been appointed over the estate, and there were minor heirs of the deceased, and there were claims against the estate of higher dignity than the judgment under which execution was issued.

Execution was issued and levied in the lifetime of the defendant, and two months subsequent to his death the property levied upon was sold, without notice of the judgment, to his executor, administrator, or heirs, in *Davis v. Moore* (1882) 103 Ill. 445. The court held that the statutory provision that no sale shall be had on any judgment until at least three months' notice in writing of the existence of such judgment shall be given to the executor, administrator, or heirs of the deceased, "before issuing execution or proceeding to sell," had no reference to cases in which execution was issued and levied in the lifetime of the debtor, but referred only to judgments which, after the death of the defendant, it would

have been necessary at common law to revive by scire facias, before issuing execution, and that in this case, after the death of defendant, there remained only the duty of the sheriff to sell, fixed and determined by the levy previously made.

Where an execution was issued, and a levy made, in the lifetime of the debtor, it was held, in *Doe ex dem. Wolf v. Heath* (1844) 7 Blackf. 156 that the execution might be completed by a sale of the property levied on, notwithstanding the death of the debtor.

And in *Doe ex dem. Murphy v. Hayes* (1853) 4 Ind. 117, under similar circumstances, it was held that the sale might be completed by a writ of vend. ex. issued after his death. As the court states, "these two writs are in fact but one writ,—the one designed to complete what the other had commenced."

In *Mead v. McFadden* (1879) 68 Ind. 340, after an execution was issued and levied on real property the debtor died, and his widow claimed the premises levied on under a statute providing that a widow is entitled to \$500 in value of the property of her deceased husband, and, if the personal property is insufficient to make said sum, the deficit shall be a lien upon the real estate of the decedent, to be paid in the same order as judgments and mortgages; but the court held that the lien of the judgment under which execution was issued attached in the lifetime of the debtor, and took precedence, while the widow's claim only accrued at his death.

Proof of the death of the defendant in an execution at the date of sale, merely, without reference to the time when the execution was issued, was rejected because it could not affect the validity of the sale, in *Sprott v. Reid* (1852) 3 G. Greene, 492, 56 Am. Dec. 549.

The court says, in *Green v. McMurtry* (1878) 20 Kan. 189, at 194: "In some cases, after jurisdiction has been obtained, and some particular proceeding has been commenced before the death of either party, such particular proceeding may be carried on to completion after the death of one or both of the parties, the whole thing relating back to the time of the commencement of the proceeding. This is illustrated by sale of property on execution after the death of one of the parties, where the property was levied on under such execution before such death."

Before the death of the debtor, in *Coffin v. Freeman* (1892) 84 Me. 541, 24 Atl. 986, the execution had been issued and levied, and notice of sale given. The court held that the execution process was not arrested by the death of the debtor, but, as the seizure was made and the writ partially executed during the lifetime of the judgment debtor, the sheriff might lawfully complete the execution of the process thus commenced.

In deciding that land levied on by a fieri facias in the lifetime of the debtor may be sold after his death, the court, in *Jones v. Jones* (1827) 1 Bland Ch. 443, 18 Am. Dec. 327, states that the real estate is thus intercepted in its descent and evicted from the hands of the heir, whose interest cannot be allowed in any manner to retard or turn aside an execution which has in fact or by relation been sued out in the lifetime of the debtor.

It appeared in *Boyd v. Harris* (1849) 1 Md. Ch. 466, that judgments were rendered and executions upon them issued and levied against the debtor in his lifetime and enjoined by him. The court held that, upon the dissolution of the injunction subsequent to his death, nothing more was necessary to authorize the sheriff to sell but a writ of vend. ex., as the lands were *in custodia legis*, and the death of the debtor 41 L. R. A.

subsequent to the levy interposed no obstacle to the further proceedings of the sheriff.

The court says, *obiter*, in *Hochgraef v. Hendrie* (1887) 66 Mich. 536, 34 N. W. 15, that the Michigan statutes recognize and continue the common-law rule that after levy an execution sale will be had without reference to the death of the judgment debtor, and that, in case of an attachment (referring to *Smith v. Jones* [1867] 15 Mich. 281), it holds, and the land may be sold although the defendant dies before judgment.

After the issuance and levy of an execution and during a suspension of proceedings but before the suing out of vend. ex., the debtor died, in *Taylor v. Doe* (1851) 13 How. 287, 14 L. ed. 149. It was insisted that the issuance of vend. ex. and proceedings thereon after the death of the judgment debtor, without revival of the judgment against the personal representative, was irregular. This contention was not supported, however, it being held that, by the levy, the judgment lien attached specifically upon the property levied upon, and determined the rights of those concerned, and that the suspension of proceedings wrought no change in the position of the parties, so that the vend. ex. was merely a continuation and completion of the previous execution and levy by which the property had been appropriated, and the sale had thereunder was therefore regular and valid. This case arose in the northern district of Mississippi.

The question involved in *Mundy v. Bryan* (1853) 18 Mo. 29, was as to the validity of a sale of real estate after the death of a defendant upon an execution issued and levy made in his lifetime. The court held the sale was not void, being but voidable at most, and that the purchaser would acquire title to the estate sold. This decision was made under the law as it stood prior to 1845, the court stating that the question could not arise under the law as it stood in 1853, as the Revised Code provided for such an occurrence.

While conceding that executions against the property of decedents have been prohibited in Missouri since the act of 1827, which required a resort to the probate court to settle any controversies in regard to the estate of decedents, the court held, in *Lewis v. Coombs* (1875) 60 Mo. 44, that a levy and sale was not void so as to be liable to impeachment in a collateral proceeding, when it was against the property of a man not known by either the officer or purchaser to be dead, although he did in fact die between the levy and sale, as was attempted to be shown in a subsequent action of ejectment by a representative of the decedent against the purchaser.

The delivery of an execution to the sheriff in the lifetime of the judgment debtor was held, in *Becker v. Becker* (1866) 47 Barb. 498, to bind his personality, and authorize a sale thereof after his death.

A sale of real property had after the death of a debtor, without revival, under an execution issued in his lifetime, was held regular in *Wood v. Moorhouse* (1869) 1 Lans. 410.

And in (1871) 45 N. Y. 368, upon appeal the court stated that, if either plaintiff or defendant dies, or any other change of interest occurs, after execution is issued and partially executed, the rule that there must be a revival of the judgment by scire facias does not apply.

There having been a judgment, execution, levy, and advertisement in the lifetime of a judgment debtor, a sale after his death was held to be authorized and effectual to pass his title in the property so levied upon in his lifetime, in *Holman v. Holman* (1872) 66 Barb. 215.

The judgment creditor, who was the purchaser at a sale under execution had after the death of the debtor, was held to have acquired a good title, in *Benners v. Rhinehart* (1890) 107 N. C. 703, 12 S. E. 450, it appearing that the execution was issued before the debtor's death. Some doubt was expressed as to whether a judgment creditor came within this general rule as to purchasers, but the court held that at most his title would be voidable only, and liable to be set aside only in a direct proceeding for that purpose.

But see other North Carolina cases *supra*, this division, holding that revivor as provided by statute is necessary.

After an execution had been issued and lands levied upon thereunder, the judgment debtor died, after which the lands were sold under a vend. ex. without proceedings to make his representatives parties to the judgment. The sale was held valid in *Bigelow v. Renker* (1874) 25 Ohio St. 542.

It was declared in *Bleecker v. Bond* (1820) 4 Wash. C. C. 6, Fed. Cas. No. 1,535, to be the practice in Pennsylvania that the death of either of the parties after the issuance of fieri facias does not prevent a venditioni exponas from issuing immediately upon the return of the fi. fa. levied on land, and that a scire facias is not necessary.

But scire facias is regarded as necessary in *Wood v. Colwell* (1859) 34 Pa. 92, *supra*, this division.

A valid levy in execution upon personalty is not destroyed by the death of the defendant, as held in *Connell v. O'Neill* (1893) 154 Pa. 582, 20 Atl. 607, the court saying: "The grasp of the law having once validly attached, its officer must go on and complete its duty."

The court states in the course of the opinion in *Downer v. Brackett* (1842) 21 Vt. 590, that the law as laid down in the case of *Grosvenor v. Gold* (1812) 9 Mass. 214, that goods attached on mesne process might lawfully be sold by the sheriff upon execution, although the judgment debtor had died insolvent after the judgment and award of execution and before the sale, was undoubtedly the same in Vermont, notwithstanding a statutory provision that, when the estate of any person deceased should be insolvent and insufficient to pay all the debts owing, the estate should be distributed *pro rata* among the creditors in proportion to their claim against the estate.

The judgment debtor died after execution had been sued out and levied, in *Sumner v. Moore* (1839) 2 McLean, 59, Fed. Cas. No. 13,610, and the court declared that it was indisputable that in such a case execution proceeds as if death had not taken place, on the principle that an execution is an entire thing.

At the teste of an execution issued against a corporation in *Boyd v. Hankinson* (1897) 83 Fed. 879, and at the time of the levy thereunder, the corporation was in the full enjoyment of its franchises, but was dissolved by a proclamation of the governor before the sale took place. In analogy with the rule in regard to natural persons, it was held that, the sale was good, the court stating that, "when a cause has been tried, judgment obtained and entered, and execution issued and levied, the rights of the parties have become fixed. No new proceedings are necessary. If the defendant die after this, his death does not prevent the sale under execution."

e. After sale, but before execution of deed.

In *United States v. Insley* (1892) 49 Fed. 776, the defendant having died after a sale by execution, but before the date of the deed, it 61 L. R. A.

was held necessary to revive the action before the deed could be executed; but upon a subsequent hearing of this suit in the United States circuit court of appeals ([1893] 4 C. C. A. 296, 12 U. S. App. 125, 54 Fed. 221), this decision was not supported, the court stating that the deed was the mere evidence of transactions that had been fully consummated in the lifetime of the judgment debtor, and, notwithstanding the failure to revive, was valid. The last decision was affirmed upon appeal taken to the United States Supreme Court, and reported in (1893) 150 U. S. 512, 37 L. ed. 1163, 14 Sup. Ct. Rep. 158.

IV. Civil death of debtor.

In *Ashmore v. McDonnell* (1888; Kan.) 16 Pac. 687, where, after a judgment was rendered, but before execution was issued, the judgment debtor was convicted of murder and deprived of all civil rights, it was held that before an execution could be issued on the judgment it would have to be revived against his legal representatives.

But civil death was held not to be identical in law with physical death, in *Coffee v. Haynes* (1899) 124 Cal. 501, 57 Pac. 482, and under the Penal Code providing that a person sentenced to imprisonment for life is not incapable of making and acknowledging a sale or conveyance of property, the court held that a plaintiff had a right to enforce a judgment rendered against a prisoner subsequently to his conviction, by execution against his property.

V. Death of one of several judgment creditors before issuance.

A husband was allowed to take out execution without sci. fa. after his wife's death upon a judgment recovered by them, in *Miles's Case* (1674) 1 Mod. 179, for the reason that by the judgment the debt became due to him in his own right.

A ca. sa. was amended in *Newnham v. Law* (1794) 5 T. R. 578, after the death of one of the plaintiffs, by suggesting the death on the roll and striking out the name of the decedent from the writ.

After a woman obtained a judgment she married, whereupon she and her husband obtained a judgment upon sci. fa. in order to have execution, which was taken out, but subsequently the wife died. The court held that the judgment of sci. fa. vested such an interest in the husband in the debt that it survived to him upon the death of the wife, and entitled him to issue execution thereon. *Woodyer v. Greaham* (1698) Carth. 415.

The question in *Ballinger v. Redhead* (1895) 1 Kan. App. 434, 40 Pac. 828, was whether, after the death of one of the members of a firm which was the judgment creditor in a judgment, the judgment should have been revived before the issuance of an execution under which land was sold. It was contended that no revivor is necessary, except in the case of the death of a sole plaintiff or defendant, but the court held that the law requires that, in all actions where either of the parties die, it must be called to the notice of the court, and a revivor ordered by the court, or an order made that the surviving party, plaintiff or defendant, be allowed to proceed to the final determination of the matter in litigation the same as though the deceased party had survived.

There were two plaintiffs in the judgment in *Payne v. Payne* (1848) 8 B. Mon. 391, one of whom died after an execution was issued, but previous to another more than twenty years later, in which his death was suggested. This death was relied upon as a ground for quash-

ing the latter execution, but the court held that it was fully settled that where there are two or more plaintiffs or defendants in a personal action, and one or more of them die after judgment, execution may be had for or against the survivors without a *scire facias*.

It was contended in *Hamilton v. Lyman* (1812) 9 Mass. 14, that where there are two or more judgment creditors, and before execution issues one of them dies, the survivors must revive the judgment by *scire facias* before they can have execution. But the court held that there is no authority in support of this principle,—on the contrary, the proper mode of proceeding in such a case being to take out the execution conformed to the judgment in the name of all the creditors without regarding the death of anyone; that a *scire facias* seems necessary only when the execution is to issue in the name of someone, not a party to the record, as an administrator or executor. The court further said that probably, if suggestion had been made to the court of the death of one of the creditors after judgment, the execution would have been allowed to issue in the name of the survivors only, and, as the latter mode had been adopted in this instance, it would not be held so irregular as to make the execution void on account of its having been so issued without order of the court.

After the recovery of judgment by a husband and wife, the husband died; and upon mention of that fact to the court, execution was ordered to be issued in the name of the wife, the court stating, however, that it might have been taken out in the name of the recoverers notwithstanding the decease of one of them. *Bowdoin v. Jordan* (1812) 9 Mass. 160.

One of three judgment creditors died after the rendering of judgment and before the issuance of execution, in *Cushman v. Carpenter* (1851) 8 Cush. 388; and, upon a suggestion of the death upon the clerk's docket, execution was issued only in the name of the two survivors. This was assigned as error, inasmuch as the execution must be founded on the judgment, and must be issued in the name of the same parties. The court, in discussing the question, states that the death of one of the plaintiffs does not necessarily require any change of parties, and the execution might properly have been issued in the name of all the judgment creditors, as, when no new party is introduced, nor anyone affected beyond the original parties to the judgment, no *scire facias* is necessary before issuing an execution. But, though execution might be thus issued in the name of all, the court stated that by the English practice it might be issued in the name of the survivors upon a suggestion being made on the roll of the death of one of the judgment creditors, and that the suggestion made on the clerk's docket in this instance was equivalent to a suggestion on the roll.

The general rule in all personal actions where there are two or more plaintiffs or defendants and one dies after judgment is stated in *Howell v. Eldridge* (1840) 21 Wend. 678, to be that execution may be sued out without any *scire facias*, for the reason that the execution of the judgment is not chargeable or beneficial to anyone who was not before a party thereto, and the court held that such rule applied as well to an action in ejectment where the surviving plaintiff took by devise the right of the deceased in the premises.

Upon the death of the executor of a deceased legatee, in favor of whom, with several other petitioners for legacies, a decree had been made, it was held, in *Ellison v. Andrews* (1851) 34 N. C. (12 Ired. L.) 188, that the administrator *de bonis non* might have execution only after reviving the decree by *scire facias*; that, on account of the interests of the several petitioners being in this instance perfectly distinct, there was no survivor of the right to issue execution; and furthermore, that an administrator *de bonis non* was not in sufficient privity with the deceased legatee to be considered a personal representative legally entitled to the money when raised without *scire facias*.

It was recognized as true, in *Berryhill v. Wells* (1812) 5 Binn. 56, that where one plaintiff dies after judgment, no one but the survivor is entitled to have execution, which may be issued by him without a *scil. fa.* upon suggesting the death of the deceased plaintiff upon the record or by recital in the execution, because there is no new party to the execution; but the court held that this was not so where, although one of the plaintiffs died after judgment, the survivor, who was a widow at the time of the judgment, married, and therefore *scil. fa.* was necessary to introduce her husband into the record, as after her marriage she must take out execution in his name, and not in her own.

But a different rule appears in *Frohook v. Gustine* (1839) 8 Watts, 121, where a surviving plaintiff was held to have no power to issue execution in an action for partition without *scire facias* to show cause why writ de partitione facienda should not issue, the court stating it to be a general rule that if, after judgment, but before execution, either the plaintiff or defendant die, judgment must be revived by *scire facias* by or against the representatives of the deceased, before any execution can issue.

And, in *Freller v. Freller* (1885) 1 Pa. Co. Ct. 265, the issuance of execution by a surviving plaintiff without a suggestion on the record or recital in the writ of the death of the coplaintiff, and without its appearing whether any letters of administration were granted in the estate, was held irregular.

An execution issued in the name of joint plaintiffs, when it was suggested on the record that one of them was dead at the time, was held properly issued without any revivor of the judgment, in *Dickinson v. Bowers* (1874) 7 Baxt. 307.

So, in *Lane v. Beltzhoover* (1840) Taney, 110, Fed. Cas. No. 8,047, where it was moved to set aside a fieri facias, upon the ground that one of the plaintiffs was dead at the time it was issued, and no suggestion thereof was made upon the record, the court held that the process was undoubtedly defective, but might be amended, either according to the English cases by suggesting the death of the decedent, and striking out his name from the fieri facias so as to make it issue in the name of the surviving plaintiff, or under the statute providing that courts of the United States "may, at any time, permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall, in their discretion and by their rule, prescribe."

VI. Death of one of several judgment debtors.

a. Before issuance.

1. In general.

It may be stated as a broad rule, to which, however, there are many varying decisions, that upon the death of one or more of several judgment debtors, execution may be issued against all, in order to conform to the judgment, but can be executed only against the goods and chattels of the survivors.

In *Thompson v. Bondurant* (1849) 15 Ala.

346, 50 Am. Dec. 136, the court recognizes as a rule of practice, well settled, that, if a judgment be rendered against two or more defendants, and one dies before execution is issued, it may be issued as against all the defendants, but can be levied on the goods of the survivors only, and is in fact an execution against them alone. The facts herein, however, showed that decedents died before entry of judgment against them, and, as the execution purported to be against them also, there being no judgment to support it, it was quashed.

In *Fabel v. Boykin* (1876) 55 Ala. 383, it was held that a judgment, having been rendered against two when one was dead, was void only as to the one deceased, and no motion having been made to vacate it, execution was properly issued in conformity with the judgment against both, although it could be enforced only against the property of the survivor.

A motion made to quash an execution, in *Smith v. Lockett* (1884) 73 Ga. 104, because the clerk had no authority to issue the *fi. fa.* after the death of one of the defendants, and also because the execution did not follow the judgment as to costs, was sustained on the latter ground, but, in regard to the first ground, the court stated that, since the passage of the statute making a judgment a lien on all the property of a defendant from the time of its rendition, it was not necessary, before issuing execution, to revive a judgment by *scire facias* against the heir or legal representative of a deceased party to a judgment.

Before an execution was issued against a principal and his bail the principal died. Upon a motion by the bail to quash the execution, the court held that the judgment might be enforced against the survivor without a *scire facias*, and, though nominally against both for the sake of conforming to the judgment, it could be enforced only against the survivor. *Carnahan v. Brown* (1841) 6 Blackf. 93.

The doctrine that where one of two or more defendants to a joint judgment dies after judgment, execution may issue against the survivors without a revival by *scire facias*, was held to be settled law, in *Johnston v. Lynch* (1814) 3 Bibb, 334. Further, it was directed that, as the execution must agree with the judgment, it must be sued out in the name of all of the defendants.

Under the Code, it was held in *Fleece v. Goodrum* (1864) 1 Duv. 306, that the death of part only of the defendants does not prevent execution being issued operating alone against the survivors and their property, and that this principle applied to a judgment the record of which was lost or destroyed.

The rule in regard to the issuance of execution when there are several defendants and one of them dies was stated, in *Davis v. Helm* (1844) 3 Smedes & M. 37, to be that in such case there is no need of a *scire facias* as to the survivors; that the execution, however, must issue against all, so that it may correspond with the judgment, and may then be levied on the goods of the survivors who can claim contribution. But the court held that the execution could not be levied on the goods of the deceased without revival of the judgment against his administrator.

Wade v. Watt (1866) 41 Miss. 248, was a decision in regard to a statute providing that upon the death of a codefendant that fact shall be noted on an execution issued against the survivors. The court held that this statute was for the protection of the right of the decedent to the end that his property should not be taken under the execution, and that the property of the survivors was liable, although there was a failure to make note of the death as provided in *L. R. A.*

vided, as the provision had no reference to them; and that their property was liable to execution in the same way as if their codefendant had been alive when the writ was issued.

The following rules are deduced from prior decisions and the Code, in *Bowen v. Bonner* (1871) 45 Miss. 10, *viz.*: That where a codefendant dies plaintiff may have execution against the survivors, although it must issue against all by name with a suggestion of the fact of the death upon the writ; also, that the right to execution against survivors is not dependent upon bringing in the representatives of deceased parties; therefore in proceeding against the survivors and against the representatives of one of several deceased parties, it is not necessary to bring in the others, but only to proceed against them by name for conformity, with proper suggestion of death. Further, when an executor or administrator comes voluntarily into court asking to be made a party to a suit, execution may be issued against him without *scire facias*. The court further held that primarily *scire facias* is not necessary in order to issue execution against survivors unless no execution has been issued within a year and a day; but, in order to charge the estates of the deceased parties in the hands of their representatives, revival is necessary.

In *Lucas v. Johnson* (1851) 6 How. Pr. 121, the court declared that an execution issued in form against all of several defendants when one was deceased was, so far as it issued against him, a nullity, as, upon his death, his personal property vested in his legal representatives, and could not be levied upon by virtue of any process against him; but the execution was held operative against the survivors. This decision, however, is not entirely in point, the execution being issued upon a judgment for costs accruing upon a motion made by the surviving defendants after the death of the decedent without taking any notice of it having occurred.

An execution was held properly issuable against a survivor in *Cabiness v. Garrett* (1831) 1 Yerg. 490, without revival against him, where it appeared that execution had been issued within a year after judgment was rendered, and returned, "No property found." The execution was issued in the names of both defendants, which, the court remarked, was proper.

In *Lucas v. Johnson* (1851) 6 How. Pr. 121, *Nail* (1848) 9 Humph. 542, on the authority of *Cabiness v. Garrett* (1831) 1 Yerg. 491, that an execution is not void because of the death of the principal defendant before its issuance, when it was issued in the joint names of both principal and stayor, although there was no revival against the personal representative of the decedent.

So, in *Cheatham v. Brien* (1859) 3 Head, 553, it is held that the death of the principal after judgment interposes no objection to the issuance of an execution without reviving the judgment, but that, although it must be taken out against both parties, it may be levied only on the property of the survivor.

In *Holt v. Lynch* (1881) 18 W. Va. 567, it was held that an execution might issue against debtors, though one or more had died, if any survived, without *scire facias*, in like manner as though no death had taken place, but that such execution must be in the name of all of them,—the dead as well as the living; and it was further held that an indorsement made on the writ by the clerk, to the effect that one of the debtors had died, was a mere nullity, having no effect whatever upon the execution.

But quite a number of cases lay down the rule that a suggestion of the death must in some way be made upon the writ, whereupon execution may issue against the survivors only.

An execution by ca. sa. was taken out against all four judgment debtors where one of them was dead, in *Pennoir v. Brace* (1697) 1 Saik. 319, 1 Ld. Raym. 244, Carth. 404 and the court held that, being in the personality, it might survive and be sued against the survivors without a scire facias, if a suggestion of the death of the party was made upon the record.

In *Withers v. Harris* (1702) 2 Ld. Raym. 808, it is said, *arguendo*, that where there are several plaintiffs or defendants, and one of them dies, execution may be sued by or against the survivors, upon suggestion of the death made upon the roll; but that where there is but one defendant, and he dies, it is a question whether execution may be sued out without scire facias, especially in personal actions, but that in ejectment it may be different, as execution is there had only out of the land recovered.

On account of the death of one of the persons named in it, the court, in *Cawthorn v. Knight* (1847) 11 Ala. 579, allowed an execution to be amended by striking the name of the decedent therefrom, without impairing its validity as to those against whom it should have issued.

The rule is laid down in *Jones v. Swift* (1847) 12 Ala. 144, that an execution cannot be issued against the estate of a deceased debtor where one was not previously issued in his lifetime on the same judgment. The court further says that the fact that there is a plurality of defendants in the judgment will not render a different rule applicable in respect to one who is dead; that the death might be suggested, however, and execution issue against the survivors.

In *Blanks v. Rector* (1866) 24 Ark. 496, 88 Am. Dec. 780, an execution was issued after the death of one of two debtors, against his administrator and the remaining debtor. The court held that such an execution was clearly irregular, whether there was more than one defendant in the judgment or not, under the settled law that an execution issued and bearing teste after the death of defendant is void; had the death been suggested of record, the court thought that an execution might properly have issued against the surviving defendant.

There is no doubt, the court says in *Mitchell v. Smith* (1822) 1 Litt. (Ky.) 243, that where a joint judgment is obtained against several, and one of them dies, an execution may issue against the survivors without revival by scire facias, upon suggesting his death.

No weight was given in *Davless v. Womack* (1848) 8 B. Mon. 383, to the objection that the execution was issued on the judgment after the death of one of the defendants, the court holding that if one of several defendants dies after judgment and before execution, an execution may issue against the survivors.

After the rendition of a judgment against two, and before execution issued, one of the debtors died. An execution was then issued against both, but only levied upon the property of the survivor, which was thereafter sold. The question was whether the execution and sale were wholly void. The court held that, although the statute provided that the execution should issue against the survivor only, and it was therefore irregular for it to issue against both, nevertheless, as it was levied only on the property of the surviving defendant, the statute had been substantially complied with, and the sale and execution were not void, but merely irregular. *Hardin v. McCaense* (1873) 53 Mo. 255.

The court declares, in *Sheetz v. Wynkoop* (1873) 74 Pa. 198, that where there are several plaintiffs and defendants, and some of them

die after final judgment and before execution, upon suggesting the death on the roll, execution may be sued out by or against the survivors in the names of all, but can be executed only against the survivors; and, by analogy, it was held that an execution issued against three on a joint judgment might be allowed to go against two, but stayed as to the third, under the statute exempting from civil process any person engaged in army service.

It seems, in *Chandler v. Hudson* (1853) 11 Tex. 35, where a judgment was against two and one died, that the court was of the opinion that there was nothing to prevent the plaintiff from running his execution against, and obtaining satisfaction from, the survivor.

A writ of ca. sa. against two, upon a judgment against three, without a suggestion of the death of one, was held void on its face, in *Ex parte Kennedy* (1834) 4 Cranch C. C. 462, Fed. Cas. No. 7,698. In an action for false imprisonment by one of the parties, taken under the writ, (reported as *Devlin v. Gibbs*, 4 Cranch C. C. 626, Fed. Cas. No. 3,842), the question arose as to whether the ca. sa. was void or only voidable, and the court this time held that it was not void, but voidable, and that therefore the parties issuing it were not liable for false imprisonment.

But in *Stoner v. Stroman* (1845) 9 Watts & S. 85, it was held that scire facias upon a revival of a judgment against two where one has died, in order to issue execution against the goods of the decedent, must lie against the survivor as well as the personal representatives of the deceased, although it may appear in the writ that the surviving judgment debtor is entirely insolvent.

And after the death of one debtor, an execution issued after a judgment by default upon scire facias issued against the administratrix of the decedent, without any appearance by her, was barred, and restitution awarded to the administratrix. *Lampton v. Collingwood* (1695) 4 Mod. 315.

It was contended in *Howard v. Pitt* (1693) Holt, 1, that, the judgment having been against six, and two dying, execution might have gone against the rest without scilicet facias; but the court held, partly on other grounds, that there should have been a remittitur of the writ of error upon the abatement by death of the parties and lapse of time, before execution could issue.

The fact that two of the sureties of a lessee of convicts died before execution was issued against them by the state was held to make no difference in the right to issue the execution against them, in *Brown v. Barnes* (1896) 99 Ga. 1, 26 S. E. 86, on the ground that the state could not be subjected to the burden of finding out whether a surety had died, and who was his executor or administrator.

In *Baskin v. Huntington* (1891) 130 N. Y. 313, 29 N. E. 310, it was held that a judgment against a principal and surety, which became a lien on the surety's land in his lifetime, is not discharged by his death, and might be enforced by execution after one year from his death, upon any property upon which it was a lien, at the time of his death, with like effect as though he were still living.

2. Distinction between reality and personality.

Numerous authorities support the doctrine that, while a judgment survives as to personality to the extent that it may be levied upon the goods and chattels of the survivor, it is not so as to reality, for the charge must be equal upon the lands of all the judgment debtors, and therefore a revival of the judgment

Must be had against the survivor and the heirs and terre-tenants of the decedent.

In *Trethentry v. Ackland*, 2 Wms. Saund. 51, note 4, it is declared that, although a judgment survives as to the personality, it does not as to the real estate; and that, where the lands of several are charged with a debt, it does not lie wholly upon the survivor, but the creditor must bring *scire facias* against the heirs and terre-tenants of the decedent, and also against the survivors, and execution must be equally made against them. On the other hand, where lands are not bound the survivor alone is charged, and *scire facias* may be taken against him only.

It is declared in *Harbert's Case* (1584) 3 Coke, 11b, that, in a judgment against several, an execution will not lie against the lands of a survivor only, but that the charge shall be equal on them all. But as to a personal lien, it was said to be otherwise.

It was declared in *Smarte v. Edsun* (1673) 1 Lev. 30, that, if an execution is against personality, it may go after *sci. fa.* against the survivor only, but if against the realty, the *scire facias* should be taken out against the heir of the decedent as well as the survivor.

An execution against personality alone was held properly issued after *scire facias* against the survivor alone, in *Edsar v. Smart* (1673) T. Raym. 26; but it appears that when the charge is upon land all the defendants must be equally charged, and so *sci. fa.* must also be had against the heir of the decedent.

The leading case of *Erwin v. Dundas* (1846) 4 How. 58, 11 L. ed. 875, arose in the southern district of Alabama, and briefly presents the following state of facts: An execution, issued upon a judgment during the lifetime of both defendants, levied upon the realty of one, and finally abandoned upon the proceedings being enjoined; then, the issuance of an alias execution nearly a year after the death of the other debtor, under which premises of the decedent were levied upon and sold and conveyed. The law of Alabama, that, when an execution has been issued during the lifetime of a defendant, but not executed, an alias or pluries may go after his death, was recognized, but held not to apply to executions against the real estate of the deceased; therefore, the case turned alone on the validity of the execution issued after the death of the debtor, and the situation presented was an execution issued and levied upon land of a deceased debtor under a judgment against two where one survived. While recognizing that the judgment survived against the personal estate of the survivor without revivor in such cases, it was held that, since the statute of Westm. 2, chap. 18 (13 Edw. 1.), before execution can regularly issue against the real estate of the survivor and deceased debtor, the judgment must be revived by *scire facias* against the survivor and the heirs, devisees, and terre-tenants of the deceased, for the reason that the execution, if against realty, must go against the lands of both, and cannot issue only against the survivor. So the court concluded that the same objections existed, in this instance, to enforcing a judgment against two by the issuance of execution thereon, and sale of the real estate of the decedent after his death, which exist at common law against the enforcement of a judgment against a single defendant after his death, and, in the words of the court, "we are satisfied, that, according to the settled principles of the common law, and which are founded upon the most cogent and satisfactory grounds, the execution having issued and bearing teste in this case after the death of one of the defendants, the judgment was irregular and void; 61 L. R. A.

and that the sale and conveyance of the real estate of the deceased under it to the plaintiff was a nullity."

Where a judgment debtor, who was the owner of an individual interest in the lands of the codebtor, had long been dead, and there had been no revivor against her heirs, a sale of the whole estate under execution was held without any authority of law and void, in any direct proceeding instituted by the heirs for that purpose. *Falson v. Johnson* (1892) 70 Miss. 214, 12 So. 152.

In *Calloway v. Eubank* (1830) 4 J. J. Marsh. 280, the court, while recognizing the doctrine that an execution may issue against the survivor of two or more judgment debtors without *scire facias*, but cannot go against the estate of the deceased joint obligor without revivor, upholds the doctrine, and recognizes it as the law of the state that, when *scire facias* is issued in such a case, it not only may, but must, be joint against the surviving, and the representatives of the deceased, co-obligors.

It appears in the old and oft-cited case of *Woodcock v. Bennet* (1823) 1 Cow. 711, 13 Am. Dec. 568, that one of the judgment debtors died before execution, which was issued against the realty of both without revival against the decedent's representatives. The execution was held to be irregular and void. Had it been against personality only, the court stated that at common law it would have been regular, as where there were two or more defendants in a personal action, and one died after judgment, execution might issue against the survivor without a *scire facias*,—it must however be taken out against both so as to follow the judgment,—but, the charge being against the realty, the court held that it did not survive the decedent's death, as the lands of both were bound, and a *scire facias* ought to have issued against the survivor to show why the plaintiff should not have execution against his goods, chattels, lands, and tenements; and against the heirs and terre-tenants of the deceased to show why plaintiff should not have execution against his lands and tenements without mentioning his personality.

Scire facias to revive a judgment against the administrator of a joint defendant was reversed in *Com. use of Bellas v. Vanderslice* (1822) 8 Serg. & R. 452, "for it is clear law that a plaintiff who has recovered against a number, can have execution only against the survivors, the goods of those who have died being discharged." But it was further held that, although a judgment might be executed against the goods and chattels of survivors only, that it was otherwise as to land, which continued bound by the lien, and was rendered effective according to the Pennsylvania practice by *scire facias* against the survivors and the executors or administrators of the decedent.

The court stated, in *Com. use of Huston v. Mateer* (1827) 16 Serg. & R. 416, that it failed to perceive the propriety of the distinction that a judgment survives as to the personality, but not as to the realty, but that there was no question that it had been so adjudged, directly in England and indirectly in Pennsylvania, and held that *scire facias* on a judgment binding the real estate of several must issue against the survivors and the executors of the deceased, in order to reach the land.

Where one of two joint debtors died, it was held, in *Stiles v. Brock* (1845) 1 Pa. St. 215, that he was thereby discharged from the payment of the debt unless it had in his lifetime become a lien upon his lands, in which case they might be taken to satisfy the debt upon revival by *sci. fa.* and therefore the court held

a sci. fa. in such a case erroneous which called for a levy upon the "goods and effects, lands and tenements," of the decedent, as the words "goods and effects" ought to have been omitted, confining the directions of the writ to the lands and tenements of the deceased which were owned by him at the time of the rendition of the judgment.

There was originally a judgment against two, in *Bressler v. Miller* (1873) 1 Legal Chronicle, 127, followed by the death of one and the due substitution of his administratrix. Then, some years later, scire facias was issued to revive the judgment, and judgment on such revival taken only against the original defendant, after which execution and vend. ex. were issued against both defendants on lands, prior to which, however, the administratrix had died. The execution was set aside, upon what ground it does not clearly appear, but apparently on several, viz.: That the execution was issued on land without revival against the personal representatives of the deceased administratrix; that the execution did not conform to the judgment as revived; and that the plaintiff had no authority to drop one of the defendants and proceed against the other.

Millard v. Gavitt (1881) 15 Phila. 279, is a decision as to who are necessary parties in a sci. fa., holding that where there is a joint judgment against several defendants, and one of them dies, a sci. fa. will not lie against the personal representatives of the deceased defendant alone for the purpose of having execution against his land, without joining the surviving defendants also.

Austin v. Reynolds (1855) 13 Tex. 544, is a decision as to the necessary parties to a scire facias in reviving a judgment recovered against two defendants, after which one dies, the court holding that revivor, for the purpose of issuing execution against realty, could not be had against the survivor unless it was at the same time taken against the representatives of the deceased.

Upon reviving a dormant judgment recovered against two by scire facias where one had died since the recovery, it was held, in *Henderson v. Vanhook* (1859) 24 Tex. 358, upon the authority of *Austin v. Reynolds* (1855) 13 Tex. 544, *supra*, that revivor must be had, not only against the survivor, but also against the administrator of the deceased debtor.

An execution issued against a surviving partner without a previous scire facias to bring in the representatives of the decedent was held regular against the survivor, and sufficient to reach the firm property in his hands, but a nullity so far as concerned the individual estate of the decedent, so that costs incurred upon the writ could not be levied against his estate in the hands of administrators. *Duquesne Nat. Bank v. Mills* (1883) 22 Fed. 611.

But in some states it is expressly provided by statute that a judgment may be enforced out of the lands of a debtor the same as out of his personality; and in such states the rule is different.

The inquiry whether, if a judgment be rendered against two, and one die before execution is issued, an execution can be issued and levied on the land of the survivor, without a sci. fa., was decided in the affirmative in *Martin v. Branch Bank* (1849) 15 Ala. 587, 50 Am. Dec. 147. The court referred to the common-law rule that if judgment was rendered against two, but one died, the plaintiff, nevertheless, might sue out execution against both for the sake of conformity with the record, but it was in law an execution against the survivor only, and his goods alone could be levied on in satisfaction of the judgment; and further L. R. A.

ther pointed out that, by the act of 1812 (Clay's Digest, 205), lands are liable to be sold under the same writ by which goods are sold, therefore, plaintiff may proceed against the land of a survivor in the same manner that he might proceed against his goods.

According to the statute, the entire amount of the judgment may be made out of the lands and tenements of one of the defendants joined with others in the same execution and issued on a judgment against all; so, in *Reed v. Garfield* (1884) 15 Ill. App. 290, it was held that a levy upon the lands of a surviving debtor without reviving the judgment against the deceased debtor's heirs and executors was valid.

One of three judgment debtors, in *Christ v. Flannagan* (1896) 23 Colo. 140, 40 Pac. 683, died before the issuance of an execution upon which a sale was made after a levy upon the real property of the one who survived. The court held that, under the Colorado statute, lands being subject to levy and sale the same as personal property, the lands of one judgment debtor on a joint and several judgment might be sold to satisfy the judgment, without reference to the property of the other judgment debtors; and that while, in order that the execution might conform to the judgment, it was necessary to use the name of the deceased, nevertheless it was entirely unnecessary to sue out a scire facias to his representative, as the property of the living judgment debtor only was subjected to the process.

b. After issuance, but before levy.

One of the defendants died a month after the issuance of an execution, whereupon a fi. fa. was issued, tested in the lifetime of the decedent, but for the purpose of reaching the property of the survivors only. The court held the proceeding regular, stating that the statute staying an execution on a judgment for one year after the death of the party against whom it was rendered applied only to the case of a sole defendant, or where the plaintiff attempted to take the property of a deceased codefendant. *Day v. Rice* (1839) 19 Wend. 644.

The rule at law, that, if an execution is in the hands of the sheriff at the time of the abatement of the suit by the defendant's death, so that he can go on and execute the judgment without any further order or direction of the court, the death of the party will not stay the proceedings under the execution, but, if a new execution is required, or any other proceeding is necessary which is either actually or constructively to be done by the court, the proceedings must be suspended until the judgment is revived by scire facias,—was declared in *Washington Ins. Co. v. Slee* (1831) 2 Paige, 365, to be equally applicable in equity; and, it appearing that the master directed in a decree to make sale of mortgaged premises had died, thus necessitating a resort to the court for an order appointing another master, such an order could not be obtained without revival of the judgment, where it also appeared that one of the defendants had also died after the decree of sale was rendered.

c. After levy, but before sale.

It appearing that the issuance and levy of an execution were had upon real property held jointly by two under a judgment against them, and, after pluries vend. ex., one of the defendants died, and the land was then sold upon a third pluries vend. ex. without letters of administration being granted upon the estate of the decedent, and no warning to the personal representatives by a writ of scire facias, it was held, in *Smith v. Siegel* (1863) 1 Woodw.

Dec. 203, that, under the prevailing statute the deceased's title in the land did not pass by the sale to the sheriff's vendee.

VII. Summary.

This question is so purely a statutory one, and therefore subject to change, that the decisions herein collated can be relied upon only in a general way to show the practice of the different states. There has been no attempt to show the latest statutory enactments on the subject, except as they appear from the adjudicated cases, which do not necessarily show the most recent procedure, and therefore, except to gain a broad and general view of the doctrines upon which the modern legislation is based, this note cannot be fully relied upon, and reference must be had to the Codes and statutes of the various states.

When the plaintiff died after judgment, but before the issuance of execution, a few early English authorities held that his personal representatives could not issue execution until the judgment had been revived by proceedings in the nature of *scire facias*, under the rule that such proceedings were always necessary when a new person was made a party to an action, thereby to be benefited or charged. In the United States decisions to this effect will be found in Alabama, Kansas, Kentucky (superseded, however, by later cases), Maryland, New Jersey, New York (superseded by later decisions), North Carolina, Pennsylvania (superseded by later decisions), Rhode Island, Tennessee, and Virginia. A few states entirely abrogate this doctrine, however, as appears from decisions in Indiana, Louisiana, Missouri, and North Dakota. A third class of cases show various modes provided by statute for accomplishing the end of revival by *scire facias* without its inconveniences, and includes Iowa, Illinois, Kentucky, Minnesota, Mississippi, New York, Pennsylvania, and Texas. (II. a, 1, (a) and (b).)

Where the judgment was assigned by the plaintiff prior to his death, the cases present a lack of harmony, or even similarity (II. a, 2), and no rule can be said to be predominating.

If the plaintiff's death does not occur until after the execution is issued, with the exception of *Wagnon v. McCoy* (1810) 2 Bibb, 198, the American decisions are uniform, that the progress of the writ shall not be affected thereby, on the theory that it is an entire thing, and, once begun, its course is not to be interrupted. (II. b.) But, in regard to the plaintiff's death after levy and before sale, several Kentucky cases, and one Tennessee decision, go on the theory that the process is thereby abated until the appointment of a personal representative. The common-law rule, however, appears to have been to the contrary. (II. c.)

The procedure upon the death of a judgment debtor after judgment but before execution is a more complicated question, and many varying rules are adopted in the various states by statute. The English practice undoubtedly was that no execution was operative until a revival of the judgment had been had by *scire facias* against the heirs or personal representatives or both, but the inconvenience of this rule was avoided by a fiction of the law, which allowed a writ to be tested by relation as of the first day of the term at which the judgment was rendered, although it was not in fact issued until later in the term or during the vacation following, and although, in the meantime, the judgment debtor had died. These rules are found in very many of the early decisions in the United States, but statutory enactments have provided other and more expeditious meth-

ods of procedure, until the situation at the present time appears to be somewhat as follows: As far as appears from the decisions, revival of the judgment in some manner, perhaps by *scire facias*, seems to be necessary in California, Iowa, Indiana, Kansas, Kentucky, Maryland, Massachusetts, New Jersey, New Hampshire, Pennsylvania, Rhode Island, and Tennessee. (III. a, 1, (a).)

In Minnesota, Mississippi, Oregon, and Wisconsin execution may be issued upon proper application, after the lapse of a certain period prescribed by statute. (III. a, 1, (b).)

Illinois allows an execution to issue upon the expiration of a year from the debtor's death, and after a three months' notice to his personal representative. (III. a, 1, (c).)

The New York statute prescribes as a prerequisite the permission of both the surrogate and the court out of which the writ is to issue, after the expiration of, in one case, a year from the debtor's death, and in another, three years; and, as to when and under what circumstances these respective periods apply, the decisions are not yet clear. (III. a, 1, (d).)

In some of the states, notably New York, these statutory provisions are not, in actual practice, proceeded under, but, rather, the judgment is enforced through the administration system for the settlement of decedents' estates. In a number of states this course is prescribed by statute, as appears from decisions holding that the attachment of probate-court jurisdiction supersedes the right to issue execution. In this class are found Alabama, Arkansas, at least as to realty, Louisiana, Missouri, Ohio, North Carolina, and Texas. Tennessee seems still to hold to the old common-law fiction that an execution may be by relation tested back to the first day of the term, and so issue although the debtor dies in the meantime. (III. a, 1, (e).)

Georgia, as appears from the *dictum* in *HATCHER v. LORD*, which, however, is fully justified by the section of the Code which provides that, upon the death of a defendant after final judgment when no execution has been issued previous to death, execution may issue as though such death had not taken place, seems to stand alone among all of the states, as far as the decisions show, in thus omitting to insist upon a preliminary warning to the personal representatives, or permission from some tribunal, before taking out execution after a debtor's death.

But if the judgment is for the recovery or sale of specific property, or the goods levied upon were previously attached in the debtor's lifetime, these circumstances may effect a change in the general rule so that execution may issue, although a number of decisions hold that the fact that the property was previously attached makes no difference. (III. a, 3, (b).)

A long line of cases in Alabama presents the doctrine that, if an execution was issued in the debtor's lifetime, and no term allowed to elapse thereafter without a renewal of the writ, thus continuing the lien originally created, an alias or pluries execution may issue and be proceeded under after his death. This doctrine does not appear as distinctly in any other state, although there are some Delaware decisions which point that way. (III. a, 5.)

Two English cases hold that where the debtor died after the issuance of the writ, but before its delivery to the sheriff, his goods were bound; but an Illinois decision is directly to the contrary. (III. b.)

A few decisions are to the effect that the death of the debtor after the issuance of the execution and its delivery to the sheriff operates to suspend further proceedings under it;

but the great weight of authority, as in the case of the death of a plaintiff at such a time, goes on the theory that an execution is an entire thing, and, having been once begun by the delivery of the writ to the sheriff, the goods are bound from that time, and it is the sheriff's duty or privilege to execute it, irrespective of the debtor's death thereafter (III. c); and likewise, where the death occurs after levy, but before sale, the doctrine that the proceedings are thereby suspended has a numerous following, but the majority of the decisions favor the theory that a levy in the debtor's lifetime creates a binding lien upon the property levied upon, which is not affected by the debtor's death subsequently, but before the sale (III. d.) In a single instance as to the effect of the debtor's death after sale, but before the execution of a deed, it was finally held that the deed, being merely the evidence of transactions fully consummated in the decedent's lifetime, was valid, without any proceedings in the nature of revivor. (III. e.)

In regard to the civil death of a debtor, the two decisions on the subject are in conflict, one in Kansas holding that a revivor of the judgment is necessarily before proceeding to execution, the same as in actual death, while a California decision does not regard civil and actual death as identical, and holds that execution may proceed against the property of one imprisoned for life.

When there are several judgment creditors, of whom only one or more die after judgment, but before the issuance of execution, leaving a survivor or survivors, the more approved doctrine seems to be that, upon a suggestion being made to the court or upon the writ, it may issue in the name of the survivors without revivor, for the reason that no new person is made a party to the record.

Again, the question becomes complicated, and the rule varying, when one or more of several debtors dies after judgment but before execution, leaving survivors. It may be stated, broadly, that under such circumstances the writ may be issued against all in order to conform to the judgment, but can be enforced only against the goods and chattels of the survivors. This doctrine is by no means uniform, however, as quite a number of decisions lay down the rule, that upon a suggestion of the death being in some manner made upon the writ, it may issue against the survivors only. Another circumstance to be considered is whether the execution is to run against personalty or realty, for numerous authorities uphold the doctrine that, while a judgment survives, as to personalty, against the goods of the survivors, it is not so as to realty, for the charge must be equal upon the lands of all the judgment debtors, and, therefore, a revival of the judgment must be had against the survivor and the heirs and terre-tenants of the decedent. But some of the states expressly provide by statute that a judgment may be enforced out of realty in the same manner as out of personalty, thus working an exception to the older rule above noted.

The death of one of the debtors after issuance, but before levy, seems to have no effect upon the progress of the writ, but, where the death occurred after the levy, a Pennsylvania decision, which is the only case discovered where the question was directly passed upon, holds, under a statute, that a sale had thereafter would not give a good title, where the personal representatives had not been warned by a writ of scire facias.

There are authorities both ways in regard to whether an execution issued after a plaintiff's death without preliminary proceedings in the 61 L. R. A.

nature of scire facias, or as prescribed by statute, is void or voidable. Such an execution is considered void in *Stewart v. Nuckolls* (1849) 15 Ala. 225, 50 Am. Dec. 127; *Graham v. Chandler* (1849) 15 Ala. 342; *Smith v. Alexander* (1885) 80 Ala. 251; *Brown v. Parker* (1853) 15 Ill. 307; *Meyer v. Mintonye* (1883) 106 Ill. 414; *Dunham v. Bentley* (1897) 103 Iowa, 136, 72 N. W. 437; *Seeley v. Johnson* (1900) 61 Kan. 337, 59 Pac. 631; *Morgan v. Taylor* (1876) 38 N. J. L. 317; *Bellinger v. Ford* (1852) 14 Barb. 250.

The following decisions go on the theory that such an execution is voidable merely: *Jennness v. Lapeer County Circuit Judge* (1880) 42 Mich. 460, 4 N. W. 220; *Hughes v. Wilkinson* (1859) 37 Miss. 482; *Nims v. Sabine* (1872) 44 How. Pr. 252; *Deyo v. Borley* (1892) 43 N. Y. S. R. 638, 18 N. Y. Supp. 300; *Day v. Sharp* (1839) 4 Whart. 341, 34 Am. Dec. 509.

In regard to an execution issued after the defendant's death without the due observance of the required preliminaries, the same conflict occurs, with the weight of authority in favor, so far as numbers are concerned, of the doctrine that such executions are void.

Decisions to the latter effect are: *Harwood v. Phillips* (1863) O. Bridg. 473; *Bentley v. Cummins* (1849) 9 Ark. 487; *Cunningham v. Burk* (1885) 45 Ark. 267; *Burk v. Jones* (1848) 13 Ala. 107; *Abercrombie v. Hall* (1844) 6 Ala. 657; *Beach v. Dennis* (1872) 47 Ala. 262; *Hunt v. Loucks* (1869) 38 Cal. 372, 99 Am. Dec. 404; *Smith v. Reed* (1877) 52 Cal. 345; *Lafin v. Herrington* (1855) 16 Ill. 302; *State v. Michaels* (1847) 8 Blackf. 436; *Whitehead v. Cummins* (1850) 2 Ind. 58; *Halsey v. Van Vleet* (1852) 27 Kan. 474; *Davis v. Young* (1825) 2 T. B. Mon. 60; *Huston v. Duncan* (1866) 1 Bush, 205; *Ilen ex dem. Sharp v. Humphreys* (1837) 16 N. J. L. 25; *Beard v. Sinnott* (1875) 6 Jones & S. 536; *Prentiss v. Bowden* (1894) 8 Misc. 420, 28 N. Y. Supp. 666; *State use of Jordan v. Pool* (1846) 28 N. C. (6 Ired. L.) 288; *Halso v. Cole* (1880) 82 N. C. 161; *Lee v. Eure* (1880) 82 N. C. 428; *Williams v. Weaver* (1886) 93 N. C. 134; *Barfield v. Barfield* (1893) 113 N. C. 230, 18 S. E. 505; *Arnold v. Fuller* (1824) 1 Ohio, 458; *Massie v. Long* (1826) 2 Ohio, 288, 15 Am. Dec. 547; *Cartney v. Reed* (1831) 5 Ohio, 221; *Bomberger v. Raymond* (1803) 12 Pa. Co. Ct. 460; *Cadmus v. Jackson* (1866) 52 Pa. 295; *Gwin v. Latimer* (1833) 4 Yerg. 22; *Overton v. Perkins* (1837) 10 Yerg. 328; *Stockard v. Pinkard* (1845) 6 Humph. 119; *Puckett v. Richardson* (1880) 6 Lea, 49; *Conkrite v. Hart* (1853) 10 Tex. 140; *Emmons v. Williams* (1866) 28 Tex. 770; *Hooper v. Caruthers* (1890) 78 Tex. 432, 15 S. W. 98; *Bynum v. Govan* (1895) 9 Tex. Civ. App. 559, 29 S. W. 1119; *Ransom v. Williams* (1864) 2 Wall. 313, 17 L. ed. 803; *Erwin v. Dundas* (1846) 4 How. 58, 11 L. ed. 875.

Those holding such an execution voidable merely are: *Elliott v. Knott* (1859) 14 Md. 121, 74 Am. Dec. 519; *Hodge v. Mitchell* (1854) 27 Miss. 564, 61 Am. Dec. 524; *Harper v. Hill* (1858) 35 Miss. 63; *Hughes v. Wilkinson* (1859) 37 Miss. 482; *Butler v. Haynes* (1823) 3 N. H. 21; *Drake v. Collins* (1840) 5 How. (Miss.) 256; *Wallace v. Swinton* (1876) 64 N. Y. 188; *Speer v. Sample* (1835) 4 Watts, 367; *Hodges v. White* (1897) 19 R. I. 717, 36 Atl. 838; *Harrington v. O'Reilly* (1848) 9 Smedes & M. 216, 48 Am. Dec. 704; *Pierce v. Logan* (1883) 2 Posey Unrep. Cas. (Tex.) 355; *Webb v. Mallard* (1863) 27 Tex. 80; *Taylor v. Snow* (1877) 47 Tex. 462, 26 Am. Rep. 311; *Cain v. Woodward* (1889) 74 Tex. 549, 12 S. W. 319; *Jones v. Davis* (1869) 24 Wis. 229.

M. M. M.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

NATIONAL SURETY COMPANY OF NEW YORK *et al.*, *Appts.*,

v.

STATE BANK OF HUMBOLDT *et al.*

(56 C. C. A. 657, 120 Fed. 593.)

- *1. The national courts have jurisdiction in equity in the absence of an adequate remedy at law in those courts. The test of their equitable jurisdiction is the absence of such a remedy in the Federal courts. The presence or absence of a remedy at law in the state courts is not the test of the jurisdiction in equity of the Federal courts.
2. The equitable jurisdiction of the Federal courts vested in them under the judiciary act of 1789, and, where it has not been subsequently changed by act of Congress, the test of that jurisdiction is the adequacy of the remedy at law for wrongs of the character under consideration in the year 1789, when the judiciary act was adopted.
3. The states did not grant, and they cannot by their legislation revoke, impair, or destroy, the equitable jurisdiction of the national courts.
4. While state legislation may not impair or destroy, it may enlarge, the rights and remedies in equity in the national courts. "A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality." Rights created and remedies provided by the statutes of the state, to be pursued in the state courts, may be enforced and administered in the national courts, either at law, or in equity, or in admiralty, as the nature of the rights or remedies may require.
5. Sections 602-611 of the Code of Nebraska, which authorize an original suit in the court in which an unconscionable judgment that the defendant was prevented by unavoidable casualty from defending against was rendered, to enjoin its collection and to annul it, provide a cumulative remedy, and do not impair the original equitable jurisdiction of the circuit courts of the United States to grant appropriate relief for a like cause in cases in which the citizenship of the parties and the amounts in controversy give those courts jurisdiction.
6. The Federal courts have plenary jurisdiction to enjoin the enforcement of unconscionable judgments and decrees, to which the defendants had meritorious defenses, that they were prevented from availing themselves of by fraud, accident, or mistake. They have the same power to relieve on account of accident or mistake as on account of fraud.
7. A Federal circuit court, sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment.

*Headnotes by SANBORN, Circuit Judge.

NOTE.—As to general equitable jurisdiction in regard to injunctions against judgments, see, in this series, *Jarrett v. Goodnow* (W. Va.) 32 L. R. A. 321, and *note*.

As to equitable jurisdiction to enjoin judgments obtained by fraud, accident, mistake, surprise, or duress, see *Merriman v. Walton* (Cal.) 30 L. R. A. 786, and *note*; also *Dowell v. Goodwin* (R. I.) 51 L. R. A. 873. 61 L. R. A.

ment of a state or of a national court for new causes, such as fraud, accident, or mistake, which prevented the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment. But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree.

8. The national courts, sitting in equity, have the same jurisdiction and power to restrain judgment plaintiffs in unconscionable judgments of the state courts from using them to extort money from defendants who ought not to pay them, that they have to enjoin such plaintiffs in like judgments of the Federal courts.
9. The Federal courts are prohibited by Rev. Stat. § 720 [U. S. Comp. Stat. 1901, p. 581], from staying proceedings of a state court or of its officers. But it is no violation of that section for these courts to enjoin the plaintiff in an unconscionable judgment of a state court from using it to extort money from a defendant who ought not, in equity and good conscience, to pay it, because such an injunction acts on the person of the judgment plaintiff, and not upon the state court or its officers.
10. The failure of an officer of a state, whom foreign corporations are compelled by the statutes of the state to appoint their agent to receive service of process as a condition of doing business in the state, to comply with a statute which requires him to send a summons to the defendant, to which it is directed, immediately upon its receipt, is not such fault or negligence of the defendant corporation as will estop it from securing equitable relief from an unconscionable judgment, which it was prevented from defending itself against by the neglect of the officer.

(February 2, 1903.)

APPEAL by plaintiffs from a decree of the Circuit Court of the United States for the District of Nebraska in favor of defendants in a suit brought to enjoin the enforcement of a judgment. *Reversed*.

Statement by SANBORN, Circuit Judge:

This is an appeal from a final decree which dismissed the bill of the complainants, National Surety Company of New York and National Surety Company of Missouri, two corporations that sought an injunction against the State Bank of Humboldt, its attorneys, and John F. Cornell, the auditor of public accounts of the state of Nebraska, to restrain them from enforcing a judgment of \$7,842.40 and costs which was rendered on May 17, 1900, in the district court of Richardson county, Nebraska, against the National Surety Company of Missouri, and in favor of the bank. These are the material facts which condition the rights of the parties in this court: The National Surety Company of Missouri made its bond, by which it agreed to indemnify the bank against such losses as it should sustain by

reason of the fraud or dishonesty of its cashier between March 31, 1896, and April 1, 1897, and should discover prior to October 1, 1897. The bank sustained losses on account of the fraud and dishonesty of its cashier during the term of the bond, but it did not discover them until more than six months after the expiration of the term, so that no cause of action in favor of the bank upon the bond ever accrued. Nevertheless the bank commenced an action on the bond for the amount of these losses in the district court of Richardson county, in the state of Nebraska, against the National Security Company of Kansas City, Missouri, and delivered the summons to the auditor of public accounts of the state of Nebraska, who accepted service of it, but failed to send it to either of the appellants, or to notify them of the pendency of the action. The statutes of Nebraska required every surety company not incorporated under the laws of that state to appoint the auditor of public accounts its attorney, on whom process against it might be served in any action, and commanded him to forward a copy of any process served upon him forthwith to the secretary of the company to which it was addressed. Neb. Comp. Stat. 1901, chap. 16, §§ 175, 176. On May 17, 1900, judgment was entered by default in the action in the district court of Richardson county against the National Security Company of Kansas City, Missouri, for \$7,842.40 and costs. On July 23, 1900, the term of that court closed, and it adjourned *sine die*. Neither of the surety companies had any notice or knowledge of the judgment, or of the action in which it was rendered, until August 6, 1900. On June 9, 1897, the National Surety Company of New York received the assets and assumed the liabilities of the National Surety Company of Missouri, so that, if the judgment against the latter is collected, the former must pay it. In this state of the case the surety companies prayed the court below to restrain the bank, its attorneys, and John F. Cornell, from enforcing the judgment, on the ground that they had a perfect defense to the claim on which it was founded, which they were prevented from presenting by the failure of the auditor to send them the summons, without any fault or negligence on their part; and the court below denied their prayer, because, in its opinion, §§ 602-611, pp. 1340, 1341, and 1342, of the Compiled Statutes of Nebraska of 1901, provided the complainants with an adequate remedy at law, and deprived the Federal courts of jurisdiction in equity to grant the relief they sought.

Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Messrs. Charles J. Greene and Ralph W. Breckenridge, for appellants:

The auditor of public accounts of Nebraska accepted service of the summons issued against the Missouri company in the suit brought in the state court, and did not notify the company. The statute imposed a positive duty upon the auditor. It was nevertheless

er contemplated by the legislature of Nebraska that a judgment against a foreign surety company could be obtained by merely serving process upon the auditor.

Hartford F. Ins. Co. v. Owen, 30 Mich. 441; *Farmer v. National Life Asso.* 50 Fed. 829.

The failure of the public auditor to forward the process served on him, as the statute commands, was, as to the Missouri company, a mistake and an accident which is not chargeable to the Missouri company as its fault or neglect, or the fault or neglect of its agents.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831.

Neither the New York company nor the Missouri company knew, until after the adjournment, *sine die*, of the term at which the judgment of the state court was rendered, that any such suit had been begun or was pending.

The surety company has a substantial and meritorious defense to the claim which passed into judgment. The bond limited liability of the surety company to a loss sustained and discovered during the continuance of the bond, and within six months after the employee should cease to be employed.

Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124; *Florida C. & P. R. Co. v. American Surety Co.* 41 C. C. A. 45, 99 Fed. 674; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.* 36 C. C. A. 671, 95 Fed. 111; *California Sav. Bank v. American Surety Co.* 87 Fed. 118; *Lombard Investment Co. v. American Surety Co.* 65 Fed. 476; *Fidelity & C. Co. v. Consolidated Nat. Bank*, 17 C. C. A. 641, 39 U. S. App. 26, 71 Fed. 116; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133.

Unavoidable accident or misfortune preventing the party from making his defense at law is a sufficient ground for the interference of equity in an otherwise meritorious case.

1 Black, Judgm. § 383; *Radzuweit v. Watkins*, 53 Neb. 412, 73 N. W. 679; *Spelling, Extraordinary Relief*, § 131; *Story, Eq. Jur.* 13th ed. § 885; *Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1013, 6 Sup. Ct. Rep. 901; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. ed. 362; *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; *Western Assur. Co. v. Klein*, 48 Neb. 904, 67 N. W. 873; *Bankers' L. Ins. Co. v. Robbins*, 53 Neb. 44, 73 N. W. 269; *Coates v. Chillicothe Branch of State Bank*, 23 Ohio St. 431; *Iler v. Darnell*, 5 Neb. 192; *Davis v. Waklece*, 156 U. S. 680, 39 L. ed. 578, 15 Sup. Ct. Rep. 555; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75; *Munro v. Callahan*, 55 Neb. 75,

75 N. W. 151; *Meyers v. Smith*, 59 Neb. 30, 80 N. W. 273; *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *Little Rock Junction R. Co. v. Burke*, 13 C. C. A. 341, 27 U. S. App. 736, 66 Fed. 83; *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Neb. 722, 84 N. W. 97; *Kaufmann v. Drezel*, 56 Neb. 229, 76 N. W. 559; *Leonard v. Capital Ins. Co.* 101 Iowa, 482, 70 N. W. 629.

The Federal circuit court has jurisdiction to enjoin the Humboldt bank, its attorneys, and the auditor of public accounts from proceeding to collect the unconscionable judgment rendered by the district court of Richardson county, Nebraska.

Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; *Haines v. Carpenter*, 91 U. S. 254, 23 L. ed. 345; *Johnson v. Waters*, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619; *Arrousmith v. Gleason*, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *McNeil v. McNeil*, 78 Fed. 834; *Young v. Sigler*, 48 Fed. 182; *McConihay v. Wright*, 121 U. S. 205, 30 L. ed. 933, 7 Sup. Ct. Rep. 940; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761; *Cowley v. Northern P. R. Co.* 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Rep. 127; *Daragh v. H. Wetter Mfg. Co.* 23 C. C. A. 609, 49 U. S. App. 1, 78 Fed. 13.

Messrs. **John L. Webster, Isham Reavis, and Frank C. Reavis**, for appellees:

Service of summons on the state auditor was sufficient to give the state court jurisdiction to render the judgment.

Pringle v. Woolworth, 90 N. Y. 502; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Osborne v. Shawmut Ins. Co.* 51 Vt. 278; *Sparks v. National Masonic Acci. Assn.* 73 Fed. 277; *Ehrman v. Teutonia Ins. Co.* 1 McCrary, 123, 1 Fed. 471; *German Ins. Co. v. Hall*, 1 Kan. App. 43, 41 Pac. 69; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 608, 37 L. ed. 292, 301, 13 Sup. Ct. Rep. 444.

The power of attorney which the company files with the state auditor is not conditioned that the auditor shall forward a copy of the summons to the surety company.

Pringle v. Woolworth, 90 N. Y. 502; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Osborne v. Shawmut Ins. Co.* 51 Vt. 278.

The acceptance of service by the state auditor was in law the same as service upon the company.

Cheney v. Harding, 21 Neb. 65, 31 N. W. 255; *Benson v. Michael*, 29 Neb. 131, 45 N. W. 276.

The surety company had an adequate remedy at law in the court which rendered the judgment.

A court of equity should not assume jurisdiction to enjoin the enforcement of a judgment when there is an adequate remedy at law.

Crim v. Handley, 94 U. S. 652, 658, 24 L. ed. 216, 218; *Nouque v. Clapp*, 101 U. S. 552, 553, 25 L. ed. 1026, 1027; *Furnald v. Glenn*, 50 Fed. 372; *Sanders v. Soutter*, 61 L. R. A.

126 N. Y. 193, 27 N. Y. Supp. 263; *Brown v. Chapman*, 90 Va. 174, 17 S. E. 855; *Travelers' Protective Asso. v. Gilbert*, 55 L. R. A. 538, 49 C. C. A. 309, 111 Fed. 269; *Knox County v. Harshman*, 133 U. S. 152, 33 L. ed. 586, 10 Sup. Ct. Rep. 257; *Walker v. Robbins*, 14 How. 584, 14 L. ed. 552; *Preston v. Kindrick*, 94 Va. 760, 27 S. E. 588; *Taylor v. Lewis*, 2 J. J. Marsh. 400, 19 Am. Dec. 135; *Ede v. Hazen*, 61 Cal. 360; *Luco v. Brown*, 73 Cal. 3, 14 Pac. 366; *Waldron v. Waldron*, 76 Ala. 285.

The Federal courts are without jurisdiction to enjoin the parties from proceeding in the state tribunals to collect judgments rendered in the state courts.

Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587; *Peck v. Jenness*, 7 How. 612-625, 12 L. ed. 841-846; *Watson v. Jones*, 13 Wall. 679-719, 20 L. ed. 660-672; *Haines v. Carpenter*, 91 U. S. 257, 23 L. ed. 346; *Dial v. Reynolds*, 96 U. S. 340, 24 L. ed. 644; *Sargent v. Helton*, 115 U. S. 348, 29 L. ed. 412, 6 Sup. Ct. Rep. 78; *Re Sawyer*, 124 U. S. 220, 31 L. ed. 409, 8 Sup. Ct. Rep. 482; *Yick Wo v. Crowley*, 26 Fed. 209; *Wagner v. Drake*, 31 Fed. 851; *Dillon v. Kansas City Suburban Belt R. Co.* 43 Fed. 111; *Ruggles v. Simon-ton*, 3 Biss. 330, Fed. Cas. No. 12,120; *Chaffin v. St. Louis*, 4 Dill. 19, Fed. Cas. No. 2,572; *Missouri, K. & T. R. Co. v. Scott*, 4 Woods, 386, 13 Fed. 793; *United States v. Collins*, 4 Blatchf. 156, Fed. Cas. No. 14,834; *Knox County v. Harshman*, 133 U. S. 152, 33 L. ed. 586, 10 Sup. Ct. Rep. 257; *Beals v. Illinois, M. & T. R. Co.* 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314; *McNeil v. McNeil*, 78 Fed. 834; *Little Rock Junction R. Co. v. Burke*, 13 C. C. A. 341, 27 U. S. App. 736, 66 Fed. 83; *Allen v. Allen*, 38 C. C. A. 336, 97 Fed. 525; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 463, 42 L. ed. 807, 818, 18 Sup. Ct. Rep. 403; *Phelps v. Mutual Reserve Fund Life Asso.* 50 C. C. A. 339, 112 Fed. 453; *Leathe v. Thomas*, 38 C. C. A. 75, 97 Fed. 136.

Sanborn, Circuit Judge, delivered the opinion of the court:

The important question in this case is whether or not a Federal court has jurisdiction in equity to restrain the parties to an unconscionable judgment of a state court from enforcing it, when the complainants in the bill had a perfect defense to the claim on which the judgment was founded, which they were prevented from presenting to the state court by accident or mistake, and when the statutes of the state have provided an original proceeding in the court in which the judgment is rendered to enable aggrieved parties to obtain relief against such judgments.

Much has been said and written by counsel for the respective parties in this suit upon the question whether or not the service of the summons upon the auditor of public accounts of the state of Nebraska, and his acceptance thereof, constituted a service upon the Missouri corporation, and gave the state court jurisdiction of the action against it, and upon the question whether or not

the action and judgment against the National Security Company of Kansas City, Missouri, were, in effect, an action and judgment against the National Surety Company of Missouri. But, in our opinion, these questions do not condition the determination of this case; and, without deciding or intimating any opinion concerning them, the positions of counsel for the appellees will be conceded. For the purposes of the discussion and decision of this case, it will be admitted that the judgment against the security company is a judgment against the surety company, and that by virtue of the service upon, and the acceptance thereof by, the auditor of public accounts, the state court acquired jurisdiction of the subject-matter and of the parties to the action, and lawfully rendered the judgment against the surety company.

The gravamen of this bill, however, is not that there was no service of the summons in the action at law. It is that in that action a judgment which ought not, in equity and good conscience, to be paid, has been rendered against the surety company, when it had a perfect defense to the action, of which it was prevented from availing itself by accident or mistake, without fault or negligence on its part. It is conceded that the judgment was regularly and legally rendered after due service of the summons. Yet the fact remains that it is a judgment without cause which the appellants ought not to be required to pay, and which they were prevented from defending themselves against by the failure of John F. Cornell, the auditor of public accounts of the state of Nebraska, to send them the summons as the statute directed.

It is said that the complainants are entitled to no relief, because Cornell was the agent of the judgment defendant, the Missouri company, to receive the service, and his negligence was its negligence. In support of this contention the remark of Mr. Justice Gray in *Knox County v. Harshman*, 133 U. S. 152, 155, 156, 33 L. ed. 586, 588, 10 Sup. Ct. Rep. 257, where the county clerk was designated by the statutes of Missouri to receive service of process against the county, that "any neglect of the clerk in communicating the fact to the county court was neglect of an agent of the county, and did not affect the validity of the service or of the judgment," is cited. In that case the Supreme Court first decided that the judgment against Knox county was just and right, and that it had no defense to the cause of action upon which it was founded (p. 155, 133 U. S., p. 588, 33 L. ed., and p. 258, 10 Sup. Ct. Rep.), and then held that the failure of the county clerk to give notice of the service of the summons was so far the negligence of the county that it did not invalidate the service. That court did not decide that the failure of this clerk was such negligence of the county as would have deprived it of equitable relief if that failure had prevented it from interposing a meritorious defense. In the case at bar the validity of the service of the summons is con-

ceded. It is further admitted that, if any fault or negligence of the surety companies prevented them from presenting their defense in the action at law, they are estopped from obtaining relief in equity. But how can it be fairly or justly said that it was the fault of these companies, or their negligence, that John F. Cornell, the auditor of public accounts of the state of Nebraska, failed to discharge his statutory duty to send them the summons? They did not select him as their agent. They had no command or control of his action,—no power to discharge or dismiss him. They were compelled by the statutes of the state of Nebraska to appoint and retain him as their agent to receive service of process, as a condition of doing business in that state. He was chosen, not by the surety companies, but by the state of Nebraska. His acts and proceedings were controlled and commanded, not by these corporations, but by the state. The state required him to send the summons to this Missouri corporation, just as it required that corporation to appoint him its agent to receive the service. Neb. Comp. Stat. 1901, chap. 16, §§ 175, 176. The corporation obeyed the statute, and the officer of the state violated it. The corporation could not have anticipated its violation. It had a right to rely on the legal presumption that the officer of the state would do his duty. Nothing that the corporation could have lawfully done, nothing that it could have failed to do, could have prevented the failure of this officer. The power of control is the test of the liability of a principal for the negligence of his alleged agent. If the principal cannot control and direct him in the discharge of a given duty, then he is not his agent in its performance and the alleged principal is neither chargeable with nor liable for his negligence in its discharge. *Brady v. Chicago & G. W. R. Co.* 57 L. R. A. 712, 52 C. C. A. 48, 114 Fed. 100, 107; *Atwood v. Chicago, R. I. & P. R. Co.* 72 Fed. 447, 454, 455; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; *Hilsdorf v. St. Louis*, 45 Mo. 94, 98, 100 Am. Dec. 352; *Pawlet v. Rutland & W. R. Co.* 28 Vt. 297, 300; *Miller v. Minnesota & N. W. R. Co.* 76 Iowa, 655, 659, 39 N. W. 188; *Wood, Railroads*, § 388; *Donovan v. Laing, W. & D. Constr. Syndicate* [1893] 1 Q. B. 629; *Rourke v. White Moss Colliery Co.* L. R. 2 C. P. Div. 205. The neglect of Cornell to notify the surety companies of the pendency of the action against the Missouri corporation was not their fault or negligence, and it is no defense to their claim for equitable relief against this judgment, because they had no command or control of his action. The failure of an officer of a state, whom foreign corporations are compelled by the statutes of the state to appoint their agent to receive service of process, as a condition of doing business in the state, to comply with a statute which requires him to send a summons to the defendant, to which it is directed, immediately upon its receipt, is not such fault or negligence of the defend-

ant corporation as will estop it from securing equitable relief from an unconscionable judgment, which it was prevented from defending itself against by the neglect of the officer. It is an unavoidable accident, which the corporation could neither have foreseen nor anticipated.

We have, then, an unconscionable judgment at law for \$7,842.40 in favor of a citizen of Nebraska, to which the appellants, citizens of New York and Missouri, respectively, had a good defense, which they were prevented, by unavoidable accident, unmixed with fault or negligence on their part, from availing themselves of. The appellees are about to enforce this judgment. Has the Federal court, sitting in equity, the jurisdiction to prevent them from so doing? Fraud, accident, and mistake are three great heads of equity jurisprudence; and whenever injustice or wrong, irremediable at law, is about to result from either, power is vested in, and the duty is imposed upon, the courts of equity, to prevent the threatened injury. Their jurisdiction rests upon the fact that, unless they act, wrong will be perpetrated, which cannot be remedied; and the bills exhibited to them are appeals to the consciences of the chancellors, to prevent injustice. Counsel for the appellees concede that the Federal courts have equitable jurisdiction to enjoin the enforcement of unconscionable judgments at law which have been procured by fraud, but they insist that they are without power to restrain the collection of those which are secured by accident or mistake. But the foundation of equity jurisdiction is the wrong that will be perpetrated if the court of equity does not act. Accident and mistake are as well established grounds for the action of a court of equity as fraud. It is as unjust—as abhorrent to the conscience of the chancellor—that one who does not owe a judgment which has been secured against him by accident should be compelled to pay it, as it is that he should be compelled to pay one procured by fraud. The injury is the same in each case. Both cases fall under equally well-recognized heads of equity jurisdiction. Both appeal with equal force to the conscience of the chancellor, and the conclusion is irresistible that each is entitled to command the same measure of equitable relief. The Federal courts, sitting in equity, have the same power to prevent the enforcement of unjust judgments at law, procured by accident or mistake, that they have to prevent the collection of those obtained by fraud. They have plenary jurisdiction to restrain the enforcement of judgments and decrees to which the defendants had meritorious defenses, that they were prevented from interposing either by fraud or accident or mistake unmixed with their own negligence. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 333, 3 L. ed. 362; *Hendrickson v. Hinckley*, 17 How. 443, 444, 15 L. ed. 123; *Hungerford v. Sigerson*, 20 How. 156, 161, 15 L. ed. 869, 870; *Gaines v. Fuentes*, 92 U. S. 10, 22, 23 L. ed. 524, 527; *Barrow v. Hunton*, 99 U. S. 80, 85, 25 L. ed. 407, 408; *Johnson v. Waters*, 111 U. S. 640, 667, 61 L. R. A.

28 L. ed. 547, 556, 4 Sup. Ct. Rep. 619; *Arrousmith v. Gleason*, 129 U. S. 86, 97, 98, 32 L. ed. 630, 632, 633, 9 Sup. Ct. Rep. 237; *Marshall v. Holmes*, 141 U. S. 589, 596, 35 L. ed. 870, 872, 12 Sup. Ct. Rep. 62. The case last cited was a suit in equity to enjoin the enforcement of judgments, and the Supreme Court there reiterated, as the settled rule upon this subject, the declaration of Chief Justice Marshall, made more than seventy years before, in *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 336, 3 L. ed. 362, 363, that "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

A careful examination of the cases cited by counsel for the appellees in support of their contention here discloses nothing inconsistent with this rule. There is not one of them which holds that the Federal circuit courts have less power or jurisdiction to grant relief against unconscionable judgments on the ground of accident than they have to grant it on the ground of fraud, while in the opinions in *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 336, 3 L. ed. 362, 363; *Hendrickson v. Hinckley*, 17 How. 443, 444, 15 L. ed. 123; *Crim v. Handley*, 94 U. S. 652, 653, 24 L. ed. 216; *Metcalf v. Williams*, 104 U. S. 93, 96, 26 L. ed. 665, 666; *Embry v. Palmer*, 107 U. S. 3, 11, 27 L. ed. 346, 349, 2 Sup. Ct. Rep. 25; *Knox County v. Harshman*, 133 U. S. 152, 154, 33 L. ed. 586, 587, 10 Sup. Ct. Rep. 257; and *Marshall v. Holmes*, 141 U. S. 589, 596, 599, 35 L. ed. 870, 872, 12 Sup. Ct. Rep. 62,—the Supreme Court expressly places accident on a par with fraud as a basis for such relief. In many of the cases which counsel cite, the gravamen of the bill was fraud, not accident, and in those cases the sufficiency of the allegations or of the proof of the fraud is naturally discussed at length. In the cases in which relief was denied, the ground of the denial was not that a meritorious defense was prevented by accident, rather than by fraud, but that the cases lacked one or more of the essential elements of a good cause of action for either fraud or accident. The indispensable elements of such a cause of action are (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law. The case of *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407, lacked the second element,—the meritorious defense,—and the court pointed out in that case the radical and controlling difference and the established line of demarcation between suits to enjoin the

collection of judgments for errors and irregularities in the proceedings on which they are based, or for illegality or incorrectness of the judgments or decisions themselves, and suits to restrain the enforcement of judgments for new causes, such as frauds, accidents, or mistakes, that prevented meritorious defenses, of which the courts which rendered the judgments were not advised, and which they neither considered nor adjudged. It declared that suits of the former class would not, while suits of the latter class would, warrant the issue of an injunction to restrain the enforcement of the judgments; that the case then before it was, in the absence of a meritorious defense, of the former class, and for that reason the complainant was entitled to no relief. In *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62, this distinction was affirmed, and this line of demarcation was broadened, deepened, and fixed. That case was declared to be one of the second class, and the enforcement of a decree of the state court was prohibited. In *Knox County v. Harshman*, 133 U. S. 152, 33 L. ed. 586, 10 Sup. Ct. Rep. 257, the defendant in the judgment had no defense to the action upon which it was founded, and for that reason its bill could not be maintained. For the same reason, *Walker v. Robbins*, 14 How. 584, 14 L. ed. 552, fell in the first class of cases, and the complainant was defeated. *Beals v. Illinois, M. & T. R. Co.* 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314, was a case based upon fraud in obtaining the judgment, and the bill was dismissed because there was a failure of proof of the fraud. *McNeil v. McNeil*, 78 Fed. 834, was a suit in equity to restrain the enforcement of a decree of divorce rendered by a state court, on account of fraud in its procurement. The court held that it had jurisdiction to grant the relief, but denied it on account of the negligence of the complainant. *Little Rock Junction R. Co. v. Burke*, 13 C. C. A. 341, 347, 349, 27 U. S. App. 736, 747, 749, 66 Fed. 83, 90, 91, failed because there was an adequate remedy at law by ejectment in the Federal court, if there was any remedy. The facts stated in the case appeared on the face of the record in the state court, and were as available in ejectment as in equity. In *Allen v. Allen*, 38 C. C. A. 336, 97 Fed. 525, the gravamen of the bill was fraud, and it appeared that the very defense which the complainant alleged was prevented by the fraud was actually considered and adjudged by the court which rendered the judgment, so that the case presented no new cause or ground for relief, but fell in the first class of cases, specified in *Barrow v. Hunton*. In *Central Nat. Bank v. Stevens*, 169 U. S. 432, 464, 42 L. ed. 807, 818, 18 Sup. Ct. Rep. 403, the essential elements of fraud, accident, or mistake that prevented a meritorious defense were lacking; and the Supreme Court held that it would not sustain an injunction, because the proceeding was, in effect, a suit to review the decision of the court, the execution of whose decree it sought to enjoin.

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This brief review of the cases cited for appellees will suffice to show what their careful reading will demonstrate,—that they contain no decision that the Federal circuit court may not lawfully enjoin the enforcement of an unconscionable judgment or decree of a state court, based upon an unfounded claim, which the defendant was prevented by unavoidable accident from defeating. More than this, they evidence this indubitable principle, which has now become so firmly established by repeated decisions of the Supreme Court that it is no longer debatable. A Federal circuit court, sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a state or of a national court for new causes, such as fraud, accident, or mistake, which prevented the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment. But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the courts which rendered the judgment or decree. The reason of this rule is that cases of the former class present new controversies, which have never been raised in other courts, of which the Federal courts cannot escape jurisdiction if they arise between citizens of different states, and involve the requisite amount (25 Stat. at L. 433, chap. 866, 1 U. S. Comp. Stat. 1901, title 13, chap. 7, § 629, p. 508), while cases of the latter class involve a jurisdiction which does not exist,—a jurisdiction of the Federal courts to review and revise the acts and decisions of courts of co-ordinate jurisdiction upon questions which they have lawfully considered and adjudged. *Arrow-smith v. Gleason*, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; *Johnson v. Waters*, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619; *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75; *United States v. Norsch*, 42 Fed. 417; *Young v. Sigler*, 48 Fed. 182; *McNeil v. McNeil*, 78 Fed. 834; *Perry v. Johnston*, 95 Fed. 322.

The argument of counsel for appellees that, although the circuit court of the United States may enjoin a judgment plaintiff from enforcing an unconscionable judgment of a national court, it is without power to prevent him from collecting a like judgment of a state court, because § 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581) prohibits the issue of an injunction by a Federal court to stay proceedings in a state court, and because such an injunction would, in effect, nullify the judgment of the state court, and tend to produce a conflict of jurisdiction between the state and the Federal courts, has been carefully considered, but it is not persuasive. Section 720 (U. S. Comp. Stat. 1901, p. 581) forbids the Federal courts from staying the proceedings of the state court, but it does not grant to litigants of whom the Federal courts have jurisdiction

unlimited license to use the unconscionable judgments of the state court to inflict irremediable injury upon the defendants. An injunction, as in *Leathe v. Thomas*, 38 C. C. A. 75, 97 Fed. 138, which restrains a sheriff—an officer of the state court—from executing the judgment of that court, is a plain violation of the Federal statute, because it stays the proceedings of the state court, and it cannot be sustained. But an injunction which forbids the plaintiff in such a judgment from making an inequitable use of it acts upon him,—upon his person only. It forbids him from perpetrating a wrong, but it neither restrains nor stays the proceedings of the state court or of its officer, and it does not fall under the ban of the section of the statute under consideration. *Marshall v. Holmes*, 141 U. S. 589, 599, 600, 35 L. ed. 870, 874, 12 Sup. Ct. Rep. 62.

The Constitution of the United States and the acts of Congress have conferred upon the Federal circuit courts the jurisdiction to hear and determine controversies between citizens of different states in which the matter in dispute exceeds \$2,000 in value. This suit presents such a controversy. It is a new controversy, which has never been presented to or decided by the state court which rendered the judgment, the enforcement of which the complainants seek to prevent. It involves the question whether or not the appellants were prevented by unavoidable accident from availing themselves of a good defense to the claim on which that judgment is based, and, if so, whether or not the judgment plaintiff should be permitted to collect the judgment. The circuit court of the United States has jurisdiction of this controversy, and the appellants have the legal right to a hearing and decision of the questions which it presents, and to the relief which the decision of those questions entitles them. That court may not lawfully renounce that jurisdiction. It cannot rightfully deny to the appellants the right to the decision, decree, and writ to which they show themselves entitled. It is not the judgment of the state court against which these appellants level the injunction they seek. It is against the plaintiff in that judgment. It is against the unconscionable use by that plaintiff of the judgment which he has recovered, to perpetrate an unconscionable wrong. The basis of the suit is the threatened use of this judgment to extort from the appellants money which they ought not to be required to pay, and the Federal circuit court is vested with the same power and charged with the same duty to enjoin the appellees from perpetrating this extortion by means of an unconscionable judgment of a state court, that it is to prevent them from effecting it by the use of such a judgment of a national court, by means of a fraudulent patent, deed, mortgage, or by the use of any other instrument or device against which they have no remedy at law. The extortion of \$7,842 from the appellants by the use of this judgment of the state court will inflict upon them as grievous an

injury as would its extortion by a like judgment of a national court, and the circuit court of the United States has the same preventive power, and the appellants are entitled to the same measure of relief from it, in the one case as in the other. The decisions of the Supreme Court which have been cited, however, have so conclusively disposed of this question that more extended discussion would be unprofitable; and we leave it with this brief statement of the reasons which have induced, and which amply sustain, the rule that the circuit courts of the United States have the same jurisdiction and power to enjoin a judgment plaintiff from enforcing an unconscionable judgment of a state court, which has been procured by fraud, accident, or mistake, that they have to restrain him from collecting a like judgment of a Federal court.

But the statutes of Nebraska provide that the state court in which this judgment was rendered has the power to vacate or to modify it, and the authority to enjoin proceedings before it, for unavoidable casualty or misfortune preventing the aggrieved party from prosecuting or defending (Neb. Code, §§ 602-611), and these provisions of the Code prescribe an original suit for that purpose, to be commenced by petition and summons within two years after the judgment is rendered (Id. §§ 603-610). It is a general rule that the absence of an adequate remedy at law is a *sine qua non* of jurisdiction in equity, and it is earnestly insisted by counsel for the appellees that the complainants in this suit were entitled to no relief in equity in the circuit court of the United States, because they had an adequate remedy at law in the state court which rendered this judgment, under these provisions of the Code of Nebraska. There are, however, many reasons why this contention cannot be sustained. The first, and one that is fatal to the position, is that it is an absence of an adequate remedy at law in the national courts, and that alone, which conditions jurisdiction in equity in those courts, and the appellants have no such remedy. The fact that they have a remedy at law in the state courts is not material. *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; *Arrowsmith v. Gleason*, 129 U. S. 86, 98, 32 L. ed. 630, 634, 9 Sup. Ct. Rep. 237; *Mayer v. Foulkrod*, 4 Wash. C. C. 349, Fed. Cas. No. 9,341; *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174; *Coler v. Stanly County*, 89 Fed. 257; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761. When the controversy which this bill discloses arose between these citizens of different states, and was presented to the circuit court of the United States, that court had jurisdiction to hear and determine it, and the appellants had the legal right to the opinion and the judgment of that court upon the questions which it presented. This right and this jurisdiction were not conditioned by the fact that the complainants had or had not like rights or remedies in the state courts, or by the fact that those courts had or had not concurrent jurisdiction. Indeed, this right

and this jurisdiction were provided by the Constitution, and granted by the acts of Congress, for the express purpose of enabling citizens of different states to escape from an adjudication of their rights by state courts which had concurrent jurisdiction to grant the relief and to administer the remedies which they were seeking in the national courts. The rights of these appellants to their hearing and decree in the Federal court, and the jurisdiction of that court to determine their controversy, were independent of state legislation. The state of Nebraska did not grant, and it could not revoke or impair, that right or that jurisdiction. As the appellants had the right to the hearing and decision of their controversy by the national court, they were entitled to institute and to maintain in that court the kind of proceeding which, according to the established rules and practice of the United States circuit court, would present to it, and secure its opinion and judgment upon, the merits of their controversy. Under the rules and practice of that court, there was no action or proceeding at law which would accomplish that end. In other words, the appellants had no adequate remedy at law in the Federal court, and yet they had the right to a hearing and to a determination of their controversy in that court, and to the relief at the hands of that court to which the law and its rules and practice entitled them. The conclusion is unavoidable that their suit in equity was well founded, and that it was the right and the duty of the court below to hear and to determine it upon its merits, and to grant to the complainants the appropriate relief.

Another reason why the proceeding provided by the Code of Nebraska does not oust the jurisdiction in equity of the national circuit court is that, while state legislation may enlarge, it cannot destroy or impair, that jurisdiction. The power of the circuit courts of the United States to administer rights and remedies in equity was vested in them, as a part of the judicial power of the nation, under the Constitution of the United States and the judiciary act of 1789; and, as it was not granted by, it may not be revoked, impaired, or destroyed by, the act of any state. Unless changed by subsequent acts of Congress, the adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States, is that which existed when that jurisdiction was vested,—that which was when the act of 1789 was adopted. *McConihay v. Wright*, 121 U. S. 201, 206, 30 L. ed. 932, 933, 7 Sup. Ct. Rep. 940. As there were no adequate remedies at law for a wrong of the character of that of which the appellants complain in 1789, and as the Congress has since provided none, this case falls within the equitable jurisdiction of the circuit court, and must be there heard, determined, and relieved.

Moreover, the provisions of the Code of Nebraska which have been cited do not purport or attempt to destroy or to diminish the jurisdiction in equity of either the Federal

or the state courts. They simply provide a cumulative remedy, and leave those previously existing unaffected. *Meyers v. Smith*, 59 Neb. 30, 80 N. W. 273; *Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151.

And finally, the Federal court, sitting in equity, has jurisdiction in an appropriate case to enforce the new right and to administer the new remedy created by these provisions of the Code of Nebraska. Rights created and remedies provided by the statutes of the states, to be pursued in the state courts, may be enforced and administered in the national courts, either at law, in equity, or in admiralty, as the nature of the rights or remedies may require. *Darragh v. H. Wetter Mfg. Co.* 23 C. C. A. 609, 615, 616, 49 U. S. App. 1, 78 Fed. 7, 13, 14; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 905; *Davis v. Gray*, 16 Wall. 203, 221, 21 L. ed. 447, 453; *Broderick's Will*, 21 Wall. 503, 520, *sub nom. Kieley v. McGlynn*, 22 L. ed. 599, 605; *Gormley v. Clark*, 134 U. S. 338, 348, 33 L. ed. 909, 913, 10 Sup. Ct. Rep. 554; *Cowley v. Northern P. R. Co.* 159 U. S. 569, 582, 40 L. ed. 263, 266, 16 Sup. Ct. Rep. 127. "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality." *Davis v. Gray*, 16 Wall. 203, 221, 21 L. ed. 447, 453. It is only in equity that the remedy provided by the statute of Nebraska can be administered in the United States circuit court, because there is no adequate remedy at law in that court which will effect the issue of an injunction against the enforcement of a judgment at law, and the avoidance of that judgment, the relief which that statute prescribes.

Our conclusion is that the appellants had no adequate remedy at law which prevented them from invoking the aid of the United States circuit court, sitting in equity, to secure for them the relief which they have sought in this suit. In opposition to this view, counsel for the appellees have cited, and before reaching this conclusion we have carefully examined, *Nougue v. Clapp*, 101 U. S. 552, 25 L. ed. 1026; *Furnald v. Glenn*, 56 Fed. 372, 374; *Travelers' Protective Asso. v. Gilbert*, 55 L. R. A. 538, 49 C. C. A. 309, 111 Fed. 269; *Crim v. Handley*, 94 U. S. 659, 660, 24 L. ed. 218, 219; and other cases of less importance. But these cases do not rule the question here presented, and there were reasons other than the fact that there were adequate remedies at law in the state courts why the complainants failed in those cases. In *Crim v. Handley* the judgment defendant was guilty of negligence in his conduct of the trial of the action at law, which estopped him from obtaining relief in equity. *Nougue v. Clapp* was a bill in equity to recover \$20,000 damages, and to avoid a foreclosure sale under a decree of a state court, which had been rendered in a proceeding of which the defendant had notice, and to which he was a party. He had an adequate remedy at law to recover the \$20,000, and he had been guilty of negligence in the conduct

of his defense in the state court. In *Furnald v. Glenn* relief was denied because the state court whose decrees were assailed had not finally disposed of the case before it, and still had jurisdiction in the same case in which the decrees were rendered to right any wrong which was likely to result from them. And in *Travelers' Protective Assn. v. Gilbert*, 55 L. R. A. 538, 49 C. C. A. 309, 111 Fed. 269, the averments of the fraud upon which the complainants relied were too vague and indefinite to effect the statement of a good cause of action on that ground; and the negligence of the secretary, who was not an officer of the state, but an agent of the complainant, was held to be imputable to the association, and fatal to its bill. None of these authorities portrays the complete cause of action in equity which the case at bar presents. None of them presents all the elements of such an action which the record in this case discloses. Each contains some, but none all, of the essential facts entitling

the complainants to equitable relief. In this case all these facts concur,—the judgment which it is against conscience to allow to be used to extort money that is not owing from a defendant remediless at law, the complete meritorious defense to the claim on which this judgment is based, the fact that the defendant in the judgment was prevented from availing itself of its defense to the cause of action by an unavoidable accident, and the absence of any negligence of the defendant or of its agents. These facts appeal with compelling force to the conscience of a chancellor. They have been presented to a court to which the Constitution and the acts of Congress have granted the power, and upon which they have imposed the duty, to grant the relief to which the complainants are equitably entitled; and *the decree which dismissed their bill must be reversed*, and the case remanded to that court, with instructions to enter a decree for the complainants. It so ordered.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

LOUDENBACK FERTILIZER COMPANY,
Plff. in Err.,
v.

TENNESSEE PHOSPHATE COMPANY.

(121 Fed. 298.)

1. **Lack of mutuality does not render void a contract** for the purchase and sale of phosphate rock, where one party agrees to take from the other all his consumption of such rock in his business as a fertilizer manufacturer, for a term of years at a stipulated price, which the other agrees to supply, it being stated that the annual consumption is estimated at a certain amount under normal conditions, but that the purchaser shall be entitled to demand double that quantity if required.
2. **A contract by a fertilizer manufacturer** whose principal business is to manufacture acidulated phosphate from crude rock, both for sale, and for the production of higher grades of fertilizer, to take his entire consumption of rock from the other party to the contract, does not give him the right to avoid taking the crude rock by purchasing in the market rock already acidulated, when he finds it to his advantage to do so, on the ground that when he purchases such rock he does not require any of the crude material.
3. **The party who commits the first breach** of a contract cannot maintain an action against the other for a subsequent failure to perform.

NOTE.—As to validity of contract for purchase of indefinite quantity, see also *Wells v. Alexandre* (N. Y.) 15 L. R. A. 218, and *note*; *Minnesota Lumber Co. v. Whitebreast Coal Co.* (Ill.) 31 L. R. A. 529; *Hayes v. O'Brien* (Ill.) 23 L. R. A. 555; *Hoffman v. Maffioli* (Wis.) 47 L. R. A. 427; *Hickey v. O'Brien* (Mich.) 49 L. R. A. 594; and *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* (C. C. App. 8th C.) 57 L. R. A. 696.
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4. **A contract to purchase and sell all the phosphate rock** consumed by a manufacturer of fertilizer for a series of years is entire.

5. **Waiver of a breach by a fertilizer manufacturer, of his contract to procure his crude rock** from the other party, by his failure to do so for two years, is not shown by neglect absolutely to refuse further compliance until after orders for a large amount have been received, where they were all rushed in within a few months, and full knowledge of the facts was not shown.

(March 13, 1903.)

ERROR to the Circuit Court of the United States for the Middle District of Tennessee to review a judgment in favor of defendant in an action brought to recover damages for breach of contract to sell and deliver phosphate rock. *Affirmed.*

Statement by Lurton, Circuit Judge:

This is an action to recover damages for a breach of a contract. The plaintiff in error, hereafter styled the "plaintiff," is an Ohio corporation, engaged in making fertilizers at its factory in Ohio. The defendant in error, hereafter referred to as the "defendant," is a Tennessee corporation, engaged in mining phosphate rock at Attilla, Tennessee. The plaintiff and defendant entered into a written contract, by which the defendant agreed to sell to the plaintiff its entire "consumption of phosphate rock" for a term of five years, beginning January 1, 1897, at a stipulated price per ton. This contract, among other things, provided:

(1) That the rock should be shipped as ordered by plaintiff.

(2) Shipments to commence as soon as 500 tons previously contracted for should be consumed, and thereafter the plaintiff

agreed to buy its entire consumption from defendant.

(3) The plaintiff to have the right to demand as much as 3,000 tons annually. But the contract recited: "It is understood that your present annual consumption is estimated at something like 1,500 tons under normal conditions."

(4) Rock to be settled for on the 10th of each month for all rock received during the preceding month.

The breach alleged is that the defendant refused to comply with the orders of the plaintiff given between January 25, and July 10, 1899, for the shipment of rock aggregating 3,000 tons.

In lieu of a general averment that the plaintiff had not itself previously breached the agreement, the pleader sets forth the circumstances surrounding the making of the contract, and precisely what had been done by each party under the agreement. Thus it is averred that the plaintiff was engaged in making and selling two grades or qualities of fertilizer, one styled a "complete," and the other an "incomplete," fertilizer. The "incomplete fertilizer," otherwise called "acid phosphate" or "acidulated phosphate," is made by treating the crushed rock with sulphuric acid, and then grinding the dried mass into powder. The resulting product is called "acid phosphate," and is itself sold and used as a fertilizer; and the business of plaintiff at the time this agreement was made was in part the manufacture and sale of this grade of fertilizer. Plaintiff's factory was equipped for the manufacture of this acidulated phosphate, and plaintiff informed the defendant that it proposed to enlarge its facilities for making acid phosphate, and to increase its output of that product. It is also averred that this acidulated phosphate was the principal constituent in the making of a more complete fertilizer.

The declaration then avers that between August, 1897, and January, 1899, it did not order any phosphate rock from the defendant, nor did it buy any from any other producer. To explain this, it is averred that the makers of sulphuric acid so advanced the price by a combination as to make it cheaper for plaintiff to buy the acidulated phosphate, both to supply its customers for that grade of fertilizer and as the basis for the higher grade of fertilizers made and sold by it. The declaration proceeds as follows: "So that the plaintiff found it absolutely necessary for its economic life, and therefore it was, by these abnormal conditions, driven to cease the manufacture, temporarily, of acid phosphate, either for use in plaintiff's own factory of complete fertilizers, or for sale for use as a direct, though incomplete, fertilizer." It is then averred that in the latter part of 1898 the promise for a much larger demand for fertilizers, together with a great decline in the price of sulphuric acid and a rise in the price of crude rock, induced the plaintiff to enlarge its capacity for producing this acid phosphate, and for extending its sale, and to

meet this increased capacity it ordered the maximum amount of crude rock admissible under the contract. It is then averred that plaintiff gave notice that it would be obliged to buy acid phosphate if defendant did not ship the crude rock as ordered, and would look to it for the difference between the price paid and the cost of manufacture; but that the defendant had refused to carry out its agreement, claiming that plaintiff had first breached the agreement by buying acid phosphate as aforesaid. It is further averred that plaintiff had bought about 3,000 tons of acidulated phosphate to supply its contracts for that product and to carry on its manufacture of the complete fertilizer. The defendant demurred. The demurrer was sustained by Judge Clark, and the plaintiff has sued out this writ of error.

Argued before *Lurton, Day, and Severens*, Circuit Judges.

Messrs. Ernst, Cassatt, & McDougall, F. C. Maury, and Thomas E. Matthews, for plaintiff in error:

The plaintiff's failure to take rock between August, 1897, and January, 1899, was not a breach of its contract.

The language in the contract, "It is understood that your present annual consumption is estimated something like 1,500 tons under normal conditions,"—is a mere recital, and is not an agreement to take that or any other specific quantity of rock.

Bracle v. United States, 96 U. S. 168, 24 L. ed. 622; *Norrington v. Wright*, 115 U. S. 204, 29 L. ed. 368, 6 Sup. Ct. Rep. 12.

The plaintiff's purchase of acid phosphate during the pendency of this contract was not a violation of the contract.

Canonsburg Iron Co. v. McKeever, 1 Monaghan, 744, 16 Atl. 97, 138 Pa. 184, 20 Atl. 938.

Even if plaintiff's failure to take phosphate rock between August, 1897, and January, 1899, was in violation of the contract, defendant cannot avail itself of such supposed breach as a defense to this action, because defendant did not prepare the rock for shipment, nor tender it to plaintiff, nor ask shipping instructions for the same.

Neis v. Yocum, 9 Sawy. 24, 16 Fed. 168; *Goldsborough v. Orr*, 8 Wheat. 224, 5 L. ed. 602; *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 338, 14 L. ed. 170; *Dunham v. Pettee*, 8 N. Y. 508; *Lester v. Jewett*, 11 N. Y. 453; *Benjamin, Sales, Bennett's* 7th ed. p. 733; *Jones v. Gibbons*, 8 Exch. 920; *Shep. Touch. title Obligation*; *Harmon v. Crook*, 2 Yerg. 127.

Even if said acts were in violation of the contract, defendant was not entitled to rescind the entire contract, because it is severable, and not entire.

Loomis v. Eagle Bank, 10 Ohio St. 327; *Coleman v. Hudson*, 2 Sneed, 463; *Barnes Bros. v. Black Diamond Coal Co.* 101 Tenn. 354, 47 S. W. 498; *Shannon's* (Tenn.) Code, § 4620; *Lanusse v. Barker*, 3 Wheat. 101, 4 L. ed. 343; *Boyle v. Zacharie*, 6 Pet. 635, 8 L. ed. 527; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102;

London Assur. Co. v. Companhia de Moagens do Barreiro, 167 U. S. 149, 160, 161, 42 L. ed. 113, 121, 17 Sup. Ct. Rep. 785; *Story*, Contr. § 280; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Bell v. Bruen*, 1 How. 169, 11 L. ed. 89; *Bank of United States v. Daniel*, 12 Pet. 54, 55, 9 L. ed. 998; *Walker v. Whitehead*, 16 Wall. 314, 21 L. ed. 357; *Deveese v. Smith*, 45 C. C. A. 408, 106 Fed. 442; *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L. R. A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 419; *Leffingwell v. Warren*, 2 Black, 599, 603, 17 L. ed. 261, 262; *Olcott v. Fond du Lac County*, 16 Wall. 678, 689, 21 L. ed. 382, 386; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. ed. 548; *Shipman v. Saltsburg Coal Co.* 10 C. C. A. 311, 17 U. S. App. 625, 62 Fed. 145; 1 *Story*, Conf. Laws, § 25, p. 16.

The criterion of a severable contract is, that the consideration on one side is indeterminate until the contract is completed on the other side, and then it is determined by some rule fixed by the terms of the agreement.

Story, Sales, § 242; *Jonassohn v. Young*, 4 Best & S. 296; *Deming v. Kemp*, 4 Sandf. 147; *Lee v. Beebe*, 13 Hun, 89; *Bernstein v. Hilpolshtainer*, 18 Misc. 376, 41 N. Y. Supp. 659; *Thompson v. Easton*, 31 Misc. 627, 68 N. Y. Supp. 75; *Catlin v. Tobias*, 26 N. Y. 212, 84 Am. Dec. 183; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304; *Veerkamp v. Hubbard Canning & Drying Co.* 58 Cal. 230, 41 Am. Rep. 265; *McLaughlin v. Hess*, 164 Pa. 570, 30 Atl. 491; *Hindrey v. Williams*, 9 Colo. 371, 12 Pac. 436; *Hansen v. Consumers' Steam Heating Co.* 73 Iowa, 77, 34 N. W. 495; *Tiedeman, Sales*, § 104; *Deveese v. Smith*, 45 C. C. A. 408, 106 Fed. 438.

Even had defendant been entitled to rescind the contract, it did not, as a matter of fact, do so until after plaintiff had ordered the 3,000 tons. Defendant, by word and conduct, waived its right to rescind, and is now estopped to deny its liability.

Norrington v. Wright, 115 U. S. 205, 212, 29 L. ed. 369, 6 Sup. Ct. Rep. 12; *Morgan v. McKee*, 77 Pa. 228; *Hennessy v. Bacon*, 137 U. S. 78, 84, 85, 34 L. ed. 606, 608, 11 Sup. Ct. Rep. 17; *Clark v. Wheeling Steel Works*, 3 C. C. A. 600, 3 U. S. App. 358, 53 Fed. 498; *Sillouay v. Neptune Ins. Co.* 12 Gray, 83; *Swain v. Seamens*, 9 Wall. 254, 19 L. ed. 554; *Rice v. Fidelity & D. Co.* 43 C. C. A. 270, 103 Fed. 427.

A contract between a company mining phosphate rock and a manufacturing company using phosphate rock as one of several raw materials in the manufacture of acid phosphate, whereby the former agrees to sell and the latter to buy latter's "consumption" of phosphate rock for five years, is valid.

National Furnace Co. v. Keystone Mfg. Co. 110 Ill. 433; *Minnesota Lumber Co. v. Whitebreast Coal Co.* 160 Ill. 85, 31 L. R. A. 529, 43 N. E. 774; *Smith v. Morse*, 20 La. Ann. 220.

Such a contract does not obligate the pur-

chaser "to require" or "consume" any specific amount.

Shipman v. Saltsburg Coal Co. 10 C. C. A. 311, 17 U. S. App. 625, 62 Fed. 145; *Grant v. United States*, 7 Wall. 331, 19 L. ed. 194; *Lobenstein v. United States*, 91 U. S. 324, 23 L. ed. 410; *Brawley v. United States*, 96 U. S. 168, 24 L. ed. 622; *Gwillim v. Daniell*, 2 Crompt. M. & R. 61; *Norrington v. Wright*, 115 U. S. 204, 29 L. ed. 368, 6 Sup. Ct. Rep. 12; *Maryland v. Baltimore & O. R. Co.* 22 Wall. 105, 112, 22 L. ed. 713; *Aspdin v. Austin*, 5 Q. B. 671.

Messrs. George T. Hughes and William L. Granbery, for defendant in error:

Contracts for the purchase of material for a definite period are valid, if at all, only when the purchaser is bound by the terms of the contract to take such material by some ascertainable method.

National Furnace Co. v. Keystone Mfg. Co. 110 Ill. 427; *Crane v. Crane*, 45 C. C. A. 96, 105 Fed. 869; *Minnesota Lumber Co. v. Whitebreast Coal Co.* 160 Ill. 85, 31 L. R. A. 529, 43 N. E. 774; *Smith v. Morse*, 20 La. Ann. 220; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; *Wells v. Alexandre*, 130 N. Y. 642, 15 L. R. A. 218, 29 N. E. 142; *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791; *Harvester King Co. v. Mitchell, L. & S. Co.* 89 Fed. 173; *Mississippi River Logging Co. v. Robson*, 16 C. C. A. 400, 32 U. S. App. 520, 69 Fed. 773; *Petroleum Co. v. Coal, Coke & Mfg. Co.* 89 Tenn. 389, 18 S. W. 65.

The plaintiff's breach of the contract by using acid phosphate from August, 1897, to January, 1899, and by not using phosphate rock under the contract, has disabled it from maintaining an action for a subsequent failure to perform by the defendant.

Rice v. Fidelity & D. Co. 43 C. C. A. 276, 103 Fed. 427; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *United States v. Peck*, 102 U. S. 52, 26 L. ed. 75; *Cresswell Ranch & Cattle Co. v. Martindale*, 11 C. C. A. 35, 27 U. S. App. 277, 63 Fed. 84; *Kauffman v. Raeder*, 54 L. R. A. 247, 47 C. C. A. 278, 108 Fed. 171; *Filley v. Pope*, 115 U. S. 213, 29 L. ed. 372, 6 Sup. Ct. Rep. 19; *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. Rep. 882; *King Philip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603.

The contract, being a continuing one, is entire, and not severable.

Cherry Valley Iron Works v. Florence Iron River Co. 12 C. C. A. 306, 22 U. S. App. 655, 64 Fed. 569; *Watson v. Ford*, 35 C. C. A. 349, 93 Fed. 359; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Providence Coal Co. v. Cox Bros.* 19 R. I. 381, 35 Atl. 210; *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. Rep. 882; *Conway v. Fitzgerald*, 70 Vt. 103, 30 Atl. 634; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304; *Bollman v. Burt*, 61 Md. 415; *Cresswell Ranch & Cattle Co. v. Martindale*, 11 C. C. A. 37, 27 U. S. App. 277, 63 Fed. 84; *King Philip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603; *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A.

108, 58 U. S. App. 397, 86 Fed. 370; *Walker v. Marks*, 17 Wall. 648, 21 L. ed. 744; *Clairborne County v. Brooks*, 111 U. S. 410, 28 L. ed. 474, 4 Sup. Ct. Rep. 489; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 541, 34 U. S. App. 60, 68 Fed. 791; *Crane v. Crane*, 45 C. C. A. 96, 105 Fed. 869; *National Furnace Co. v. Keystone Mfg. Co.* 110 Ill. 427.

Defendant has not waived its right to insist upon plaintiff's breach, and is not estopped to deny liability for its refusal of further performance.

Colt v. Miller, 10 Cush. 49; *Palmer v. Sawyer*, 114 Mass. 1; *Freeland v. Ritz*, 154 Mass. 262, 12 L. R. A. 561, 28 N. E. 226; *Trottinger v. East Tennessee, V. & G. R. Co.* 11 Lea, 538; *Bradford v. Foster*, 87 Tenn. 9, 9 S. W. 195.

Lurton, Circuit Judge, delivered the opinion of the court:

The only consideration upon which this contract rests is the mutual obligation to perform. It is not an agreement for the sale and purchase of a definite quantity of phosphate rock. But that is not fatal. If the agreement had been to supply to the plaintiff 1,500 tons of rock each year, no one would question the definiteness of the agreement. That amount was the estimated annual consumption of such rock by the plaintiff under ordinary conditions. But in a particular year it might be more or it might be less than this estimated average consumption. Now, in this situation the seller, in effect, says: "You say your usual consumption is 1,500 tons per year, but that the demand for the rock is dependent on the demand for fertilizers, and that the latter demand is dependent on agricultural conditions, which are variable; that one year you may need more than that amount, and another less. Very well, let us contract with regard to this. I, too, must know something about the amount I may be called upon to supply. We will fix a maximum on that side of 3,000 tons. You, on your part, instead of agreeing to take each year a definite number of tons, must agree to take all of your consumption of rock from me at the stipulated price, and I will agree to hold myself in readiness to furnish you all of your rock as you may order same. But you must take your entire supply from me, for, if you are to take it only as you choose to buy from me, you may choose to buy none if the price goes down and a great deal if the price goes up." Now, such a contract would not be unilateral. The plaintiff would be bound to take its entire supply from the defendant. The amount which is to be bought is made as definite as possible under the circumstances. The quantity is to be measured by the requirements of the factory in a business which necessarily requires a very large amount if it shall continue to be operated in the future as in the past. Though the 61 L. R. A.

quantity to be bought and sold was indefinite, it was ascertainable by the terms of the agreement, and therefore certain. *Certum est quod certum reddi potest*. A contract to buy all that one shall require for one's own use in a particular manufacturing business is a very different thing from a promise to buy all that one may desire, or all that one may order. The promise to take all that one can consume would be broken by buying from another, and it is this obligation to take the entire supply of an established business which saves the mutual character of the promise. *Manhattan Oil Co. v. Richardson Lubricating Co.* 51 C. C. A. 553, 113 Fed. 923; *National Furnace Co. v. Keystone Mfg. Co.* 110 Ill. 427; *Wells v. Alexandre*, 130 N. Y. 642, 15 L. R. A. 218, 29 N. E. 142; *Brawley v. United States*, 96 U. S. 168, 172, 24 L. ed. 622; *Staver Carriage Co. v. Park Steel Co.* 43 C. C. A. 471, 104 Fed. 200; *Smith v. Morse*, 20 La. Ann. 220.

The contract, thus interpreted, is distinguishable from a class of cases where the agreement was held to be a mere option. Thus, in *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240, an offer to receive and transport railroad iron from New York to Chicago, not to exceed a certain number of tons, during a specified period, at a definite rate, was accepted without any agreement to deliver any iron for transportation. This contract was held not to be binding on either party for want of mutuality. In *Petroleum Co. v. Coal, Coke & Mfg. Co.* 89 Tenn. 381, 387, 18 S. W. 65, a lease was upon consideration that, if the lessee should "deem it advisable" to test for and work mines discovered thereon, he should pay a royalty upon the output. The lease was held void, the lessee not being required to make any test or operate any mine if discovered. In *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791, a contract to sell 10,000 barrels of oil at an agreed price, in such quantities per week as the buyer might desire, and to be paid for as delivered, was held void, because the buyer was held not to be under obligation to take or receive any particular quantity per week, or the whole in a definite number of weeks. In *Crane v. Crane*, 45 C. C. A. 96, 105 Fed. 869, a contract by a wholesale dealer to sell a retailer, during a certain time, at stated prices, so much lumber as the latter "should require for his trade," was held void for want of mutuality, as there was no approximation of what might be the trade of the retailer. If prices should go down, he would naturally make no sales at a price below what he was to pay; but, if prices went up, he would be in a situation to drive his rivals from business by increasing his trade at the expense of the vendor. In *Davie v. Lumberman's Min. Co.* 93 Mich. 491, 24 L. R. A. 357, 53 N. W. 625, a contract by which the plaintiffs agreed to work an ore bank for \$1.50 per ton of ore produced "as long as we can make it pay" was held void for want of mutuality and definiteness of terms.

But how does the plaintiff interpret the agreement? For two years it bought no rock. The third year it demands the maximum quantity allowable under any conditions. It excuses itself for its failure to take any rock in 1897 and 1898 by, in effect, saying that "it was more profitable for me to stop making acid phosphate altogether, and to buy my supply of that product." "As I bought 'acid phosphate,' and did not buy the crude rock, I did not violate my agreement with you, for my factory was during that period consuming no crude rock whatever." But, as illustrating the inconsistency of this position, the plaintiff, when it became cheaper to make than to buy acidulated rock, notified the defendant that if it did not supply its demand for crude rock it would buy acidulated rock, and hold defendant liable for the difference between the price paid and what it would cost to make it; and the damages sued for in this case is the difference between the price paid for the acidulated rock and the cost of making same. If this result is possible, the operation of the contract is most unjust. The only "consumption" of phosphate rock by plaintiff's factory at the date of this contract was in the making of the lower form of fertilizer called "acid phosphate" or "acidulated phosphate." This product it made and sold as a fertilizer. It also used it as a base in making a higher grade of fertilizer. To justify the demand for 3,000 tons of crude rock in 1899,—that being double the average or normal demand,—the plaintiffs in this declaration aver that when the contract was made they notified defendant that it expected to greatly increase its capacity for making and storing that kind of fertilizer.

Now, in the face of this character of operation conducted by its factory and the known normal "consumption" of rock in its factory, the plaintiff excuses its purchase of acid phosphate by, in effect, saying, "I found it more economical to buy acidulated phosphate than to make it, as I have been doing. This I did in good faith. That is, it was in fact more economical for me to buy than to make, and this good faith of mine justifies my conduct, and now, that it is more profitable to take the rock from you at the stipulated price, seeing that such rock has now doubled in price, and sulphuric acid gone down, than to buy the rock already acidulated, I now elect to resume the consumption of rock for the making of acidulated rock on as great a scale as my agreement with you will permit." Thus interpreted, the agreement is a mere option, and utterly void. *Addison, Contr. § 18; Crane v. Crane*, 45 C. C. A. 96, 105 Fed. 869; *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 540, 4 U. S. App. 60, 68 Fed. 791; *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240; *Davie v. Lumberman's Min. Co.* 93 Mich. 491, 24 L. R. A. 357, 53 N. W. 625; *Wells v. Alexandre*, 130 N. Y. 642, 15 L. R. A. 218, 29 N. E. 142.

The only consideration for the promise of the defendant to sell is the obligation of the 61 L. R. A.

plaintiff to take its entire consumption of rock, and if the plaintiff is in fact at liberty to carry on its business by buying its acidulated rock when its price was less than the cost of making it, and thereby avoiding any actual consumption of crude rock, the contract is one which it may perform or not, as it pleases. "The mutuality of obligation is the very essence of all contracts founded upon mutual promises. 'Hence it follows,' observes Pothier, 'that nothing can be more contradictory to such an obligation than an entire liberty, in either of the parties making the promise to perform it or not, as he may please. An agreement giving such a liberty would be absolutely void for want of obligation.'" *Addison, Contr. § 18*. But we do not accept the plaintiff's interpretation of the agreement as correct. From all the surrounding circumstances it was intended to make the amount of rock which the plaintiff was bound to take as definite as possible by the statement of the average or normal consumption in the manner in which the factory was operated and by the agreement to take the entire consumption for a definite time at a stipulated price. Undoubtedly, there is a margin of allowance to be made for the contraction or expansion of the business incident to the varying conditions to which it is ordinarily subject. These conditions may be said to be within the contemplation of the parties when, instead of contracting for a definite amount, deliverable each year, the contract was made for "all of the consumption" of the rock during a definite period of time. This contract gave the plaintiff liberty to use more or less, so long as it did not reduce or increase its consumption beyond the requirements of the usual fluctuations incident to the character of manufacturing carried on by it. This diminution or increase according to the reasonable fluctuations of such a business, if the result of the carrying on of the business with good faith in view of the obligations of the plaintiff to the defendant, constitutes the limit of the liberty allowed by the contract, and it is only in this respect that the question of good faith has any bearing upon the rights of the parties under the agreement.

Any interpretation of the agreement which will enlarge the discretion of the plaintiff so as to allow him to desist from carrying on the business substantially as it was carried on when the agreement was made, by permitting it to substitute purchased acid phosphate for that of its own make, simply because it could temporarily be bought more cheaply than it could be made, would place the defendant at the mercy of the plaintiff, and convert the agreement into a mere option. The contract must be read in the light of the fact that the principal business of the plaintiff was to make "acidulated phosphate" both for sale and for mixing in combination with other chemicals to make another grade of fertilizer. The defendant had the right to believe that the plaintiff's purpose was to continue the making of acid phosphate, and

that the rock consumed in that business was to be all taken from it. To say that the plaintiff was at liberty to desist entirely from making acidulated phosphate whenever it could buy the product to meet the demands of its business cheaper than it could make it, and was only bound to take rock when it could make that grade of product cheaper than it could buy it, is in opposition to the plain meaning of the agreement, as well as destructive of the mutuality of the contract.

In *Crane v. Crane*, 45 C. C. A. 96, 105 Fed. 869, the contract was by a wholesale dealer in lumber to supply a retailer during a certain time, and at a stipulated price, with so much of a certain grade of lumber as the purchaser "should require for his trade." This contract was held void for want of mutuality, inasmuch as it left it practically optional with the purchaser to increase or diminish his orders with the rise or fall in price. The opinion of the court was by Grosscup, Circuit Judge, who, after referring to such cases as *National Furnace Co. v. Keystone Mfg. Co.* 110 Ill. 427, and *Smith v. Morse*, 20 La. Ann. 220, and *Great Northern R. Co. v. Witham*, L. R. 9 C. P. 16, said: "In all these cases contracts looking towards the future, and embodying subject-matter necessarily indefinite in quantity, have been upheld; but it will be observed that, although the quantity under contract is not measured by any certain standard, it is capable of an approximately accurate forecast. The capacity of the furnace, the needs of the railroad, or the requirements of the hotel are, within certain limits, ascertainable by the vendor. He is thus enabled to make reasonably accurate calculation of the extent of his obligation. Then, too, the purchase is only an incident of the vendee's business. Presumably, the business will go on irrespective of a rise or fall in the prices of subsidiary supplies. There thus remains to the vendee little or no temptation, on account of the rise or fall in prices, to greatly enlarge or diminish the quantity of his orders."

In *Wells v. Alexandre*, 130 N. Y. 642, 15 L. R. A. 218, 29 N. E. 142, the contract was to furnish all the steamers of the defendants' line with coal for a definite time at a stipulated price. These steamers were at the time making regular trips between certain ports. Coal was delivered as needed for a part of the time, when defendants sold and ceased to operate their steamers, and declined to receive coal thereafter, although the purchaser of the steamers continued to operate them as before. The contract was construed as one to furnish all of the coal which should be required to operate the steamers during the period covered by the agreement, and that the sale of the steamers did not operate to relieve the defendants from the obligation to take the coal "which the ordinary and accustomed use of the steamers required."

The plaintiff in error has cited and greatly relied upon the case of *McKeever v. Canonsburg Iron Co.* 138 Pa. 184, 20 Atl. 938, 161 L. R. A.

Monaghan, 744, 16 Atl. 97. The agreement involved there was to supply an iron mill "with all of the coal you will require for your mill for three years." The prices fixed were for three grades of coal,—"forked coal," "run of mines," and "slack." The mill, pending this agreement, introduced natural gas, a fuel unknown when the agreement was made, which greatly reduced the quantity of coal required. It also bought a grade of coal called "nut" from another person, and claimed that they were liable only for the coal of the kinds specified actually required after the consumption of gas was begun. It was held that the mill was at liberty to diminish the use of coal as fuel by the introduction of gas, but that, as it appeared the "nut" coal took the place of "slack," it had no right to use it without liability to the plaintiffs. The case differs in its principal point on the facts and circumstances from the one at bar, though in the minor question—the right to substitute one grade of coal for another,—it quite resembles the present case, and supports the conclusion we have reached. The opinion is, however, entitled only to that weight which attaches to a judgment of the Pennsylvania supreme court, for it is not supported by either argument or authority.

2. The plaintiff, by the facts stated on the face of the declaration, shows that it committed the first substantial breach of the contract. Having desisted from receiving phosphate rock for a period of nearly two years, because it found it more profitable to buy than to make acidulated phosphate, it now demands damages from the defendant because it had to buy acidulated phosphate at a loss in consequence of the refusal of the defendant to supply it with phosphate rock after it became more profitable to make than to buy that grade of fertilizer. If there is anything well settled it is that the party who commits the first breach of the contract cannot maintain an action against the other for a subsequent failure to perform. The plaintiff has not kept the contract, and shows no excuse for his breach. It does not, therefore, show any such performance on its own part as to entitle it to demand that the defendant shall go on and perform, or pay damages for a subsequent refusal to recognize the contract as in force.

3. The contract was clearly an entire contract. It was for the sale of all the phosphate rock which should be needed for the ordinary requirements of the plaintiff's factory, and was not a number of single contracts for the sale and delivery of definite quantities as ordered from time to time. The breach went to the whole of the consideration. *Cherry Valley Iron Works v. Florence Iron River Co.* 12 C. C. A. 306, 22 U. S. App. 655, 64 Fed. 569; *Monarch Cycle Mfg. Co. v. Royer Wheel Co.* 44 C. C. A. 523, 105 Fed. 324; *Norrington v. Wright*, 115 U. S. 212, 29 L. ed. 371, 6 Sup. Ct. Rep. 12; *Cresswell Ranch & Cattle Co. v. Martindale*, 11 C. C. A. 35, 27 U. S. App. 277, 63 Fed. 84; *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. Rep.

882. We find no settled line of decisions in either Tennessee or Ohio in conflict with the decisions cited. So, whether the contract be a Tennessee or Ohio contract, and be governed by the law of the one state or the other, the result is the same, *viz.*, the contract was entire, and not divisible. The Tennessee statute (§ 4620, Shannon's Code) has no application, as it does not determine whether a particular contract is entire or divisible. It only provides that successive actions may be brought for successive breaches of a contract "whenever, after the former action, a new cause of action arises therefrom."

4. The right of the defendant to bring an action for the breach of the agreement is not before us. If it were, we would have to deal with the question as to how far it would be essential to aver and show a readiness on its own part to comply.

5. It is next contended that the defendant company "waived its right to rescind," and "is estopped to deny liability," because it did not refuse performance until after the plaintiff had filed its orders for 3,000 tons of rock between January 25 and July 25, 1899. There is nothing in this in any view of the case. The failure of the plaintiff to order shipments of rock for nearly two years naturally induced the defendant to suppose the agreement abandoned. Hence, when plaintiff began to give orders again, the defendant was unable to comply, having made no preparation to carry out the contract.

But under date of February 17th the defendant declined to ship rock, and denied liability for the difference between cost of acid phosphate rock in the market and its cost made from rock under the contract. Under date of March 30th, defendant inquired upon what the mill of plaintiff had been run during its long period of inactivity in sending orders for rock. Plaintiff's correspondence is disingenuous in this matter. It waited until May 13, 1899, before answering, and then gave no information, referring the defendant to its statement in some earlier letter that "we had complied with the terms of our contract with you in every respect," and making no other explanation of its own breach. Instead it rapidly rushed in its orders, so that within a very short period it ordered 3,000 tons of rock, although its declaration avers that for the previous years its consumption of phosphate rock would not have exceeded 750 tons per year if it had bought the crude rock and made its own acid phosphate. No intention to waive is shown, and no such full knowledge of the facts as would justify us in saying that it was bound even if the fact of waiver was made out. There are other answers to this in view of the pleadings and the attitude of the parties. But it is enough to say that no intent to waive is shown by the facts appearing in the declaration.

The demurrer was properly sustained, and the judgment is affirmed.

ARIZONA SUPREME COURT.

A. Y. GREER, *Plff. in Err.*,

v.

MERCEDES DOWNEY.

(.....Ariz.....)

A statute permitting the sale at auction of trespassing animals, after the posting for ten days by the proper officer of notice that the animals had been impounded, and are detained for a certain amount of damages and costs, without providing any judicial proceeding to ascertain either the damages to be paid, or whether or not the animals were in fact running at large within the meaning of the statute, is void as depriving the owner of his property without due process of law.

(March 20, 1903.)

ERROR to the District Court for Yuma County to review a judgment in favor of plaintiff in an action brought to recover the value of a horse which was alleged to have been impounded and sold to defendant by a pound keeper under the provisions of a statute. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to constitutionality of statute providing summary proceedings for impounding and sale of stray animals, see, in this series, *Burdett v. Allen* (W. Va.) 14 L. R. A. 337.

As to constitutionality of statute forbidding

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Mr. Peter T. Robertson, for plaintiff in error:

The legislative power of the territory extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.

U. S. Rev. Stat. § 1851; *Ariz. Rev. Stat.* § 15.

At common law the owner was required to keep his cattle within his own close. If he did not, and they strayed upon the land of his neighbor, he was liable in damages for the trespass.

3 *Hammond's Bl. Com.* pp. 9, 10, 14; *Lorraine v. Hillyer*, 57 Neb. 266, 77 N. W. 755; *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295; *Hahn v. Garratt*, 69 Cal. 147, 10 Pac. 329; *Bulpit v. Matthews*, 145 Ill. 345, 22 L. R. A. 55, 34 N. E. 525; *Haight v. Bell*, 41 W. Va. 19, 31 L. R. A. 131, 23 S. E. 666.

And the owner of the land trespassed upon could distrain the animals *damage feasant*, and impound them as a pledge for the payment of the damages.

We only adopted such portions of the com-

animals to run at large, see *Halgh v. Bell* (W. Va.) 31 L. R. A. 131.

As to impounding and forfeiture of animals running at large generally, see *Ft. Smith v. Dodson* (Ark.) 4 L. R. A. 252, and *note*.

mon law as were suitable to the needs of the people.

Ariz. Rev. Stat. 1887, § 2935.

At the time the common law was adopted mining and stock raising were the principal industries. It was better for the prosperity of the country to compel the farmer to fence his possessions than to compel the stockman to herd or fence in his cattle.

As agricultural interests developed the rule adopted in the early days of the territory became burdensome and unjust to the settlements where farming was the principal industry, and where cattle raising was insignificant in comparison therewith, and the legislature, recognizing the conditions, came to the rescue by enacting the law under examination.

The power to impound and sell, after a specified time,—and after notice to the owner,—animals found running at large, is frequently conferred upon municipalities.

1 Am. & Eng. Enc. Law, p. 588; *Wilson v. Beyers*, 5 Wash. 303, 32 Pac. 90; *Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 399; *Burdett v. Allen*, 35 W. Va. 347, 14 L. R. A. 337, 13 S. E. 1012.

If the legislature can confer such power upon a town or village, why may it not with equal propriety, with equal legality, confer such power upon a county?

Haight v. Bell, 41 W. Va. 19, 31 L. R. A. 131, 23 S. E. 666.

Mr. H. C. Davis for defendant in error.

Kent, Ch. J., delivered the opinion of the court:

This action was brought by Mercedes Downey, the defendant in error, for the recovery of the value of a horse claimed by her, which had been impounded and sold to the plaintiff in error, the defendant in the action, by the poundkeeper of the justice precinct, under act No. 41, p. 32, of the Laws of 1893. Judgment was entered in the court below in favor of the plaintiff upon an agreed statement of facts, and that judgment is brought to this court for review by writ of error.

The agreed statement of facts shows the compliance in every particular with the requirements of the act, and the regularity of the impounding and sale; and the only question to be determined in this court is whether or not the act is constitutional. The act in question provides that a majority of all the taxpayers residing in any justice precinct in the territory may petition the board of supervisors of the county in which such precinct is situated, expressing their desire that no fence shall be required around the lands in such precinct, and that, after the filing of such petition and due publication thereof, no fence shall be required around the lands in such precinct, and it shall be unlawful for any animal to run at large in such precinct thereafter. By § 2 of the act the constable of the precinct is made the poundkeeper of the precinct, and by § 3 it is provided, if any neat cattle, horses, etc., shall trespass or do any damage upon the premises of any person in such justice precinct, an action against the owner of the trespassing

animals may be maintained. By § 4 and subsequent sections the act further provides that the owner of any property may detain all animals doing damage on such property, and turn them over to the poundkeeper, who shall examine all marks or brands on them, and post notices containing a description of the animals, the amount of damages and costs for which they are detained, and the date and place at which they shall be sold, and such other information as the poundkeeper may deem advisable to bring the attention of the owner of the animals to the detention of the same. If the damages, costs, and expenses of keeping the animals are not paid, and the animals claimed, within ten days after the posting of such notices, the poundkeeper shall sell such animals at public auction to the highest bidder, the proceeds of the sale, after deducting damages, costs, and expenses, to be deposited with the county treasurer to the credit of the school fund of the county, provided that the owner of the animal, upon satisfactory proof of such ownership within six months of the date of sale, may obtain from the county treasurer the net proceeds of the sale. By the organic act Congress has provided that "the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." U. S. Rev. Stat. § 1851. It is claimed that the act of 1893 in question authorizes a deprivation of property without due process of law, and hence is unconstitutional. The Supreme Court of the United States has held that a statute which enacts that a railroad company shall be responsible in damages for property along its line of road destroyed by fire communicated from its locomotive engines is constitutional (*St. Louis & S. F. R. Co. v. Matheus*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243), and that a statute which provides that a person driving a herd of cattle along a highway running on a hillside shall be liable for damages done by such cattle in destroying the banks or rolling rocks onto such highway, is constitutional (*Jones v. Brim*, 165 U. S. 181, 41 L. ed. 677, 17 Sup. Ct. Rep. 282). So, the Supreme Court held valid a statute authorizing the recovery of double the value of stock killed by a railroad which failed to erect a fence, saying that from its former adjudications "it is evident that the 14th Amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of its citizens." *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207. It has been held that a statute providing that animals running at large on the public highway may be seized by anyone, and sold by a public officer to pay the expenses incurred, is valid as a proper exercise of police power: *Campau v. Langley*, 39 Mich. 451, 33 Am. Rep. 414. And it has been repeatedly held that a city charter, as an exercise of police power, may provide for the taking up and impounding of animals found running at large in the public streets, and for their sale to pay expenses,

without judicial proceedings, and, in some cases, without notice to the owner. *Com. v. Alger*, 7 Cush. 85; *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 625, 15 N. W. 435; *Burdett v. Allen*, 35 W. Va. 347, 14 L. R. A. 337, 13 S. E. 1012; *Coyle v. McNabb* (Tex. App.) 18 S. W. 198; *Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41; *Paris v. Hale*, 13 Tex. Civ. App. 386, 35 S. W. 333; *Wilson v. Beyers*, 5 Wash. 303, 32 Pac. 90; *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208. It has also been held that a law authorizing the seizure of animals trespassing upon private property, and authorizing proceedings for their condemnation, and giving the person injured a lien on the cattle, is constitutional (*Cook v. Gregg*, 46 N. Y. 439; *Campbell v. Evans*, 45 N. Y. 356); and so when such seizure is followed by a sale by an officer to pay the expenses (*Anderson v. Locke*, 64 Miss. 283, 1 So. 251); and, further, that an act of the legislature making it unlawful for animals to run at large in a county is valid (*Haigh v. Bell*, 41 W. Va. 19, 31 L. R. A. 131, 23 S. E. 666).

It will be observed, however, that in these cases, and in all the cases we have examined on this subject, no court has held that a legislature has acted within the limits of its authority when it has attempted to authorize by such an act as is now in question, in the manner therein provided, a recovery or a recompense for damages suffered by an individual by reason of the trespass by animals at large upon his private property. We have not before us the question whether the legislature has the power to pass an act restricting the running at large of animals, and providing that they be impounded and sold by an officer upon such notice as may be proper, to meet the charges of impounding, if not paid. Such control and the regulation of

conflicting interests of stockmen and farmers, if deemed advisable, is a proper exercise of legislative authority, when confined thereto. Nor do we pass upon the question whether the legislature, in the act before us, has not properly provided by § 3 thereof for an action on the part of the farmer against the owner of animals trespassing upon his lands, and thereby has adopted and declared for this territory the common-law rule with respect thereto. Neither do we pass upon the validity of this section of the act. The objectionable feature of the act is that, independent of any proceeding contemplated by § 3, the poundkeeper is authorized by subsequent sections of the act, without any judicial proceedings for the purpose of ascertaining either the amount of the damages or whether the animal was in fact running at large within the meaning of the act, to sell to satisfy the private claim of the landowner for damages for the trespass.

We have no doubt that the portion of the act which authorizes a seizure and sale and a payment of damages claimed for the trespass without judicial process or proceedings other than as provided for in the act is a deprivation of property without due process of law, and as such is repugnant to the Constitution. Such is the logical deduction to be made from the reasoning of the courts in the cases cited above, with which we are in accord; and in addition thereto, questions nearly identical have been so determined by the courts of last resort in New York and Texas. *Rockwell v. Nearing*, 35 N. Y. 302; *Armstrong v. Traylor*, 87 Tex. 598, 30 S. W. 440.

The decision of the trial court was right, and the judgment is affirmed.

Sloan, Davis, and Doan, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY, *Plff. in Err.*,

v.

Helen A. SULLIVAN, Admr., etc., of John T. Sullivan, Deceased.

(120 Fed. 709.)

1. The recovery and disposition of a fund for the negligent killing of a person are governed by the laws which give the right of action.
2. An administrator appointed in one state is not prevented from suing in another state for the negligent killing of his intestate there, by the fact that the statutes of the two states providing for the recovery and distribution of damages in such cases are dissimilar and in substantial conflict.
3. Riding in the coach set apart for

colored passengers, contrary to the rules of the carrier and provisions of the statute, is not negligence on the part of a white person which will prevent a recovery for his death through the negligence of the carrier, although he would not have been injured had he not been in that coach.

4. The measure of damages in an action by an administrator for the negligent killing of his intestate, recovery in which will be a general asset of the estate applicable to payment of debts and administration expenses, is the present cash value of the estimated reasonable net earnings and acquisitions of deceased for the period of his natural expectancy of life at the time immediately preceding his death.

(Pardee, Circuit Judge, dissents.)

(March 3, 1903.)

NOTE.—For other cases in this series as to contributory negligence of passenger or railroad employee in riding in wrong car, see *Wagner v. Missouri P. R. Co.* (Mo.) 3 L. R. A. 156; *Meloy v. Chicago & N. W. R. Co.* (Iowa) 4 L. R. A. 287; *Baltimore & O. R. Co. v. State* (Md.) 61 L. R. A.

6 L. R. A. 706; *Florida Southern R. Co. v. Hirst* (Fla.) 16 L. R. A. 631, and *note*; *Blake v. Burlington, C. R. & N. R. Co.* (Iowa) 21 L. R. A. 559; *Baltimore & P. R. Co. v. Swann* (Md.) 31 L. R. A. 313; and *Illinois C. R. Co. v. Beebe* (Ill.) 43 L. R. A. 210.

ERROR to the Circuit Court of the United States for the Southern District of Florida to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her intestate. *Affirmed.*

Statement by **McCormick**, Circuit Judge:

This was an action by Helen A. Sullivan, as the administratrix of the estate of John T. Sullivan, deceased, against the Florida Central & Peninsular Railroad Company. The plaintiff was a citizen of Dallas county, Alabama, of which state and county John T. Sullivan, deceased, was a citizen up to the time of his death. The action was brought in the United States circuit court for the southern district of Florida. The plaintiff in her pleading showed that the deceased, on the 14th day of December, 1898, was a passenger on the railroad of the defendant, and while being carried as such passenger, by reason of the negligence of the defendant and of its servants, he received injuries that resulted in his death. The proceedings presented the usual features, and resulted in a judgment in favor of the plaintiff. The case is brought here by the defendant on writ of error.

Argued before *Pardee*, *McCormick*, and *Shelby*, Circuit Judges.

Messrs. John C. Cooper and John A. Henderson, for plaintiff in error:

The decedent never did have a right of action for death, and therefore his administrator does not take any right to such action by way of the survival of the action.

Jacksonville Street R. Co. v. Chappell, 22 Fla. 616, 1 So. 10; *Gerling v. Baltimore & O. R. Co.* 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Hulbert v. Topeka*, 34 Fed. 513; *Andreus v. Hartford & N. H. R. Co.* 34 Conn. 57; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Holton v. Daly*, 106 Ill. 131; 3 Sutherland, Damages, § 1260.

The recovery would not be assets in the hands of the administratrix, and she could not sue on this cause of action in Alabama, and recover on the same there as general assets of the estate.

13 Am. & Eng. Enc. Law, p. 937; *Fairchild v. Hagel*, 54 Ark. 61, 14 S. W. 1102; *Sims v. Hodges*, 65 Miss. 211, 3 So. 457; *Pott v. Pennington*, 16 Minn. 509, Gil. 460; *Moore v. Jordan*, 36 Kan. 271, 59 Am. Rep. 550, 13 Pac. 337; *Maysville Street R. & Transfer Co. v. Marvin*, 8 C. C. A. 21, 16 U. S. App. 236, 59 Fed. 91.

An administratrix appointed under the laws of Alabama must account, under this appointment, to the court in Alabama, and must turn over the proceeds of the recovery to the persons entitled under the laws of Alabama.

Smith v. Union Bank, 5 Pet. 518, 8 L. ed. 212; *Harrison v. Sterry*, 5 Cranch, 289, 3 L. ed. 104; *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177.
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Under the statutes of Alabama, the creditors have no interest in this recovery.

The plaintiff in error would not be protected by payment of the judgment in this case, against another action brought by an administrator appointed by a Florida court.

Maysville Street R. & Transfer Co. v. Marvin, 8 C. C. A. 21, 16 U. S. App. 236, 59 Fed. 91; *Hulbert v. Topeka*, 34 Fed. 510; *Noonan v. Bradley*, 9 Wall. 394, 19 L. ed. 757; *Johnson v. Powers*, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; *Limekiller v. Hannibal & St. J. R. Co.* 33 Kan. 83, 52 Am. Rep. 523, 5 Pac. 401; *Moore v. Jordan*, 36 Kan. 271, 59 Am. Rep. 550, 13 Pac. 337; *Usher v. West Jersey R. Co.* 126 Pa. 206, 4 L. R. A. 261, 17 Atl. 597; 1 Woerner, Am. Law of Administration, § 167, *375; *Lower v. Segal*, 59 N. J. L. 66, 34 Atl. 945; *Fairchild v. Hagel*, 54 Ark. 61, 14 S. W. 1102; *Oates v. Union P. R. Co.* 104 Mo. 514, 16 S. W. 487; *Ash v. Baltimore & O. R. Co.* 72 Md. 144, 19 Atl. 643; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 283, 13 S. W. 803.

The statute in Florida authorizing the administrator to sue for the death of his intestate does not designate any person as the beneficiary for whose benefit the recovery is had; and therefore such recovery is a general asset of the estate, and is applicable to the payment of debts and other administration purposes.

11 Am. & Eng. Enc. Law, p. 834; *Maysville Street R. & Transfer Co. v. Marvin*, 8 C. C. A. 21, 16 U. S. App. 236, 59 Fed. 91, 94; *Givens v. Kentucky C. R. Co.* 89 Ky. 234, 12 S. W. 257; *Findlay v. Chicago & G. T. R. Co.* 106 Mich. 700, 64 N. W. 732.

If the defendant in error desired to prosecute this action against the plaintiff in error, she should have procured an appointment by the probate court of Madison county, in the state of Florida, where the accident occurred, this right of recovery being an asset of the estate; and she should have sued as an administratrix appointed under the laws of Florida.

13 Am. & Eng. Enc. Law, 2d ed. 926; *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, 71 N. W. 283; *Illinois C. R. Co. v. Cragin*, 71 Ill. 177; *Vaughan v. Northup*, 15 Pet. 1, 10 L. ed. 639; *Noonan v. Bradley*, 9 Wall. 394, 19 L. ed. 757; *Johnson v. Powers*, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; *Findlay v. Chicago & G. T. R. Co.* 106 Mich. 700, 64 N. W. 732.

The law of the place of accident must prevail over the law of the place of appointment of the administratrix who brings this suit.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Boston & M. R. Co. v. McDuffey*, 25 C. C. A. 247, 51 U. S. App. 111, 79 Fed. 936; *Denick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 608, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Erey v. Mexican C. R. Co.* 38 L. R. A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81

Fed. 294; *Serensen v. Northern P. R. Co.* 45 Fed. 407; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400.

The plaintiff in error, as a common carrier, operating a railroad, would be entitled to provide reasonable regulations in the management of its trains, and in so doing, as one of such regulations, to provide separate cars for white and colored races, and to require the different races to ride in the several cars so set apart to each respectively.

Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Bertonneau v. Directors of City Schools*, 3 Woods, 177, Fed. Cas. No. 1,361; *Ex parte Plessy*, 45 La. Ann. 80, 18 L. R. A. 639, 11 So. 948; 1 Elliott, Railroads, § 200, p. 285; 2 Wood, Railway Law, § 297; *West Chester & P. R. Co. v. Miles*, 55 Pa. 210, 93 Am. Dec. 744; *Hutchinson, Carr.* §§ 542, 543, and note 1; *The Sue*, 22 Fed. 844; *Logwood v. Memphis & C. R. Co.* 23 Fed. 318; *Murphy v. Western & A. R. Co.* 23 Fed. 640.

It had the right to enforce and insist upon obedience to these regulations.

Texas & P. R. Co. v. Ludlam, 6 C. C. A. 454, 13 U. S. App. 540, 57 Fed. 481.

The plea stated a case of the deceased having met his death at a time when he was refusing to obey a reasonable regulation of the defendant company, and at a time when he had broken his contract as a passenger; and also stated a case in which he had placed himself in a position on the train, where, by reason of being in such position, he met with the accident, whereas if he had been in the place on the train provided for him, and where he had a right to be, he would not have met with the accident. Both of these elements made the plea a defense to the declaration.

Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506; *Florida Southern R. Co. v. Hirst*, 30 Fla. 1, 16 L. R. A. 631, 11 So. 506; *Patterson, Railway Accident Law*, 271, 272, 274; *Beach, Contrib. Neg.* 150, 151; *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208; *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21, 37 Am. Rep. 651; 8 Am. & Eng. Enc. Law, p. 11; *Burton v. West Jersey Ferry Co.* 114 U. S. 474, 29 L. ed. 215, 5 Sup. Ct. Rep. 960; *Hutchinson, Carr.* §§ 542, 543, 555; 4 Elliott, Railroads, §§ 1576, 1581, note 4; *O'Brien v. Boston & W. R. Co.* 15 Gray, 20, 77 Am. Dec. 347; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245; *McVeety v. St. Paul, M. & M. R. Co.* 45 Minn. 268, 11 L. R. A. 174, 47 N. W. 809; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19.

Mr. W. W. Quarles, for defendant in error:

Under the law of Alabama and of Florida, a right of action survives to the deceased. This right of action alone was property,—the property of the intestate left by him at his death.

Jones v. Townsend, 23 Fla. 355, 2 So. 612; *Jacksonville Street R. Co. v. Chappell*, 22 Fla. 616, 1 So. 10.

Choses in action constitute an estate with-
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in the contemplation and purview of the statutes of both states, and, being intangible property, their situs follows the domicile of the owner.

New Albany v. Meekin, 3 Ind. 481, 56 Am. Dec. 522; *Boardman v. Tompkins County*, 85 N. Y. 359; *People v. Whartenby*, 38 Cal. 461; *State v. Earl*, 1 Nev. 394; *Augusta v. Dunbar*, 50 Ga. 387; *Re Mayo*, 60 S. C. 401, 54 L. R. A. 660, 38 S. E. 634; *Hunter v. Board of Supers.* 33 Iowa, 376, 11 Am. Rep. 132; *Trammell v. Connor*, 91 Ala. 399, 8 So. 495; *Boyd v. Selma*, 96 Ala. 144, 16 L. R. A. 729, 11 So. 393; *Cooley, Taxn.* p. 270; *Story, Confl. L.* 378, 380; *Desty, Taxn.* p. 330; *Epping v. Robinson*, 21 Fla. 36.

It is within the power of a legislature to invest foreign administrators with the right to sue, and to exercise other authority, within its jurisdiction.

Weaver v. Baltimore & O. R. Co. 21 D. C. 499; *Texas & P. R. Co. v. Humble*, 181 U. S. 57, 45 L. ed. 747, 21 Sup. Ct. Rep. 526; *Kane v. Paul*, 14 Pet. 33, 10 L. ed. 341; *Childress v. Emory*, 8 Wheat. 643, 5 L. ed. 705; *Brown v. Louisville & N. R. Co.* 97 Ky. 228, 30 S. W. 639; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228, 41 Ind. 48; *Wabash, St. L. & P. R. Co. v. Shacklett*, 10 Ill. App. 404, Affirmed in 105 Ill. 364, 44 Am. Rep. 791; *Stewart v. Baltimore & O. R. Co.* 163 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420; *Union R. & Transit Co. v. Shacklett*, 119 Ill. 232, 10 N. E. 896; *Gordon v. Simonton*, 10 Fla. 196; *Tiffany, Death by Wrongful Act*, §§ 110, 201; *Sloan v. Sloan*, 21 Fla. 589; *Blakely v. Frazier*, 20 S. C. 155; *Boston & M. R. Co. v. Hurd*, 56 L. R. A. 193, 47 C. C. A. 615, 108 Fed. 116; *Sullivan v. Honacker*, 6 Fla. 372; *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527; *Wilson v. Tootle*, 55 Fed. 211; *McCarty v. New York, L. E. & W. R. Co.* 62 Fed. 437; *South Carolina R. Co. v. Nix*, 68 Ga. 572.

The foreign administratrix is the person to sue, and her receipt will be ample protection to the defendant.

Wilkins v. Ellett, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641; *Dial v. Gary*, 14 S. C. 579, 37 Am. Rep. 737; *Heyward v. Williams*, 57 S. C. 241, 35 S. E. 503; *Purple v. Whited*, 49 Vt. 187; *Wilson v. Keels*, 54 S. C. 545, 32 S. E. 702; *Tyer v. Charleston Rice Mill. Co.* 32 S. C. 598, 10 S. E. 1067; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Memphis & C. Packet Co. v. Pikry*, 142 Ind. 304, 40 N. E. 527; *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48; *Union R. & Transit Co. v. Shacklett*, 119 Ill. 232, 10 N. E. 896; *McCarty v. New York, L. E. & W. R. Co.* 62 Fed. 437; 8 Am. & Eng. Enc. Law, 2d ed. pp. 903, 904; *Hodges v. Kimball*, 34 C. C. A. 103, 63 U. S. App. 688, 91 Fed. 845.

A slight difference in the laws of descent and distribution between the two states constitutes no defense to this suit. The courts

of either state can and will distribute as the laws of the other may require.

Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Texas & P. R. Co. v. Humble*, 181 U. S. 67, 45 L. ed. 747, 21 Sup. Ct. Rep. 526; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Stoeckman v. Terre Haute & I. R. Co.* 15 Mo. App. 503; *Missouri P. R. Co. v. Lewis*, 24 Neb. 848, 2 L. R. A. 67, 40 N. W. 401; *O'Reilly v. New York & N. E. R. Co.* 16 R. I. 388, 5 L. R. A. 364, 6 L. R. A. 719, 17 Atl. 171, 906, 19 Atl. 244; *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169, 15 N. E. 230; *Boston & M. R. Co. v. Hurd*, 56 L. R. A. 193, 47 C. C. A. 615, 108 Fed. 116.

Deceased's right of action survives.

Jones v. Townsend, 23 Fla. 355, 2 So. 612; *Jacksonville Street R. Co. v. Chappell*, 22 Fla. 616, 1 So. 10; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

If a railway company negligently leaves its tracks unfenced, whereby an animal strays upon the track and comes in collision with one of its trains, whereby the train is derailed and a passenger killed or injured, the negligence of the company in leaving its track unguarded by a sufficient fence will be deemed the proximate cause of the death or injury, and the company will be liable in damages.

Blair v. Milwaukee & P. du Ch. R. Co. 20 Wis. 254; *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597; *Buxton v. North Eastern R. Co.* L. R. 3 Q. B. Div. 549; *Arkansas Midland R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280; *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371, 11 L. R. A. 486, 15 S. W. 280; *Lackawanna & B. R. Co. v. Chenevith*, 52 Pa. 382, 91 Am. Dec. 168; *Cornwall v. Sullivan R. Co.* 28 N. H. 161; *Dickson v. Omaha & St. L. R. Co.* 124 Mo. 140, 25 L. R. A. 320, 27 S. W. 476; 1 Thomp. Neg. 2d ed. § 110; *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L. R. A. 768, 9 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370.

The complaint need not negative fault on the part of plaintiff or deceased. It need not negative contributory negligence.

Orlando v. Heard, 29 Fla. 581, 11 So. 182; *McDonald v. Montgomery Street R. Co.* 110 Ala. 161, 20 So. 317; *Smoot v. Wetumpka*, 24 Ala. 112; *Montgomery & E. R. Co. v. Chambers*, 79 Ala. 338; *Thompson v. Duncan*, 76 Ala. 334; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 4 L. R. A. 710, 6 So. 277; *Bromley v. Birmingham Mineral R. Co.* 95 Ala. 397, 11 So. 341; *O'Brien v. Tatum*, 84 Ala. 186, 4 So. 158; *Georgia P. R. Co. v. Davis*, 92 Ala. 300, 9 So. 252; *Montgomery Gaslight Co. v. Montgomery & E. R. Co.* 86 Ala. 372, 5 So. 735; *West v. Thomas*, 97 Ala. 622, 11 So. 768; *Western R. Co. v. Williamson*, 114 Ala. 131, 21 So. 827; *Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897; *Columbus & W. R. Co. v. Bradford*, 86 Ala. 574, 6 So. 90; *Mobile & M. R. Co. v. Crenshaw*, 65 Ala. 566; *Holt v. Whately*, 51 Ala. 569; *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. 61 L. R. A.

Rep. 618; *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557; *Griffith v. Baltimore & O. R. Co.* 44 Fed. 574; *Mackey v. Baltimore & P. R. Co.* 8 Mackey, 282; *Harmon v. Washington & G. R. Co.* 7 Mackey, 255; *Northern P. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. 32; *Chesapeake & O. R. Co. v. Steele*, 29 C. C. A. 81, 54 U. S. App. 550, 84 Fed. 93; *Fitchburg R. Co. v. Nichols*, 29 C. C. A. 500, 50 U. S. App. 297, 85 Fed. 945; *Berry v. Lake Erie & W. R. Co.* 70 Fed. 193; *Texas & P. R. Co. v. Nolan*, 11 C. C. A. 202, 23 U. S. App. 443, 62 Fed. 552; *Hayes v. Northern P. R. Co.* 20 C. C. A. 52, 46 U. S. App. 41, 74 Fed. 279; *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 24 U. S. App. 176, 63 Fed. 942; *Sanders v. Reister*, 1 Dak. 151, 46 N. W. 680; *The Frank & Willie*, 45 Fed. 494; *Mares v. Northern P. R. Co.* 3 Dak. 336, 21 N. W. 5; *Gram v. Northern P. R. Co.* 1 N. Dak. 252, 46 N. W. 972; *Hines v. Georgetown Gas Co.* 3 App. D. C. 369; *Conroy v. Oregon Constr. Co.* 10 Sawy. 630, 23 Fed. 71; *Dillon v. Union P. R. Co.* 3 Dill. 319, 325, Fed. Cas. No. 3,916; *Texas & P. R. Co. v. Volk*, 151 U. S. 73, 38 L. ed. 78, 14 Sup. Ct. Rep. 239; *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; 1 Thomp. Neg. 2d ed. § 366; 2 Fetter, Carr. Pass. § 432; 5 Enc. Pl. & Pr. pp. 1, 2.

If the regulation of a carrier of passengers is unreasonable, the passenger is not bound to comply with it.

Day v. Owen, 5 Mich. 520, 72 Am. Dec. 62; Thomp. Carr. Pass. 306, 311; *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258; *DuLaurans v. First Div. St. Paul & P. R. Co.* 15 Minn. 49, Gil. 29, 2 Am. Rep. 102; *Bass v. Chicago & N. W. R. Co.* 36 Wis. 450, 17 Am. Rep. 495; 3 Thomp. Neg. 2d ed. § 3107.

Equally safe cars must be provided for each race.

Houck v. Southern P. R. Co. 4 Inters. Com. Rep. 441, 38 Fed. 226; *Britton v. Atlanta & C. Air-Line R. Co.* 88 N. C. 536, 43 Am. Rep. 749; *Chilton v. St. Louis & I. M. R. Co.* 114 Mo. 88, 19 L. R. A. 269, 21 S. W. 457; *Chesapeake, O. & S. W. R. Co. v. Wells*, 85 Tenn. 613, 4 S. W. 5; *Green v. Bridgeton*, 9 Cent. L. J. 206, Fed. Cas. No. 5,754; *Logwood v. Memphis & C. R. Co.* 23 Fed. 318; *Murphy v. Western & A. R. Co.* 23 Fed. 637; 1 Fetter, Carr. Pass. § 256; 3 Thomp. Neg. 2d ed. § 3125.

Unless the conduct of deceased contributed to his injury; helped to produce it; formed part of the agency or force which injured him; and occupied unmistakably the relation of cause and effect to what happened to him,—his being in the car, lawfully or unlawfully, could not constitute negligence.

Rend v. Chicago West Division R. Co. 8 Ill. App. 517; *Laethem v. Ft. Wayne & B. I. R. Co.* 100 Mich. 297, 58 N. W. 996; 2 Thomp. Neg. 2d ed. §§ 1469, 1631; *Boyden v. Fitchburg R. Co.* 70 Vt. 125, 39 Atl. 771; *Van Auken v. Chicago & W. M. R. Co.* 96 Mich. 307, 22 L. R. A. 33, 55 N. W. 971.

The fact, if it be a fact, that the plaintiff was engaged in violating the law, does not prevent him from recovering damages of the defendant for an injury which the defendant could have avoided by the exercise of proper care, unless the unlawful act contributed proximately to produce the injury, and was an efficient cause thereof.

Chicago v. Keefe, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; *Spofford v. Harlow*, 3 Allen, 176; *Hall v. Ripley*, 119 Mass. 135; *Welch v. Wesson*, 6 Gray, 505; *Simmonson v. Stellenmerf*, Edm. Sel. Cas. 194; *Aston v. Heaven*, 2 Esp. 533; *Steele v. Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191; 1 Thomp. Neg. 2d ed. §§ 82, 102, 249, 1326; *Vallo v. United States Exp. Co.* 147 Pa. 404, 14 L. R. A. 743, 23 Atl. 594.

If the deceased had been guilty of drunkenness, and if he had been using vulgar or profane language prior to, or at the time of, the accident and injury, such conduct and language might have formed good ground for his expulsion or arrest, and may have been circumstances proper to go to the consideration of the jury as *res gestæ*, which they did do in the case at bar; but it is inconceivable how they could, as matter of law, occupy the relation of cause to effect as to the injury complained of here, or be, in any wise, as law or fact, set up as contributory negligence.

3 Thomp. Neg. 2d ed. §§ 3086, 3087, 3083, 3098; *Gillingham v. Ohio River R. Co.* 35 W. Va. 588, 14 L. R. A. 798, 14 S. E. 243; *St. Louis A. & T. R. Co. v. Mackie*, 71 Tex. 491, 1 L. R. A. 667, 9 S. W. 451; *Illinois C. R. Co. v. Minor*, 69 Miss. 710, 16 L. R. A. 627, 11 So. 101; *Richmond & D. R. Co. v. Jefferson*, 89 Ga. 554, 17 L. R. A. 571, 16 S. E. 69; *St. Louis, I. M. & S. R. Co. v. Greenthal*, 23 C. C. A. 100, 40 U. S. App. 554, 77 Fed. 150; *West Memphis Packet Co. v. White*, 99 Tenn. 256, 38 L. R. A. 427, 41 S. W. 583.

If the passenger is riding in a passenger's place in a passenger car, and makes no exposure of his person to danger, but, nevertheless, is injured from some extraordinary cause attributable to the negligence of the carrier, no question of contributory negligence can arise.

Louisville, N. A. & C. R. Co. v. Snyder, 117 Ind. 435, 3 L. R. A. 434, 20 N. E. 284; *Ray*, Negligence of Imposed Duties, §§ 12(b), 121; *Creed v. Pennsylvania R. Co.* 86 Pa. 139, 27 Am. Rep. 693; *Willis v. Long Island R. Co.* 34 N. Y. 670, 32 Barb. 398; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, 18 Am. Rep. 360; *Williams v. New York & H. R. R. Co.* referred to in *Colegrove v. New York & H. R. Co.* 6 Duer, 434; *Carroll v. Interstate Rapid Transit Co.* 107 Mo. 653, 17 S. W. 61 L. R. A.

889; *Carroll v. New York & N. H. R. Co.* 1 Duer, 571, Affirmed in 6 Duer, 415; *Baltimore & O. R. Co. v. State*, 72 Md. 36, 6 L. R. A. 706, 18 Atl. 1107; 3 Thomp. Neg. 2d ed. § 2942, art. 2, §§ 2943-2983; *Lynn v. Southern P. Co.* 103 Cal. 7, 24 L. R. A. 710, 36 Pac. 1018.

That the passenger was not riding in the car assigned to him is no defense to this action.

Pennsylvania R. Co. v. McCloskey, 23 Pa. 526; *Keith v. Pinkham*, 43 Me. 501, 69 Am. Dec. 80; *Carroll v. New York & N. H. R. Co.* 1 Duer, 571; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, Gil. 110, 18 Am. Rep. 360; *Wharton*, Neg. 2d ed. § 381.

Messrs. A. W. Cockrell & Son also for defendant in error.

McCormick, Circuit Judge, delivered the opinion of the court:

In this case many errors are assigned, but it would be unprofitable to notice them in detail. They present substantially only three questions: (1) Can the administratrix, appointed in Alabama, maintain this suit in the state of Florida? (2) Does the matter offered by the defendant in support of its plea of contributory negligence tend to establish contributory negligence on the part of the deceased? (3) Is the case one in which the administrator can recover damages?

As to the first of these questions: The administratrix was appointed by proper proceedings in the proper court in the state of Alabama, and at the institution of her action she filed in the circuit court a properly authenticated copy of the letters of administration granted to her by the probate court in the matter of the deceased's estate. In the case of *Sullivan v. Honacker*, 6 Fla. 374, the supreme court of Florida, in discussing the law of that state, said: "Our statute was intended to place foreign executors and administrators, mentioned in it, with respect to the institution and maintenance of suits in our courts, upon the same footing as executors or administrators who had obtained their letters testamentary or of administration in this state, whenever they should produce such letters duly obtained and properly authenticated."

It is, however, insisted by the plaintiff in error that the statutes of Florida which fix the liability of the defendant for such injuries as are alleged to have been done the deceased, and which provide who may sue to recover the same, taken in connection with the provision for the distribution of the proceeds when recovered, compared and contrasted with the statutes in Alabama fixing similar rights, providing for the recovery of damages for such injuries, and for the distribution thereof, show such a dissimilarity and substantial conflict as to exclude this administratrix from prosecuting this action.

The law upon which the action is based is embraced in §§ 2342 and 2343 of the Revised Statutes of Florida. It is unnecessary to quote the sections in full, or to give even the substance of § 2342, further than

to say that it fixes the liability of persons committing such injuries. The other section provides that the action may be brought by the widow or surviving husband, as the case may be, and, where there is neither widow nor husband surviving, then by the minor child or children, and where there is no widow nor husband, nor minor child or children, then by any person or persons dependent on such person killed for support, and, where there is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed. In the case of *Florida C. & P. R. Co. v. Foxworth*, reported in 41 Fla. 1-77, 25 So. 338, in discussing this statute the supreme court of Florida used this language (on page 70, 41 Fla., page 347, 25 So.): "Our statute, unlike the English one, by giving a right of action to the administrator of the deceased, imposes the liability whether there be a family to compensate or not. Its effect was to abrogate the common-law rule for which, if any reason ever existed, the world has long since outgrown it, denying damages for human life, and to affix a penalty, by an award of pecuniary damages, for a careless or wrongful act resulting in another's death. In authorizing suits to enforce this liability, our act gives the right to those who are supposed to suffer most by the death of the deceased, but on no account does the action fail for want of a person to sue, as with Lord Campbell's act."

As to the objection grounded on the different disposition of the fund by the laws of Florida and the laws of Alabama, it is enough to say that the law of Florida which gives the right, and gives direction to the proceeds of such a recovery, is the law of the case both as to the recovery and to the disposition of the proceeds. But it would be a reproach to the laws of Alabama to say that, when the money recovered in such an action as this came into the hands of the administratrix, the courts of that state could not compel its distribution as the law of Florida applicable thereto directs. *Denick v. Central R. Co.* 103 U. S. 11-21, 26 L. ed. 439-443; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

In reference to the second question: The bill of exceptions shows that "the plaintiff introduced evidence tending to show that on the date of the accident the deceased, John T. Sullivan, was an enlisted soldier in the United States Army, a member of Battery D, Fifth Artillery, and was going from St. Augustine, Florida, through Jacksonville, to New Orleans, Louisiana, and that he got upon the train of the defendant at Jacksonville, on the morning of the accident, with 23 other soldiers, members of the company, all of whom were traveling upon one ticket to the party, and held by an officer

in charge, and that, at the time the deceased and the rest of the party of soldiers got upon the train at Jacksonville, there were not seats enough in the regular passenger coach, to wit, the second car in the rear of the baggage car, for the entire party to obtain seats. That the train was composed of engine, baggage car, colored passenger coach, white passenger coach, Pullman car, and a special or private car; and that at the time of the accident the deceased, John T. Sullivan, and another soldier, known as Henry Lowenberg, were sitting in the car known as the 'colored car,' a car provided for colored persons; and that the train was running on a down grade about 45 or 50 miles an hour, and struck some cattle on the track, and that the engine was forced into the car in which Sullivan was riding, and the people on the left of the car were crushed under the boiler, causing the death of Sullivan.

"The defendant introduced evidence that some years before, and at the time of the alleged accident, the defendant had issued a rule or regulation providing for separate cars on its train for white passengers and colored passengers, requiring white passengers while traveling on its trains to take seats in and remain in the car for white passengers, and colored passengers to take seats in and remain in the car for colored passengers, and not to allow white passengers to take seats in and remain in the cars for colored passengers, or colored passengers to take seats in or remain in the car for white passengers, while riding on the trains of the defendant, and that these separate cars were provided exclusively for seating white and colored persons, respectively, in making up trains of the defendant; and that upon the train upon which the deceased, John T. Sullivan, was a passenger at the time of the accident, there was a car provided exclusively for colored passengers, and a car provided exclusively for white passengers; and that John T. Sullivan was a white person; and that when the train left Jacksonville the deceased was sitting in the car provided for white persons, and afterwards went into the car in the train provided for colored persons, with two or three soldiers of the company (and that John T. Sullivan and the two or three soldiers with him were boisterous, talked loud, drinking, and disturbing passengers), and the defendant's conductor and other employees of the defendant upon the train several times directed John T. Sullivan, on the date of the accident, before the same, and on one occasion immediately before, to leave the said car provided for colored persons, in which John T. Sullivan was, and go into the car provided for white persons, and the conductor informed him that the rules and regulations of the defendant company required white persons to sit and be in the car provided for white persons, and not to travel in the car provided for colored persons in which Sullivan was sitting and traveling, but Sullivan refused to leave the car provided for colored persons, and would not and

did not return to the car provided for white persons; and that at the time of the accident John T. Sullivan was still sitting and riding in the car so provided for colored persons, on the left-hand side of the same, about the middle of the car. That there was sufficient room in the car provided for white persons for John T. Sullivan to obtain a seat in the same; and that each time the conductor and other employees of the defendant company directed Sullivan to go into the car for white persons, there was room in the car for Sullivan to obtain a seat in the car; and that the car provided for colored persons was immediately behind the baggage car in the train, and nearer to the engine than the car provided for white persons; and that this was the order in which the cars were usually placed in the defendant's train; and that the train on which Sullivan was riding consisted of an engine, immediately behind which was a baggage car, then a car for colored persons, then followed a car for white persons, then followed a Pullman car, and behind the Pullman car was a special car. That the accident was caused by the engine striking cattle on the track; that the engine was turned around, the baggage car was thrown from the track and damaged, but not destroyed, and the engine and boiler were forced back into the car provided for colored persons, and the front half on the left-hand side of the car was destroyed for one half of the length of the car; and that none of the persons sitting in the rear of the car, and none of the persons sitting in the car for white persons, were injured at all; but that the deceased, who was sitting on the left-hand side of the car provided for colored persons, about the middle of the car, was killed, and several colored persons on the left-hand side and on the front of the car provided for colored persons were killed or injured."

On this issue the circuit court, in the charge to the jury, used this language: "The next important question for consideration is the plea of contributory negligence. This question should be submitted to the jury as a question of fact only when it appears, by a reasonable construction of the facts proven, considering them most favorably in behalf of the person presenting them, it might be found that the deceased was guilty of some conduct of which a reasonable, prudent man would not have been guilty. This is to be judged of by the acts of the deceased, and the prospect of danger or otherwise, at the time of such acts, and not by the result. In this case it is contended that the deceased was guilty of negligence in remaining in the car set aside for colored passengers; not that the car, on account of its being so set apart for that purpose, was any more exposed to danger, but because it was the forward car nearer the engine. But it is not contended that he was guilty of negligence in being in the forward car of a train, but on account of its being the forward car and at the same time the colored car.

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"In all the cases cited, or which I have been able to find, in which passengers have been held to be guilty of negligence on account of the place or position in which they were riding, it has been because the place or position, *per se*, was one of danger,—on the pilot, in the baggage car, or on the platform,—where passengers were prohibited from riding on account of being exposed to greater danger, and not on account of their belonging to a different class.

"It is not considered necessary to pass upon the constitutionality or validity of the statute of the state, or the regulations of the corporation under which it is claimed the passenger was prohibited from occupying the car where he was, or the purpose for which it was enacted or established; but it was not so enacted or established for the protection of passengers from danger, and the defendant is estopped, by the law which requires equal accommodations for both classes, from claiming that the colored coach was a place of danger, and that a white person was, by taking a seat there, placing himself in a place of danger, and removing himself from the right of the protection of the carrier. It cannot be claimed that the colored coach was a place of danger of itself, nor can it be considered that the forward coach was a place of danger, nor that, when both of the peculiarities are combined, can it so be considered; and, in order to find that the deceased was guilty of contributory negligence, it would be necessary to so find, which, under the most favorable consideration of the testimony, the court considers should not be done. I therefore take the responsibility of relieving you from the consideration of the plea of contributory negligence, and instruct you that you exclude from your consideration all testimony relating to the deceased being in the colored coach, or relating to the law, rules, or regulations concerning the separation of the classes and designation of different cars."

We concur in the view of the learned judge of the circuit court, and approve his action in withdrawing this issue from the jury. *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *Northern P. R. Co. v. Egeland*, 163 U. S. 93, 41 L. ed. 82, 16 Sup. Ct. Rep. 975; *Kresanowski v. Northern P. R. Co.* 5 McCrary, 528, 18 Fed. 229.

As to the third question: We find this paragraph in the brief filed by counsel for the plaintiff in error: "The statute in Florida authorizing the administrator to sue for death of his intestate does not designate any person as the beneficiary for whose benefit the recovery is had, and therefore such a recovery is a general asset of the estate, and is applicable to the payment of debts and other administration purposes."

The language of the statute is: "And in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed."

In the *Foxworth Case*, 41 Fla. 71. 25 So. 348, the supreme court of Florida said: "It is a difficult mat-

ter to lay down general rules by which to estimate damages in this class of cases. Those which occur to us as being applicable to this case [the action was by the widow], so far as we can judge from the evidence in the record, are as follows: In estimating the pecuniary loss sustained by the widow, the jury may properly take into consideration her loss of the comfort, protection, and society of the husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any; but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the result of the injury. She is also entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the situation or condition in society which he would probably have occupied according to his past history in that respect, and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of the deceased's age, health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death; all these elements to be based upon the probable joint lives of herself and husband. She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate in case her life expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages."

In analogy to the foregoing, it would be easy to define the elements of recovery in an action by a minor child, or by one dependent upon the deceased for support, and it would seem to be not difficult to draw from the foregoing, as the trial judge did, instructions to the jury as to the elements

of recovery in this case, where the suit was by the administrator for the recovery of a general asset of the estate, applicable to the payment of debts and other administration purposes.

Upon this subject the trial judge instructed the jury, substantially, that they were to determine from their "own best, honest, and enlightened judgment," from the testimony before them of the age, character, and health of the deceased, the period of his natural expectancy of life at the time immediately preceding his death, and estimate the amount of the net earnings and accumulations he would reasonably have acquired during the period of such expectancy, and then find the cash value of this amount at the time of the trial, according to well-recognized rules, and, for this present cash value of the estimated reasonable net earnings and acquisitions of the deceased, find their verdict in favor of the plaintiff.

Our examination of the case has discovered no error in the action of the Circuit Court for which the judgment should be reversed, and it is therefore affirmed.

Pardee, Circuit Judge, dissenting:

I think the court erred in taking away from the jury the question of contributory negligence. Contrary to the rules of the company, and in violation of the directions and orders of the company's agents, the deceased, Sullivan, a white person, persisted in remaining in the car set apart for colored people, which, from its location in the train and in the nature of things, and as the result showed, was a place of greater danger than the place set apart by the rules of the company for Sullivan to occupy.

Conceding it was the duty of the company to provide a place in the train for colored people, of equal accommodations and equal safety with that provided for white persons, yet this was not a duty that the company owed to Sullivan. I do not care to elaborate.

The question should have been submitted to the jury under all the evidence adduced in the case, with proper instructions as to the rules of law concerning contributory negligence in personal-injury cases.

IOWA SUPREME COURT.

J. T. S. BROWN *et al.*
v.

J. J. WIELAND *et al.*

(.....Iowa.....)

1. A statute making void all sales of

NOTE.—Conflict of laws as to sales of intoxicating liquor.

- I. General principles, 418.
- II. Where executed contract consummated; delivery to carrier generally, 419.
- III. When executory contract consummated in one state and executed contract in another, 424.

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intoxicating liquors, and providing for a return of the price paid, does not apply to sales consummated in another state, although they were made in response to an order procured by a local agent, and were delivered by the carrier to the purchaser in the state where the statute exists.

IV. Effect of soliciting order within state having prohibitory law, 427.

V. Public policy of forum; intention to violate prohibitory statute of forum, 429.

VI. New or substituted contract, 433.

VII. When sale invalid by law of place where made, but valid by law of forum, 434.

This note does not cover, except incidentally, 27

2. A sale of liquors is subject to the laws of the state of the purchaser's residence, where, although the order is sent to another state, and they are there delivered to a carrier for transportation to the purchaser, the seller makes delivery to him conditional on his complying with the terms of the contract and obtaining the bill of lading, which the seller takes in his own name and transmits to a bank for delivery when the contract is complied with, the shipper retaining full control until that time.
3. A statute providing that consideration paid for liquor shall be received under an agreement to return it on demand creates a cause of action in favor of the buyer, which may be set up as a counterclaim in an action to recover the balance of the purchase price, if demand for its return is made before it is pleaded, under a statute permitting a counterclaim of a cause of action held when suit is brought, either matured or not, if matured when pleaded.

(February 8, 1902.)

the question as to the extent of the state's power to control and regulate interstate transactions in intoxicating liquors. In view of the decision in *Lelsy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 86, 10 Sup. Ct. Rep. 681 (the original package case), many of the earlier cases hereinafter cited seem to have proceeded upon a false assumption as to the states' power in that respect; but the passage of the Wilson act restored the foundation for such assumption, and the decisions prior, as well as subsequent, to that act, would now seem to have full force as precedents upon the questions that were expressly considered therein. Cases in which the entire transaction took place within the state of the forum, no element thereof having had its situs outside of that state, are excluded, although the question as to the particular locality in the state where the sale was made may have been involved. The cases included in the note generally turn upon principles that are broader than the subject of the note. The purpose of the note, however, is merely to show the result of the application of these principles to the questions arising under sales of intoxicating liquors, when different parts of the transaction have occurred in different states, or, if they all occurred in the same state, the action based thereon has been brought in another state.

I. General principles.

It must be remembered, in discussing the subject treated in this note, that the legislature of a state may, except so far as it is restrained by constitutional provisions, forbid the maintenance of any action for the recovery of the purchase price of intoxicating liquor, whether the contract and sale were made within the state or in another state by the law of which they are valid; and, subject to constitutional limitations, that power may be exercised with respect to a sale every element of which, from the solicitation of the order to the consummation of the executed contract by delivery of the goods, had its situs in another state the law of which permitted such sales; and this, too, without reference to any intention upon the part of either party to violate or evade the laws of the forum.

Even in the absence of express legislation upon the subject, the courts, as shown in subdivision V., *infra*, under some circumstances, refuse, upon the ground of public policy, to entertain the action, though the sale was valid 61 L. R. A.

CROSS-APPEALS from a judgment of the District Court for Carroll County in defendants' favor in an action brought to enforce payment of a promissory note which was alleged to have been given for intoxicating liquors; plaintiffs appealing from so much of the judgment as refused a recovery; and defendants appealing from so much as disallowed their counterclaim for a recovery of money already paid. *Affirmed on plaintiffs' appeal; reversed on defendants' appeal.*

Statement by McClain, J.:

Action on a promissory note signed by J. J. Wieland and E. R. Wieland, his wife. Defendants allege that the consideration of the note was intoxicating liquors sold in violation of law, and by way of counterclaim the defendant J. J. Wieland seeks to recover from plaintiffs money paid to plaintiffs by said J. J. Wieland for intoxicating liquors

by the law of the state where it was made. In the absence of a statute to that effect, however, the courts do not deem it contrary to the public policy of the forum to entertain such an action merely because the sale, if made at the forum, would have been invalid, when there was no intention to violate or evade the law of the forum.

Assuming, then, that in a particular case there are no considerations of public policy that require the court to decline to entertain the action if neither the sale nor any of the preliminary steps fall within the prohibitory statute, it becomes important to determine whether the sale, or any of the preliminary steps leading thereto, do fall within the condemnation of such statute. And, first, it may be premised that such a statute has no extraterritorial operation, and does not apply to a sale or any preliminary steps which take place in another state. This principle, which is tacitly assumed in nearly all of the cases cited in the note, is expressly declared in the following cases:

The provision of Mass. Gen. Stat. chap. 86, § 61, that all securities for debt, "given in whole or in part for the price of liquor sold in violation of this chapter," shall be void against holders with notice of the unlawful consideration, applies only to sales made in Massachusetts. *Ely v. Webster*, 102 Mass. 304; *Tracy v. Webster*, 102 Mass. 307, note.

The Rhode Island act, avoiding and making penal sales of intoxicating liquor, only applies to sales made within the state. *Read v. Taft*, 3 R. I. 175.

When the prohibitory or regulative statute is confined exclusively to executed sales, and does not, either expressly or by construction, cover any of the preliminary steps, it is only necessary to determine the place of the completed sale, and, if the sale is valid by the law of that place, the action will lie (assuming always that the public policy of the forum is not violated) wherever the preliminary steps leading to it may have been taken.

The prohibitory or regulative statute of the forum may, however, either in express terms or by construction, apply to, and render illegal, acts done within the state in furtherance of the sale, although the sale is technically consummated in another state by the law of which it is valid. When such is the case, it is not necessary for the court of the forum to resort to the ground of public policy to justify its refusal to entertain the action, but the action

unlawfully sold and delivered by plaintiffs to said defendant in this state. The court sustained a demurrer to defendant's counterclaim, and, on the trial to a jury, directed a verdict for defendant on the issue as to the promissory note. From the judgment on this directed verdict, plaintiffs appeal, and defendants appeal from the ruling on demurrer to the counterclaim. The litigation appears to be solely between plaintiffs and J. J. Wieland, and he will be treated as sole defendant.

Messrs. John H. Mosier and George W. Bowen, for plaintiffs:

If the plaintiff's agent sold the liquors to the defendant in Iowa, and forwarded to his principal a statement of such sale to be filled by forwarding the liquors specified therein, it was an Iowa contract, and plaintiffs cannot recover. But if the agent took an order

from defendant then they can recover, unless it is shown that they sold the liquors with intent to violate our liquor law.

Tegler v. Shipman, 33 Iowa, 194, 11 Am. Rep. 118; *Taylor v. Pickett*, 52 Iowa, 467, 3 N. W. 514; *Engs v. Priest*, 65 Iowa, 232, 21 N. W. 580; *Gross v. Scarr*, 71 Iowa, 656, 33 N. W. 223; *Second Nat. Bank v. Curran*, 36 Iowa, 555; *Rindskoff v. Curran*, 34 Iowa, 326; *Fred Miller Brewing Co. v. De France*, 90 Iowa, 395, 57 N. W. 959; *Gipps Brewing Co. v. De France*, 91 Iowa, 108, 28 L. R. A. 386, 58 N. W. 1087; *Sachs v. Garner*, 111 Iowa, 424, 82 N. W. 1007; *Gross v. Feehan*, 110 Iowa, 163, 81 N. W. 235.

The burden is on the defendant to show that the sale was made contrary to law, and, if he does not do so, plaintiffs must recover the value of the goods.

Resseguieu v. Van Wagencn, 77 Iowa, 351, 42 N. W. 318.

falls because one of the steps leading to the consummated contract and sale had its situs at the forum, and comes within the condemnation of the statute of the forum.

From what has already been said, it is apparent that the following questions are of vital importance:

(1) In what state is the completed sale (the executed contract) deemed to have been consummated? This question is discussed in subdivision II., *infra*.

(2) Assuming that the completed sale (the executed contract) was consummated in one state, by the law of which it is valid, does the fact that the executory contract was consummated in another subject the transaction to the law of the latter? This question is discussed in subdivision III., *infra*.

(3) Assuming that both executed and executory contracts were consummated in another state by the law of which they were valid, what is the effect of the fact that some of the preliminary steps leading to the completed contract,—*e. g.*, the solicitation of the order,—were taken at the forum? This question is discussed in subdivision IV., *infra*.

(4) Assuming that neither the completed sale, nor any of the steps leading thereto, are within the terms of the prohibitory or regulative statute of the forum, under what circumstances will the court of the forum refuse, upon the ground of public policy, to entertain an action based upon the sale? This question is discussed in subdivision V., *infra*.

II. Where executed contract consummated; delivery to carrier generally.

For general question as to where title passes, see notes to *Dunn v. State* (Ga.) 3 L. R. A. 199, and *Com v. Hess* (Pa.) 17 L. R. A. 176.

Assuming, for the present, that the public policy of the forum is not violated by entertaining an action for the purchase price of liquor sold in another state, and that the prohibitory or regulative statute applies only to executed contracts of sale consummated within the state, and does not cover the executory contract or other preliminary steps that may have had their situs there if the executed contract was consummated elsewhere, it is important to locate the completed sale, since, upon the hypothesis here assumed, the rights of the parties will depend upon the law of the place where the sale was made.

The purpose of this subdivision is merely to show the rule applied by the cases in determining 61 L. R. A.

ing the location of the completed or executed sale. The question whether it is necessary, in order to maintain an action for the purchase price, that the executory, as well as the executed contract, shall have been consummated outside of the state having the prohibitory or regulative statute is discussed in subdivision III., *infra*. By way of caution, however, and to avoid the necessity of duplication when the latter question is taken up in that subdivision, the cases cited in support of the rule about to be stated are classified so as to show whether the executory and executed contracts were consummated in the same or in different states.

The principle established by the great weight of authority (though it rests upon the presumed intention of the parties, and is subject to be overthrown by circumstances rebutting the presumption) is that, when a resident of one state gives an order to a dealer doing business in another for a quantity of liquor, not specifically identified or appropriated, and the seller in the ordinary course of business delivers the same to a carrier in the latter state, consigned to the buyer in the former state, the title passes and the executed contract is consummated upon delivery to the carrier. That principle is supported by the following cases, which, having by the application of the same located the executed sale in a state in which it was valid (the order having also been finally accepted in that state), held that an action would lie for the recovery of the purchase price, or upon a security given for the purchase price, notwithstanding that the order was given to an agent of the seller in, and the liquor was shipped into, a state (generally the forum) by the law of which the sale would have been invalid if made there: (The decisions are, of course, upon the assumption that there was nothing in the circumstances of the case making it contrary to the public policy of this forum to entertain the action.) *Sortwell v. Hughes*, 1 Curt. C. C. 244, Fed. Cas. No. 13,177; *J. & J. Eager Co. v. Burke*, 74 Conn. 534, 51 Atl. 544; *Whitlock v. Workman*, 15 Iowa, 351; *Engs v. Priest*, 65 Iowa, 232, 21 N. W. 580; *Gross v. Feehan*, 110 Iowa, 163, 81 N. W. 235; *Sachs v. Garner*, 111 Iowa, 425, 82 N. W. 1007; *Williams v. Feinman*, 14 Kan. 288; *Snider v. Koehler*, 17 Kan. 432; *Bowman Distilling Co. v. Nutt*, 34 Kan. 724, 10 Pac. 103; *Westheimer v. Weisman*, 60 Kan. 753, 57 Pac. 969; *Merchant v. Chapman*, 4 Allen, 362; *Kling v. Fries*, 33 Mich. 275; *Kerwin v. Doran*, 29 Mo. App. 397; *Corning*

Knowledge of sale and intent to evade the law is not of itself sufficient to defeat a recovery of their price. It must also be shown that there were acts of the vendor in furtherance of the illegal transaction.

Gamba v. Sutherland, 101 Mich. 355, 59 N. W. 652; *Brand v. Sutherland*, 101 Mich. 358, 59 N. W. 652; *Black, Intoxicating Liquors*, § 269; *State v. Flanagan*, 38 W. Va. 53, 22 L. R. A. 430, 17 S. E. 792.

Mr. M. W. Beach, for defendants:

This was not a Kentucky sale.

Gipps Brewing Co. v. De France, 91 Iowa, 108, 28 L. R. A. 386, 58 N. W. 1037.

The vendor may retain his hold upon the goods to secure the payment of the price, although he puts them in the course of transportation to the place of destination, by delivery to the carrier. The appropriation which he then makes is said to be provisional or conditional.

v. Abbott, 54 N. H. 469; *Lynch v. Stott*, 67 N. H. 589, 30 Atl. 420; *Backman v. Jenks*, 55 Barb. 468; *Mack v. Lee*, 13 R. I. 293.

In *Val Blatz Brewing Co. v. Bobrecker Bros.* 79 Mo. App. 65, the principle was applied, notwithstanding that the vendor at the purchaser's request, and to avoid the prohibition law of the state to which the liquor was shipped, took a bill of lading in his own name and immediately assigned it to the purchaser.

In *Brockway v. Maloney*, 102 Mass. 308, the principle was applied notwithstanding that the order was finally accepted in the state in which the sale was prohibited, the goods being delivered to the carrier in another state (see *infra*, III., as to this point).

And the principle has been applied in the following cases, with the result of upholding the action for the purchase price where an order was sent directly by mail from the state in which the sale was prohibited to that in which it was permitted, the liquor having been delivered to the carrier in the latter state: *Engs v. Priest*, 65 Iowa, 232, 21 N. W. 580; *Orcutt v. Nelson*, 1 Gray, 536; *Portsmouth Brewing Co. v. Smith*, 155 Mass. 100, 28 N. E. 1130; *Webber v. Donnelly*, 33 Mich. 469; *Wagner v. Breed*, 29 Neb. 270, 46 N. W. 286; *McConihe v. McMann*, 27 Vt. 95; *Tuttle v. Holland*, 43 Vt. 542; *Dame v. Flint*, 64 Vt. 533, 24 Atl. 1051.

The place of the sale is not changed by the fact that the order which purported to be signed by the buyer in person was in fact signed by his wife without his knowledge or authority, he having ratified her act by receiving and using the liquor and making a partial payment. *Tuttle v. Holland*, 43 Vt. 542.

Where the seller of intoxicating liquors delivers the same in Massachusetts to an express company, consigned to himself at a place in Vermont, but indorses a duplicate receipt with the words "Deliver to the bearer," and immediately sends them through the mail to the buyers, who duly receive the same and obtain the liquor shipped on presentation thereof, the sale and delivery will be deemed to have been made in Massachusetts. *Dame v. Flint*, 64 Vt. 533, 24 Atl. 1051.

In *Wind v. Her*, 93 Iowa, 316, 27 L. R. A. 219, 61 N. W. 1001; *Abberger v. Marrin*, 102 Mass. 70; and *Dolan v. Green*, 110 Mass. 322. —the principle was applied with the result of defeating an action by the vendee against the vendor to recover back the amount paid upon the purchase price, the delivery to the carrier having been made in a state where the sale 61 L. R. A.

Forcheimer v. Stewart, 65 Iowa, 596, 54 Am. Rep. 30, 22 N. W. 886; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 295.

In this case the plaintiffs intended to, and did, retain the *jus disponendi* to this property, and the title only passed when the bill of lading or freight receipt, as it is denominated, was delivered to Wieland at the First National Bank in Carroll.

Merchants' Nat. Bank v. Citizens' State Bank, 93 Iowa, 652, 61 N. W. 1065; *Rock Island Flour Co. v. Meredith*, 107 Iowa, 498, 78 N. W. 233.

When the evidence was all in, and taking the whole record in the case, giving the plaintiffs all they could fairly claim for the evidence on the facts, it becomes a question of law as to where this sale was made.

Meyer v. Houck, 85 Iowa, 319, 52 N. W. 235.

was valid. In the first case the order was finally accepted in the latter state, but in the other two cases the order was finally accepted in the state where sales were forbidden (see *infra*, III., as to this point).

So, where one doing business in North Dakota orders by telephone, of a person doing business in Minnesota, a quantity of beer to be delivered to the former in North Dakota, and, in pursuance of such order, the beer is so delivered, the sale will be deemed to have been made in North Dakota; and, being illegal and unenforceable according to the law of that state, an action cannot be maintained in Minnesota to recover the purchase price. *Theo. Hamm Brewing Co. v. Young*, 76 Minn. 246, 79 N. W. 111, 396.

A sale will be deemed to have been made in New York where the goods were delivered to the carrier, notwithstanding that the order was filled by the successor of the New York dealer to whom it was directed. *Orcutt v. Nelson*, 1 Gray, 536. The court held that the purchaser assented to the transaction by accepting the goods upon their arrival in Massachusetts, and that such assent related back to the original order, and that the sale was therefore complete on delivery to the carrier in New York.

So, in *Gross v. Feehan*, 110 Iowa, 163, 81 N. W. 235, it was held that the sale was made in Illinois where the goods were delivered to the carrier, consigned to the purchaser in Iowa, notwithstanding that after the order was given the purchaser, by notice to the seller's agent, undertook to countermand it, but accepted the liquor upon its arrival at his place of business, it not appearing that the seller had actual notice of the countermand before shipping the liquor. The purchaser claimed in this case that he was liable, if at all, only on an implied contract by reason of his acceptance of the liquor in Iowa. In this view the contract would have been an Iowa contract and invalid under the Iowa statute; but the court said that, when the purchaser accepted the goods shipped on his order, he waived his countermand, and confirmed the contract made by the order and its acceptance.

So, in *Whitlock v. Workman*, 15 Iowa, 351, it was held that where a resident of Iowa ordered liquors of a party in New York, and the goods were delivered to the carrier in the latter state, the sale must be regarded as having been made in New York, notwithstanding that, some months after the sale and delivery of the liquor, notes were signed in Iowa as evidence of the indebtedness.

McClain, J., delivered the opinion of the court:

Plaintiffs, carrying on the business of selling intoxicating liquors as wholesale dealers at Louisville, Kentucky, received, in March, 1899, through their agent in Iowa, an order from defendant for certain kinds and quantities of liquor, to be shipped to him at Audubon, Iowa; the total amount to be paid for the liquors purchased being \$1,670. This order was taken subject to the approval of plaintiffs, and, if sale had been effected in accordance with its terms, such sale, so far as appears, would have been valid, and the purchase price could have been collected by plaintiffs. But negotiations were subsequently carried on between the parties, by telegram and letter, with reference to change of terms, and there was a question as to whether the order had not been revoked by Wieland. In the meantime the liquors had

already been shipped to Audubon under a bill of lading taken by plaintiffs in their own name, with direction to the railroad company to notify defendant; and this bill of lading had been sent to a bank, with direction to deliver it to defendant on his making a certain cash payment, and delivering certain notes partly secured, for the balance of the purchase price. As a result of the negotiations, new terms of payment were agreed upon; and the bank was directed by plaintiffs to deliver the bill of lading to defendant when he should pay one fifth of the purchase price in cash, and give notes for the balance, which should mature at various times,—two of them to be secured by the signature of his wife, as surety. Defendant paid the money in accordance with this last arrangement, and delivered the notes, duly executed, and received the bill of lading, by means of which he secured from the railroad

An agreement made in Iowa whereby a brewing company doing business in Wisconsin agrees to deliver, upon cars in Wisconsin, liquor at a specified price whenever ordered by a dealer in Iowa, does not constitute a sale, but is a conditional agreement as to sales in contemplation. The sale takes place when, in pursuance of the agreement, the liquor is delivered on board the cars in Wisconsin. *Fred Miller Brewing Co. v. DeFrance*, 90 Iowa, 395, 57 N. W. 959.

The doctrine that the sale is not complete until delivery to the carrier rests upon the assumption that the order does not relate to specific liquor that is identified and appropriated by the terms of the order, but merely to a quantity of liquor that is to be furnished from a larger stock. This appears to be assumed in all of the cases above cited, but is especially emphasized in *Abberger v. Marrin*, 102 Mass. 70, and *Dolan v. Green*, 110 Mass. 322, *supra*.

Consequently, the doctrine does not apply to a sale of a specific lot of liquor that is identified and appropriated by the terms of the order.

Thus, in *Felton v. Fuller*, 29 N. H. 121, it was held that the sale was completed in Massachusetts where the parties made an agreement in that state for the purchase and sale of liquors which were stored in New Hampshire. In this case the goods were not a part of a larger stock, but were separate and distinct, so that nothing remained to be done to identify them. The decision is upon the general principle that the delivery of possession is not necessary between the vendor and vendee. This was an action upon a promissory note given for the purchase price, and the purchaser was allowed to recover, the sale being valid by the law of Massachusetts, although invalid by the law of New Hampshire.

In *Myers v. Carr*, 12 Mich. 63, however, it was held that a sale of intoxicating liquors must be regarded as having been made in Michigan in violation of its law, notwithstanding that the executory contract of sale was completed in New York, it appearing that the liquor was, at the time, in Michigan, and that the contract provided for an allowance to the purchaser by reason of leakage or shrinkage, the amount of which was to be subsequently ascertained in Michigan.

The doctrine that delivery to the carrier is delivery to the purchaser rests upon the presumed intention of the parties. *Wind v. Iler*, 93 Iowa, 316, 27 L. R. A. 219, 61 N. W. 1001.

It is therefore subject to be defeated by cir-
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cumstances rebutting the presumption upon which it rests.

Thus, a sale of intoxicating liquors will be deemed to have been made in Rhode Island, rather than Pennsylvania, where the order was procured in the former state by the salesman of a Philadelphia concern, and the salesman's agreement was to deliver the goods in Rhode Island free of freight. *Weil v. Golden*, 141 Mass. 364, 6 N. E. 229. This decision seems to be upon the assumption that the order was approved in Pennsylvania, and that it was optional with the principal whether to send the goods or not. The court said that the fact that the seller was to pay, and did pay, the freight to Rhode Island was of consequence as bearing upon the place of delivery.

So, in *Suit v. Woodhall*, 113 Mass. 391, it was held that, notwithstanding that orders for intoxicating liquor, given in Massachusetts to an agent of a dealer in Kentucky, were accepted in Kentucky, the sale must be regarded as having taken place in Massachusetts, and was therefore in violation of the statute of that state, if, by the contract of sale, the liquor was to be delivered to the buyer in Massachusetts; though it was held that, in the absence of such an agreement, delivery to the carrier in Kentucky would be a delivery to the buyer.

In *Lewis v. McCabe*, 49 Conn. 155, 44 Am. Rep. 217, where it was held that the law of Connecticut, which permits conditional sales with the reservation of title in the vendor until the purchase price is paid, governed with respect to sale of liquor made by dealers in New York, to a resident of Connecticut, pursuant to an order solicited by an agent in the latter state and approved by the dealers in New York,—there was an express finding to the effect that the sale was made in Connecticut, and that the liquor was placed in the possession of the purchaser in Connecticut.

When the purchaser expressly reserves the right to accept or reject the goods upon their arrival at destination, it often becomes a close question, in the event of acceptance, whether the title passed upon delivery to the carrier or upon actual acceptance by the purchaser. It depends to a large extent upon the exact terms of the reservation.

Wilson v. Stratton, 47 Me. 120, while conceding that ordinarily a delivery of the liquor to the carrier in another state, to be transported to the purchaser, completes the sale, held that where an order was given in Maine, and the goods were to be delivered to a common carrier in Massachusetts, directed to the

company the liquors specified therein. Three of the notes have been paid, and this action is brought on the fourth and last of them. The counterclaim is for the recovery of the amount of the cash payment, and of the notes which had already been paid when suit was commenced. The defense to plaintiffs' action on the note and the counterclaim are both based upon the provisions of Code, § 2423, the material part of which, as affecting this case, is as follows: "All payments or compensation for intoxicating liquor sold in violation of this chapter, whether such payments or compensation be in money or anything else whatsoever, shall be held to have been received in violation of law, and to have been received upon a valid promise and agreement of the receiver to pay on demand to the person furnishing such consideration the amount of said money, or the just value

of such other thing. All sales, transfers, liens, and securities of every kind which either in whole or in part shall have been made for or on account of intoxicating liquors sold in violation of this chapter shall be null and void against all persons, and no rights of any kind shall be acquired thereby."

It is well settled in this state that where a sale of liquor is made outside of the state, though in response to an application secured by an agent in the state, the sale is not invalid on account of the provisions of the section above referred to, and the seller may recover the price of the liquor, although the liquor is shipped by common carrier into the state, and by the carrier delivered to the purchaser. This is on the theory that the sale is completed outside of the state, by the delivery of the liquor to the carrier for

purchaser in Maine, subject, however, to his acceptance or rejection as the goods should or should not prove satisfactory to him, the sale must be regarded as having taken place in Maine.

A sale of intoxicating liquor ordered by a dealer in Maine from the traveling salesman of a wholesale liquor dealer doing business in Massachusetts will be deemed to have been made in Maine, rather than in Massachusetts, where the contract with the agent was that the vendor should send the liquor to the buyer in original packages, and that the buyer should have ten days after receiving the goods in which to return them if they were not satisfactory. *Wasserboehr v. Boulter*, 84 Me. 165, 24 Atl. 808. The decision is upon the ground that the sale was completed after the arrival of the goods at the place of destination in Maine, and that while they were in Massachusetts the sale was conditional. The court referred with approval to *Ballantyne v. Appleton*, 82 Me. 570, 20 Atl. 235, which lays down the general rule that where the buyer is, by the terms of the contract, bound to do anything as a condition either precedent or concurrent on which the passing of the title depends, the title will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer. Treating the transaction as a sale in Maine, it was illegal, and it was held there could be no recovery of the purchase price.

But in *Wind v. Her*, 93 Iowa, 816, 27 L. R. A. 219, 61 N. W. 1001, and *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140, it was held that the express reservation by the purchaser of the right to examine the liquors after they arrive at his place of business, and to return them if not according to contract, does not operate to postpone the passing of the title, or to defeat the effect of the delivery to the carrier as a delivery to the purchaser. In the former case the court said that the law distinguishes between an option to purchase if satisfactory and an option to return if not satisfactory; and in the one case a title will not pass until the option is determined, and in the other case the title passes at once, subject to the right to rescind and return.

Where, by the terms of an order for intoxicating liquor, the purchaser is to have thirty days to see if the liquors are as represented, and if so is to pay for them, and if not, have the right to return them to the vendors, the sale will be regarded as completed upon delivery to the carrier in New York, consigned to the purchaser in Rhode Island, and does not fall within the terms of the Rhode Island statute voiding 61 L. R. A.

sales in that state not made in original packages. *Schlesinger v. Stratton*, 9 R. I. 578. The court distinguished the case of *Wilson v. Stratton*, 47 Me. 120, upon the ground that the condition of the contract in that case was a condition precedent, it being agreed that the defendant need not have the liquor or pay for it unless it was what he wanted; while in the case at bar the condition was a condition subsequent, the defendant being entitled to thirty days after the liquor was received to return it if not found to be as represented.

So, a sale of liquor to a dealer in Kansas will be deemed to have been made in another state where the seller did business and from which the goods were shipped, notwithstanding that the goods were ordered in Kansas from a sample there shown, and it was expressly agreed that the goods were not to be received and accepted unless they proved identical with the order given in quality and in quantity, the purchaser expressly reserving the right to reject the liquor for any deficiency in quality or in quantity, and, in case of such deficiency, to return the goods to the seller. *McCarty v. Gordon*, 16 Kan. 35; *Gill v. Kaufman*, 16 Kan. 571. The court said that the express provisions in the contract were no more than the law would imply from a sale by sample.

Statute of frauds.

The question as to where the completed or executed sale is deemed to take place is sometimes complicated by the statute of frauds. It is true that the delivery of the liquor to the purchaser ordinarily removes any objection based upon the invalidity of the original executory contract under the statute of frauds; but, assuming that the executory contract was invalid under the statute of frauds of the state in which the order was accepted, there is no longer any foundation for the implied agency of the carrier to accept the goods in behalf of the purchaser, upon which the doctrine that delivery to the carrier is a delivery to the purchaser rests. Under such circumstances, therefore, the delivery to the purchaser takes place in the state in which he receives and accepts the liquor, and therefore the executed or completed sale is located in that state, since the acceptance of the goods by the purchaser does not relate back to their delivery to the carrier in the other state. *Kelwert v. Meyer*, 62 Ind. 587, 30 Am. Rep. 206; *Webber v. Howe*, 36 Mich. 150, 24 Am. Rep. 590, *infra*.

It is immaterial, for the purposes of this point, whether the order is finally accepted in the state where it is given, or in another

transportation, and, unless there has been an intent on the part of the seller to assist the buyer in violating the laws of this state, the transaction is not illegal, so far as the laws of the state are concerned. *Whitlock v. Workman*, 15 Iowa, 351; *Tegler v. Shipman*, 33 Iowa, 194, 11 Am. Rep. 118; *Fred Miller Brewing Co. v. De Francoe*, 90 Iowa, 395, 57 N. W. 959; *Wind v. Ilcr*, 93 Iowa, 318, 27 L. R. A. 219, 61 N. W. 1001; *Gross v. Feehan*, 110 Iowa, 163, 81 N. W. 235; *Sachs v. Garner*, 111 Iowa, 424, 82 N. W. 1007; *Shuenfeldt v. Junkermann*, 20 Fed. 357. If these liquors had been shipped directly to defendant, the subsequent modification of the terms of the sale would probably not have converted the transaction into an Iowa sale. *Gross v. Feehan*, 110 Iowa, 163, 81 N. W. 235. But plaintiffs, by delivering the liquors to the carrier under the bill of lading

taken in their own name, did not make the delivery to the defendant in Kentucky. While the mere fact of taking the bill of lading in plaintiffs' name might not in itself be controlling, yet it is plain, from the entire transaction, that plaintiffs did not intend that the title to the liquor should pass to defendant until defendant complied with the terms of the contract, by making payments and delivering the notes at the bank in Iowa, and thereby became entitled to the bill of lading, which was then to be delivered to him. Until the defendant thus procured the bill of lading, he was not to have any control over the liquors, and he was not, of course, the owner thereof. Delivery of the liquors to defendant under the contract was to be made, and was made, only when defendant became entitled to the possession of the bill of lading by performing his part

state, assuming that it would be invalid under the statute of frauds of either state, since in either case the foundation for the carrier's implied authority to receive the goods in behalf of the purchaser is lacking.

Thus, in *Kelwert v. Meyer*, *supra*, it was held that the completed or executed sale was made in Iowa, and came within the operation of the prohibitory law of that state, notwithstanding that the goods were delivered to a carrier in Wisconsin. The decision rests upon the ground that the executory contract, evidenced by the order which was accepted by one of the vendors while temporarily in Iowa, was originally invalid under the Iowa statute of frauds, and that consequently there was no foundation for the implied authority of the carrier to receive the goods as the agent of the buyer, and consequently no acceptance of the goods by the purchaser, which would meet the requirements of the statute of frauds, until they were received and accepted by him in Iowa. The same conclusion, upon similar reasoning, was reached in *Rindskopf v. De Buyter*, 39 Mich. 1, 33 Am. Rep. 340, though in the latter case the order was given in Michigan to the agent of a Wisconsin firm subject to the approval of the firm, and the executory contract completed by the acceptance of the order in Wisconsin. This case, like the former case, rests upon the view that at the time the goods were delivered to the carrier there was no foundation for its implied authority to accept the goods as agent for the buyer, and the place of delivery by which the executed contract was consummated was therefore located in Michigan and fell within the prohibitory law of Michigan.

Sometimes the statute of frauds operates in favor of, rather than against, the seller.

Thus, in *Roethke v. Philip Best Brewing Co.* 33 Mich. 340, it was held that so much of the liquor in question as was sent from Wisconsin to Michigan under a verbal contract between an agent of the seller and the purchaser in Michigan was void under the Michigan liquor law, which, as shown in subdivision III., *infra*, covers the executory, as well as executed, contracts of sale consummated within the state; but that with respect to the remainder, which was sent from Wisconsin on separate orders, the contracts were Wisconsin contracts and presumably valid. The decision is upon the ground that the verbal agreement made in Michigan was insufficient under the statute of frauds of that state, to cover future orders, and such future orders therefore stood on their own merits, and the sales and shipments in pursuance thereof were therefore made in Wisconsin.

In *Webber v. Howe*, 38 Mich. 150, 24 Am. 61 L. R. A.

Rep. 590, in which it was held there could be no recovery of the purchase price, although the liquors were delivered to a carrier in Ohio, because the contract was completed, as an executory contract, by the acceptance of the order in Michigan, and was therefore in violation of the Michigan prohibitory law which covers executory as well as executed contracts, the seller attempted to avoid the effect of the acceptance of the order in Michigan by insisting that the original executory agreement, assuming it to have been made in Michigan, was void under the Michigan statute of frauds, and consequently did not take effect as an agreement until the delivery of the goods to a carrier in Ohio; but Cooley, Ch. J., said, in reply to that argument: "If we assume the original invalidity of the agreement in this state on this ground, it cannot, we think, help the vendors. If void originally it would not become binding upon the purchaser until he should do something in ratification of it, and it does not appear that anything further was done by him until the liquors were received in this state. His void order could not make any carrier to whom the vendors should see fit to deliver the goods his agent. The case must, therefore, stand either upon the original order, or upon the reception of the goods at Detroit under it; and in either case the contract must be regarded as a Michigan contract."

In *Garfield v. Paris*, 96 U. S. 557, 24 L. ed. 821, a resident of Michigan, while temporarily in New York, ordered liquors from a party in the latter state, and the liquor was received and sold by the purchaser, who, when sued for the purchase price, set up the prohibitory liquor law of Michigan, providing that all such contracts are utterly null and void. The question discussed in this case was whether the delivery to the purchaser in New York of certain labels, to be affixed to the bottles containing the liquor, constituted such a part delivery as to satisfy the New York statute of frauds; and it was held that the finding of the jury that there was such a delivery was supported by the evidence. It seems to have been assumed, at least for the purposes of the case, that it was necessary, in order to avoid the effect of the Michigan prohibitory law, to show a completed executory contract of sale in New York that would satisfy the requirements of the statute of frauds of that state. The manner in which the liquor itself was delivered to the purchaser does not expressly appear. Presumably it was delivered to a carrier in New York. Upon the assumption that there was a valid executory contract completed in New York, the delivery to the carrier there might operate as a delivery to the

of the contract. At this time the liquors were in Iowa, and we cannot escape the conclusion that the sale was therefore an Iowa sale. Plaintiffs suggest that the transaction was similar to a shipment of goods C. O. D., and that it has been held that such a transaction passes the title when the goods are delivered to the carrier. Without discussing that question, about which there is some conflict in the authorities, it is sufficient to say that this was not a similar case. The shipper here retained the full ownership and right to dispose of the goods, and did in fact alter the terms on which the goods should be delivered to the defendant: assuming to do so as the owner of the goods, having full control over them. Nor is the case like that of *Wind v. Her*, 93 Iowa, 316, 27 L. R. A. 219, 61 N. W. 1001, where it was held that the right of the buyer to inspect on receipt

was not inconsistent with the title having passed at the time and place of shipment, inasmuch as a right of inspection and rejection is incident to a sale, which is completed by delivery to the carrier, of goods selected by the seller without the buyer's inspection and approval. We reach the conclusion, therefore, that the sale was made in Iowa, and was void under the section of the Code already referred to, inasmuch as the plaintiffs had no authority to make sales of liquor in this state.

With reference to the ruling of the court sustaining plaintiffs' demurrer to defendant's counterclaim, the contention is that the action to recover money paid as consideration for the illegal sale of intoxicating liquor can only be maintained after demand for repayment (*Schober v. Rosenfield*, 75 Iowa, 455, 39 N. W. 706), and, as such demand in this case was not made by defend-

purchaser, so that both the executory and the executed contract would be consummated in New York. Upon the other hand, unless a partial delivery to the purchaser in New York had been shown, there would be no valid executory contract at the time of the delivery of the liquor to the carrier, and therefore no basis for inferring the carrier's agency for the purchaser. (See the reasoning of Cooley, Ch. J., in *Webber v. Howe*, 36 Mich. 150, 24 Am. Rep. 590, *supra*, on this point.)

In *Bancher v. Cilley*, 38 Me. 553, it was held that even if the clerk of a wholesale liquor dealer, doing business in Massachusetts, had authority to accept an order for liquor given by a dealer in Maine, the sale must nevertheless be regarded as taking place in Massachusetts so as not to fall within the Maine statute forbidding the recovery of the purchase price of liquor sold in that state, where the value of the goods was more than \$30, and no memorandum was made thereof in Maine in compliance with the statute of frauds of that state, and there was no delivery of goods in that state sufficient to satisfy the requirements of the statute.

III. When executory contract consummated in one state and executed contract in another.

Assuming that by the application of the principle stated in subdivision II., the executed contract has been located outside the state having the prohibitory or regulative statute, the question arises as to the effect upon the rights of the parties of the fact that the executory contract was consummated within that state by the final acceptance of the order there. Referring back to subdivision II., it will be observed that in most of the cases cited in that subdivision, where the order was given to an agent within the state having the prohibitory or regulative law, the agent's authority was limited to soliciting orders which were subject to the approval of the principal, and were finally accepted by the latter in the state where the goods were delivered to the carrier. Under such a state of facts both executory and executed contracts were located outside of the state having the prohibitory or regulative law. That is also true of the cases cited in that subdivision in which the order was sent by mail.

In most, though not all, of those cases, however, the question principally discussed was whether the delivery to the carrier constituted a delivery to the purchaser. Still, they cannot be regarded as authority for the proposition that an action will lie for the recovery of the

purchase price when the executed contract is consummated by delivery of goods to the carrier in a state in which such sale is permitted, if the executory contract is consummated by the acceptance of the order in the state having a prohibitory or regulative statute.

Few of the cases distinguish sharply between the executory and executed contract. Such a distinction, however, was made in *Webber v. Howe*, 36 Mich. 150, 24 Am. Rep. 590, *supra*, II.; and it was there held that, even upon the assumption that the delivery to the carrier in Ohio constituted a delivery to the purchaser, the contract nevertheless fell within the Michigan prohibitory liquor law, because the contract, as an executory contract, was consummated by the giving and acceptance of the order in Michigan. The Michigan statute, however, not only avoided sales but "all contracts or agreements relating thereto." See also *Rindskopf v. De Ruyter*, 39 Mich. 1, 33 Am. Rep. 340, *supra*, II., which clearly proceeds upon the assumption that, if the executory contract, in pursuance of which the liquor is delivered, is consummated in Michigan by acceptance there, there can be no recovery, although the delivery by which the executed sale is completed takes place in another state.

In *Finch v. Mansfield*, 97 Mass. 89 (an action upon notes given for the purchase price of intoxicating liquor), the court took the position that, if the vendor did not know that the liquors were intended to be used in violation of the law of Massachusetts, he could recover, assuming that his agent had no authority to sell, but only to receive and transmit orders to Connecticut for liquors to be sent by railroad to the purchaser in Massachusetts, the contract being completed by the delivery of the liquor on the railroad in Connecticut, the buyer agreeing to pay the freight. It is plainly implied in this case that it would be otherwise if the agent had authority to accept the order in Massachusetts, even if the goods were delivered in Connecticut. The court said that the test was whether the defendant, by anything transacted between him and the agent in Massachusetts, acquired any right against the seller; that the agreement as to the price would not be decisive unless the agent agreed, and had authority to agree, that the liquor should be supplied so as to bind his principals.

Upon the other hand, in *Brockway v. Maloney*, 102 Mass. 308, where the two contracts were expressly distinguished, the court said that the Massachusetts statute applied only to executed contracts of sale, and that therefore

ant until after the commencement of plaintiffs' action, recovery cannot be had by way of counterclaim. Code, § 3570, so far as applicable to this case, requires that a counterclaim shall consist of a cause of action in favor of defendant, and against plaintiff, which the defendant "might have brought when suit was commenced, or which was then held, either matured or not, if matured when so pleaded." Defendant insists, however, that the demand was material only for the purpose of maturing the claim which already existed and had existed from the time the money was paid; and this view seems to be supported by the language of Code, § 2423, already quoted. When the plaintiffs received in Iowa, as consideration for the sale of liquors, unlawfully made in Iowa, the payment of cash and notes, they did so under the condition imposed by the statutory pro-

vision that such compensation was "received upon a valid promise and agreement of the receiver to pay on demand to the person furnishing such consideration the amount of said money, or the just value of such other thing." By the provision of the statute the duty to repay is directly and positively imposed, and the time of repayment, only, is dependent on the demand. Therefore defendant's claim against plaintiffs was already held by him when plaintiffs' action was brought, and it was matured by demand before it was interposed as a counterclaim, and the demurrer to his counterclaim should have been overruled.

The case is therefore affirmed on plaintiffs' appeal, and on the appeal of defendant it is reversed.

Rehearing denied.

an action would lie in Massachusetts for the recovery of the purchase price of intoxicating liquors which were delivered to a carrier in New York, even if the order for the goods was accepted in Massachusetts.

So, in *Abberger v. Marrin*, 102 Mass. 70, and *Dolan v. Green*, 110 Mass. 322, it was assumed that the Massachusetts statute providing for the recovery back of money paid for intoxicating liquors "sold in violation of law" did not apply to a sale that was completed in another state by the delivery of the goods to the carrier there, though the executory contract was consummated in Massachusetts by the acceptance of the order there.

In *Sherley v. McCormick*, 135 Mass. 126, also, it was held, in an action for the purchase price of whisky, that it was immaterial whether the seller or his agent had a license to sell spirituous liquors in Massachusetts, notwithstanding that the proposal to sell was accepted in Massachusetts, it appearing that the contract contemplated that the title to the whisky should pass to the buyer in Kentucky.

So, in *Bollinger v. Wilson*, 76 Minn. 262, 79 N. W. 109, it was held that, to constitute a sale under the Iowa statute, providing for the recovery of all payments or compensations for intoxicating liquor sold in violation of law, there must be a transfer of the title to the property in Iowa, and that delivery, either actual or constructive, is essential to such a sale. It was accordingly held that there was not a sale in Iowa within the meaning of the statute, notwithstanding that a valid executory contract was made in that state, it appearing that by the terms of such contract the seller was to deliver the liquor free on board the cars at Milwaukee. The court said that the liquor became the property of the purchaser when it was delivered at Milwaukee to the carrier, who, for the purpose of delivery, represented him; and, until that was done, the agreement to sell was merely executory.

So, in *Sortwell v. Hughes*, 1 Curt. C. C. 244, Fed. Cas. No. 13,177, an action to recover the purchase price of liquor which was ordered in New Hampshire to be delivered in Massachusetts, the court held that a penal statute of New Hampshire imposing a penalty for the sale of intoxicating liquors applied only to executed sales consummated within the state, and not to executory contracts of sale, and hence there was no implication that the making of an executory contract in New Hampshire for the sale of liquor to be delivered elsewhere was forbidden.

In *Williams v. Feinman*, 14 Kan. 288, *supra*, 11., it was held (Brewer, J., writing the opinion) 61 L. R. A.

that the Kansas statute forbidding a "sale" of intoxicating liquors did not apply where an order for liquors was taken in Kansas subject to the approval of the dealers in another state, and the goods were selected and separated from the stock in the latter state, and delivered to the carrier in that state, the charges for carriage being paid by the purchaser, there being no special agreement to deliver the goods in Kansas. In this case it expressly appeared that the order was subject to the approval of the sellers in the other state, but, from the reasoning of the opinion, it would seem that the decision would have been the same, even if the agent had had authority to accept the order and to complete an executory contract of sale. The court said: "Clearly there was no complete sale, no transfer of title to the particular goods, until they had been separated from the entire stock. Before such separation there was at best only a contract to sell. Now the thing forbidden by the dramshop act is a sale, not a contract to sell. . . . But, as we have seen, the thing forbidden is a sale, and no sale was completed until the goods were separated and delivered to the carrier."

In *Dunn v. State*, 82 Ga. 27, 3 L. R. A. 199, 8 S. E. 806, which involved a contract for the sale of whisky made in a county where sales were prohibited, the delivery having been made in another county, the court said that, in order to render prohibitory laws effectual in the largest degree, the contract to sell, as well as the sale itself, should be brought within their purview; but that, until that was done by legislation, the courts were powerless.

In Iowa, however, where the statute declares that "all sales, . . . and securities of every kind, which either in whole or in part shall have been made for or on account of intoxicating liquors sold in violation of this act, shall be utterly null and void," the courts have proceeded upon the assumption that it is sufficient to bring the case within the statute if the executory contract is consummated in Iowa, although the delivery of the goods is made in another state.

Thus, in *Tegler v. Shipman*, 33 Iowa, 194, 11 Am. Rep. 118, the court, while holding that the contract in question was an Illinois contract, and therefore did not come within the provision referred to because the order, which was given in Iowa to an agent of the dealer in Illinois, was finally approved by the principal in the latter state, and did not become a contract until approved, said that the pivotal question in the case was as to where the contract was made; that, if the agent sold the liquor to the

purchaser in Iowa, and forwarded to his principals a statement of such sale for them to fill by forwarding the liquor specified, then it was an Iowa contract; but that, if the agent simply took an order from the purchaser upon his principals in Illinois which they might fill or refuse, at their option, it was an Illinois contract. In this case there was no question but that the delivery took place in Illinois, as it expressly appears that the liquor was delivered there to a carrier, consigned to the purchaser, the latter paying the freight and charges and taking the risk of leakage, etc.

In *Second Nat. Bank v. Curren*, 36 Iowa, 555, also, the implication seems to be that, even assuming that the delivery took place in another state, so that the title to the liquor passed there, yet, if the executory contract was completed in Iowa by the acceptance of the order there, the transaction would be invalid under the Iowa statute without reference to the intention of the parties.

So, in *Taylor v. Plckett*, 52 Iowa, 467, 3 N. W. 514, the court rejected the contention that the sale is made at the place where the property is kept, and where it is set apart and designated for the purchaser, holding that a sale by an agent is considered as made where the order is given, unless such order, after being forwarded to the principal, is to be subject to his approval before it is filled.

And in *Shuenfeldt v. Junkermann*, 20 Fed. 857, where an agent of Illinois dealers took an order for liquor in Iowa, and the liquor was delivered to the carrier in Illinois, the question whether the sale was an Iowa or Illinois sale was made to turn upon the question whether ratification of the order by the principal was necessary. In this case, however, it was held, upon the assumption that the agent's authority was limited to soliciting contracts, that the validity of the contract was governed by the law of Illinois rather than the law of Iowa.

Again, in *Sachs v. Garner*, 111 Iowa, 425, 82 N. W. 1007, *supra*, II., where it was held that the contract was a Kentucky contract, the order having been taken in Iowa (by an agent whose authority, without the knowledge of the purchaser, was limited to taking orders subject to approval), and approved in Kentucky, it seems to be implied that, if the agent had had authority to accept the order, the purchase price could not have been recovered, notwithstanding that the delivery took place in Kentucky.

In *Fred Miller Brewing Co. v. DeFrance*, 90 Iowa, 393, 57 N. W. 959, *supra*, II., which held that the sale was made in Wisconsin, it will be observed that the preliminary agreement made in Iowa was treated merely as a conditional agreement as to sales in contemplation; and in this case, therefore, the executory, as well as the executed, agreement was consummated in Wisconsin.

In *Engs v. Priest*, 65 Iowa, 232, 21 N. W. 580, the court laid more stress upon the question where the delivery took place; but this case arose under a provision of the Iowa Code to the effect that no action shall be maintained in any court in Iowa for intoxicating liquors or the value thereof, sold in any state or country contrary to the law of such state or country. It will be observed that this provision, unlike that involved in the other Iowa cases, does not in terms cover sales made "in part" in violation of law. Besides, it appeared as a matter of fact in this case that the order was finally accepted in the state in which the goods were delivered to the carrier.

In *Gipps Brewing Co. v. DeFrance*, 91 Iowa, 108, 28 L. R. A. 380, 58 N. W. 1087, where recovery was denied, both executory and executed contracts were consummated in Iowa, an agree-

ment providing for delivery in Iowa having been sent from Illinois to Iowa and signed in the latter state by the purchaser.

In *Erwin v. Stafford*, 45 Vt. 390, an agent of a wholesale liquor dealer of New York, who had authority to solicit orders for liquor and agree on the price and time of payment,—the principals, however, reserving the right to accept or reject his order,—obtained an order in Vermont from a dealer in that state who was not aware of the limitation upon his authority. Subsequently the purchaser sent orders directly to the wholesalers in New York. It was held that an action would lie in Vermont for the recovery for liquors furnished pursuant to orders sent directly, but that there could be no recovery for liquor sent pursuant to the order given to the agent. So far as appears, the shipment in both instances was made in the same manner and from the same place, and the decision with respect to the order made through the agent is on the ground that the contract was completed in Vermont, the purchaser not being bound by the limitation of the agent's authority. This decision, therefore, seems to be authority for holding the sale invalid when the executory contract is completed within the state, though the delivery takes place in another state. The exact terms of the statute do not appear.

In *Territt v. Bartlett*, 21 Vt. 184, and other Vermont cases cited in subdivision IV., *infra*, the court refused to entertain the action, the order having been accepted in Vermont though the delivery took place elsewhere; but in these cases it appeared that the vendee intended to resell the liquor in violation of the law of Vermont, and that the vendor knew of such purpose. This may have been the fact in *Erwin v. Stafford*, but the decision in the latter case is put upon the ground that the contract was completed in Vermont.

The later cases in Vermont (*Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109; *Beverwick Brewing Co. v. Oliver*, 69 Vt. 323, 37 Atl. 1110; and *Bacon v. Hunt*, 72 Vt. 98, 47 Atl. 394) go further than *Erwin v. Stafford*, 45 Vt. 390, and hold that the mere fact that the order was taken in Vermont is sufficient to render the sale invalid without reference to the intention of the parties, though the order was accepted and the liquor was delivered elsewhere. Those decisions, however, are not upon the ground that the contract was completed in Vermont, but that it was in part made there, and that the statute covered contracts partially made within the state, as well as those wholly made therein. Of course, if the mere fact that the order was given in the state will subject the sale to the statute, *a fortiori* the fact that it was accepted there will have that effect.

The apparent conflict between the cases above cited, upon the point whether the law of the place where the executory contract was consummated will be applied when the executed contract was consummated by delivery to the carrier in another state, is, in a measure at least, due to the difference in the statutes. When the statute in terms merely applies to a "sale," the tendency seems to be to exclude executory contracts of sale; but when the statute refers expressly to contracts of sale, or refers to sales "in whole or in part," the tendency seems to be to include, within its operation, executory contracts consummated by acceptance of the order within the state, though the executed contract is consummated by delivery of the goods to a carrier in another state.

It will be observed with reference to most of the cases cited in subdivision II., *supra*, that, notwithstanding it was assumed that the order was accepted in a state in which the sale was permitted, the cases nevertheless were made to

turn upon the question as to where the delivery of the goods, by which the executed contract was consummated, took place.

These cases, therefore, tacitly assume that, even when the executory contract is located in a state which permits the sale, it is necessary, in order to support a recovery of the purchase price in a state which forbids the sale, to locate the delivery of the goods, by which the executed sale is consummated, in the other state, assuming that the order did not relate to specific goods already identified and appropriated. The principle here tacitly assumed is expressly declared in *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617, which held that, if a contract for the sale of intoxicating liquor is made in one state where such a sale would be valid, but the goods are to be delivered in another state where the sale is prohibited, the seller cannot maintain an action in the latter state for the recovery of the purchase price.

Even in Iowa, where, as above pointed out, the courts assume that, in order to sustain the action, it must be shown that the acceptance of the order by which the executory contract is consummated took place in another state, it is clearly assumed that the delivery, also, must take place out of the state.

IV. Effect of soliciting order within state having prohibitory law.

Assuming that the executory contract was consummated by the acceptance of the order in the state in which the sale was permitted, and that the executed contract of sale was consummated by the delivery of the goods to the carrier there, the question still remains as to the effect of the fact that the order was solicited in a state having the prohibitory or regulative law. As already pointed out (*supra*, I.), the legislature of a state may, subject to the interstate commerce clause of the Federal Constitution, forbid the soliciting of orders within the state, although the order is to be accepted or rejected in another state and the goods are to be delivered in the latter state.

Thus, in *State v. Ascher*, 54 Conn. 299, 7 Atl. 822, it was held that one who solicited orders in Connecticut for a firm of liquor dealers doing business in New York was within the terms of the act of 1882 forbidding all persons, without a license therefor, to sell intoxicating liquors "by sample or by soliciting or procuring orders," notwithstanding that the orders in question were approved in New York and the sale was completed by delivery to a carrier there.

In *Mack v. Lee*, 13 R. I. 293, however, it was held that a statute of Rhode Island prohibiting offers to sell liquor "in violation of the preceding sections" did not apply to an offer made in Rhode Island if the liquor was delivered in New York.

State v. Ascher, 54 Conn. 299, 7 Atl. 822, did not involve any question as to the validity of the sale made in pursuance of the order solicited by the agent; and it was subsequently held in *J. & J. Eager Co. v. Burke*, 74 Conn. 534, 51 Atl. 544, that the statute did not prevent the recovery of the purchase price of liquor, the order for which was solicited in Connecticut by an agent without a license, in violation of the act, but approved in New York, the liquor being delivered to a carrier there. The court took the position that the offense of the agent was personal, and did not vitiate the sale in the absence of evidence that the vendor knew that he was unlicensed when he procured the order. So, it was held in *Westheimer v. Weisman*, 60 Kan. 763, 57 Pac. 969, that while a traveling salesman, a resident of Missouri, who solicits in Kansas conditional orders subject to approval of 61 L. R. A.

his principals in Missouri, is subject to the penalties prescribed by the Kansas statute for taking or receiving an order for intoxicating liquors in the state, yet his offense does not invalidate the sale which is completed in Missouri by the acceptance of the order and the delivery of the goods to the common carrier there, or prevent a recovery of the purchase price.

In the two cases last cited it will be observed that the statute made the soliciting of orders within the state an offense without reference to the intention of the person giving the order to resell the liquor in the state in violation of its law, or to the vendor's knowledge of such intention. In New Hampshire the statute makes it a penal offense to solicit orders within the state for spirituous liquors to be delivered at any place without the state, knowing, or having reasonable cause to believe, that if so delivered the same will be transported to the state and sold in violation thereof. It has been held that the solicitation of an order within the state in violation of such statute will preclude the maintenance in New Hampshire of an action for the recovery of the purchase price, even upon the assumption that the order was accepted and the goods were delivered in another state. *Dunbar v. Locke*, 62 N. H. 442; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384; *Lang v. Lynch*, 4 L. R. A. 831, 38 Fed. 489. In these cases it not only appeared that the order was solicited in New Hampshire, but that the vendor or his agent knew, or had reasonable cause to believe, that the liquor was to be transported to the state and sold there in violation of law. In *Holden v. Brooks*, 66 N. H. 184, 20 Atl. 247, it was held that the mere soliciting of the order in New Hampshire will not preclude recovery for the price, unless the vendor knew, or had reasonable cause to believe, that the liquor, if delivered, would be transported to New Hampshire and sold in violation of law.

In *Durkee v. Moses*, 67 N. H. 115, 23 Atl. 793, it was held that, prior to the act of Congress of August 8, 1890, the provision of the New Hampshire statutes making it an offense for any person to solicit orders for spirituous liquors within the state, to be delivered without the state, knowing, or having reasonable cause to believe, that the same will be transported to the state and sold in violation of its laws, was an unlawful interference with interstate commerce, and therefore held that an action would lie for the recovery of the purchase price upon such a sale, notwithstanding the statute.

The passage of the act of Congress above referred to seems to have restored to the earlier New Hampshire decisions, above cited, their authority as precedents for cases subsequently arising under the state statute.

The cases thus far cited in this subdivision have turned upon statutes that were expressly aimed at the solicitation of orders within the state; the question remains as to the effect of the solicitation of the order in the state, in the absence of such a statute.

It is important, in the consideration of this question, to observe a distinction, that has apparently been overlooked by some of the courts, between cases in which it does not appear that there was any unlawful purpose on the part of the vendee with reference to the future disposition, or, if there was, it does not appear that the vendor knew thereof, and those in which it does appear that the vendee entertained such unlawful purpose, and that the vendor, either personally or through his agent, knew thereof at the time the order was solicited.

In the first group of cases cited in subdivision II., *supra*, it was assumed that the order was solicited in the state where the sale was forbidden, and as they nevertheless held that an action

would lie for the recovery of the purchase price, the order having been accepted and the goods delivered in another state, they are implied authority, at least, for the proposition that a statute forbidding sales does not cover the mere solicitation of the order within the state when the order is accepted and the liquor is delivered in another state.

In the later cases in Vermont, however, the courts have refused to entertain the action without reference to the vendee's purpose or the vendor's knowledge thereof, if the order was solicited in Vermont, notwithstanding that it was accepted in another state and the goods were delivered in the latter state. *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109; *Beverick Brewing Co. v. Oliver*, 69 Vt. 323, 37 Atl. 1110. So, in *Bacon v. Hunt*, 72 Vt. 98, 47 Atl. 394, the right of the vendee to recover back what he had paid the vendor was made to turn upon the question whether the letter ordering the goods from the vendor in Massachusetts was written in pursuance of an agreement previously made in Massachusetts, or one previously made in Vermont. Upon either assumption it would seem that the acceptance of the order by which the executory contract was consummated in this case took place in Massachusetts, though, in case the understanding pursuant to which the letters were written was made in Vermont, the order might be regarded as having been solicited there. As already stated, the three decisions last cited are made without reference to the intention of either party with respect to the resale of the goods.

In *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109, it expressly appeared that the purchaser did not intend to make an unlawful use of the liquor. The Vermont statutes, at the time of the sales involved in these cases, made it unlawful to sell spirituous liquor in the state except as provided by statute, although the purchaser intended to make, and did make, a lawful use of it (Vt. Stat. § 4460); and prohibited recovery for intoxicating liquor, or the value thereof, except such as was sold or purchased in accordance with the provisions of the statute (Vt. Stat. § 4464). It would seem that it might have been plausibly argued that the second provision applied, although the sale was not made within the state, though it was held in *Orcott v. Nelson*, 1 Gray, 536, that a similar statutory provision did not apply to a sale of liquors, made in another state without any fraudulent view to their resale in Massachusetts, although the purchaser was a resident of Massachusetts and the order for the liquors was sent from that state. The decisions in the Vermont cases, however, are not based upon the second, but upon the first, of the statutory provisions referred to. That the court proceeded upon the assumption that the case came within the first provision is apparent from the fact that, in reply to the objection that the contract was made in New York, the court said that it was, in part at least, made in Vermont, and that that prevented recovery as effectually as though it had been wholly made there. The only basis for the statement that the contract was made in part in Vermont is that the order was solicited there. The court cites, as authority for its position, the cases of *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187, and *Backman v. Mussey*, 31 Vt. 547, *infra*. It is not apparent, however, how those cases support that position, since they were decided upon the assumption that the vendee intended to keep or resell the liquor in Vermont in violation of its law, while the assumption in *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109, was that the vendee intended to, and did, make a lawful use of the liquor. The position taken in *Starace v. Rossi*, that a statute which provides that it shall be unlawful to "sell" liquor in the state includes the mere

solicitation of the order in the state when it is accepted and the goods are delivered elsewhere, is clearly opposed to the great weight of authority.

When, in addition to the fact that the order was solicited in the state, it appears that it was so solicited with knowledge on the part of the vendor, actual or imputed to him through his agent that the vendee intended to keep or resell the liquor in violation of law, the question assumes a different aspect.

As pointed out in subdivision I., *supra*, and as more fully shown in subdivision V., *infra*, the right to maintain the action may be denied upon the grounds of public policy, even though neither the completed sale, nor any of the preliminary steps leading thereto, fall within the condemnation of the prohibitory or regulative law of the forum. Now, at least upon the assumption that the entire transaction from the solicitation of the order to the consummation of the executed sale by the delivery of the goods took place in another state, the weight of authority is that mere knowledge by the vendor of the unlawful purpose to keep or resell the liquor at the forum in violation of its statute does not constitute such an act of participation in that unlawful purpose as to defeat an action for the purchase price upon the ground of public policy, yet there is some ground for a distinction when it appears that, with such knowledge of the vendee's unlawful purpose, the vendor solicited and obtained his order within the state. As already pointed out, New Hampshire has adopted a statute covering such a case; and, even in the absence of such a statute, the earlier cases in Vermont seem to hold that, under such circumstances, the action will not lie.

In *Territt v. Bartlett*, 21 Vt. 184; *Smith v. Allen*, 23 Vt. 298; and *Converse v. Foster*, 32 Vt. 828,—the court refused to entertain an action for the purchase price, although the delivery took place in another state, because the order was given and accepted in Vermont with knowledge that the vendee intended to resell the liquor in that state in violation of law. If these cases stood alone, their citation in this subdivision would not be appropriate because the executory contracts were consummated by acceptance of the order in Vermont. In *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187, and *Backman v. Mussey*, 31 Vt. 547, however, where the court likewise refused to entertain the action, it does not, expressly at least, appear that the order was accepted in Vermont, though it does appear that it was solicited there with knowledge of the vendee's unlawful purpose.

And in *McConliffe v. McMann*, 27 Vt. 93, where the court refused to entertain the action, the agent's acts were subject to the approval of the vendor; and the court said that it was immaterial whether the purchase was finally consummated in Vermont or New York.

The latter decision is expressly put upon the ground that the vendor was aiding the purchaser to violate the law of Vermont with knowledge that it was his intention to do so. This seems to be the true ground of all the earlier Vermont cases; and it will be observed, therefore, they do not, like the later Vermont cases, rest upon the mere fact that the order was solicited, or even that it was solicited and accepted, within the state. While the distinction is not alluded to by the court, and while some of the earlier cases are cited as authority for the decision in *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109, the earlier and later decisions seem to rest upon different principles. In the earlier cases the vendor's participation in the vendee's unlawful purpose, by soliciting his order within the state with knowledge of such purpose, seems to be invoked for the purpose of justifying the court in refus-

ing, upon the grounds of public policy, to entertain the action. Otherwise, why make a point of the vendee's unlawful purpose and the vendor's knowledge of it? So far as appears, the prohibitory or regulative statute of Vermont made no distinction with reference to the intention of the parties. In the later cases, the decision is not put upon the ground of public policy, but upon the ground that the transaction between the vendor and vendee fell within the prohibitory statute because one of the elements of that transaction (*c. g.*, the solicitation of the order) had its situs within the state; and in that view the intention of the vendee with reference to the subsequent disposition of the liquor was wholly immaterial.

In *Wilson v. Stratton*, 47 Me. 120, the court held that the sale was completed in Maine, but intimated that, even if it had been completed in Massachusetts, there could have been no recovery, since the vendor sent his agent into the state to solicit orders for liquor to be sold in the state in violation of law.

In *Fuller v. Leet*, 59 N. H. 163, however, it was held that the soliciting and receiving orders in New Hampshire for the purchase of liquor to be delivered in another state, prior to the act of July 18, 1876, prohibiting the taking of such orders, did not invalidate the sale, although the seller knew, or had reasonable cause to believe, that the purchaser was intending to sell the liquor in violation of the laws of New Hampshire.

A foreign merchant selling goods to residents of Connecticut is not bound to ascertain whether his purchaser has legally complied with the local license law; nor is he bound, when employing a resident of Connecticut to procure orders for the sale of his goods upon commission on orders approved by the principal, to ascertain whether the person so employed has qualified himself to transact the business. *J. & J. Eager Co. v. Burke*, 74 Conn. 534, 51 Atl. 544.

V. Public policy of forum; intention to violate prohibitory statute of forum.

Upon general question as to right to recover price of property sold for unlawful use, see note to *Graves v. Johnson* (Mass.) 15 L. R. A. 834.

Assuming that, by the application of the principles and rules above stated the sale has been located in another state by the law of which it is valid, and that no step preliminary to the completed contract was taken at the forum in violation of its law, the court of the forum will not refuse to entertain an action for the purchase price merely because the sale, if made at the forum, would have been invalid, unless, under the circumstances of the particular case, it would be contrary to the public policy of the forum to do so. So much is implied in the cases cited in subdivision II., *supra*, in which, after the sale had been located in the other state, the vendor was allowed to maintain his action at the forum to recover the purchase price, notwithstanding that if the sale had been made at the forum it would have been invalid, and therefore would not have supported such an action. But even assuming that the entire transaction, from the solicitation of the order to the consummation of the executed contract by the delivery of the goods, took place in another state where the sale was valid, the court of the forum may nevertheless refuse to entertain the action upon the ground that it would be contrary to the public policy of the forum to do so. Since the legislature of the state, subject to the Federal and state Constitutions, has complete control of questions relating to the enforcement, in the courts of the state, of contracts and sales made in other states, it may, except as restrained by constitutional provisions, upon the ground of

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public policy, forbid the maintenance of an action for the purchase price of intoxicating liquors sold in another state and valid by the law of that state, without reference to any intention upon the part of either vendor or vendee to violate the law of the forum.

Thus, *Dearborn v. Holt*, 41 Me. 120, under the sweeping terms of a statute which provided that no action shall be maintained in the state for intoxicating liquor sold in any other state, held that an action would not lie although there was no proof that the liquors were used or intended for unlawful use or sale in Maine. That was an extreme exercise of legislative power, and goes beyond the statutes in most states on this subject.

Mass. Gen. Stat. chap. 86, § 61, provided that no action should be maintained for the price of liquor sold in any other state for the purpose of being brought into Massachusetts to be kept there or sold in violation of law under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained such illegal purpose.

Here knowledge of the vendor's unlawful intention was, of course, sufficient, under this statute. *Bligh v. James*, 6 Allen, 570. But, even under this statute, it was necessary to prove that the vendee in fact entertained the unlawful purpose, and it was not enough to prove merely that the vendor had reasonable cause to believe that the former entertained such purpose, without proving that he did in fact entertain it. *Finch v. Mansfield*, 97 Mass. 89; *Savage v. Mallory*, 4 Allen, 492; *Ely v. Webster*, 102 Mass. 304.

Under the foregoing statute, it was held in *Suit v. Woodhall*, 113 Mass. 391, that, if an agent employed to negotiate sales of intoxicating liquor knew, or had reasonable cause to believe, that the buyer intended to sell the liquor purchased in violation of law, the seller was affected by such notice, and the sale was illegal, though completed in another state.

In *Charlton v. Donnell*, 100 Mass. 229, it was held that an inference that one who sold intoxicating liquors in another state to a resident of Massachusetts had reasonable cause to believe that the purchaser intended to sell them in Massachusetts in violation of its law was justified by evidence that the purchaser, who was a retailer of liquors, told the seller on one occasion that he wanted an assortment of liquors suitable to be sold from the bar; at another time spoke of retailing by the glass; at another, told the seller that he had been prosecuted, and should have to give up the business and return some of the liquor to the seller; and other evidence that the seller knew that there was a prohibitory liquor law in Massachusetts which rendered the sale of liquor to be drunk on the premises illegal. The court said it was immaterial whether he knew the exact provision of the statute or not.

Mass. Gen. Stat. chap. 86, § 61, was repealed by Mass. Stat. 1868, chap. 141. It was re-enacted by Mass. Stat. 1869, chap. 415, § 63; but the last statute did not have a retroactive effect, and applied only to future sales. *Hotchkiss v. Finan*, 105 Mass. 86. The last statute was repealed by act of 1875, chap. 99, § 22. *Lindsey v. Stone*, 123 Mass. 332.

Mass. Gen. Stat. chap. 86, § 61, affected the remedy only, and not the cause of action; and its repeal before the commencement of an action for the purchase price of liquor sold put the defense back again, upon the principles of common law. *Ely v. Webster*, 102 Mass. 304; *Hotchkiss v. Finan*, 105 Mass. 86.

When the question depends upon principles of common law, in order to defeat such an action upon the grounds of public policy the vendee

must have purchased the liquor with the intention to hold or resell it in violation of the law of the forum, and the vendor must, at least, have known of such intention.

Thus, *Torrey v. Corliss*, 33 Me. 333, which involved a sale made prior to the Maine statutes referred to in *Dearborn v. Hoyt*, 41 Me. 120; and *Barnard v. Field*, 46 Me. 526, which seems to have been decided after the repeal of that statute, held that an action might be maintained in Maine for the price of intoxicating liquor sold in another state in conformity with its laws, to a citizen of Maine, where the evidence failed to show that the seller even knew that the purchaser intended to resell the liquor in Maine in violation of its law. It is true that in *Meservey v. Gray*, 55 Me. 540, and *Pollard v. Allen*, 96 Me. 453, 52 Atl. 924, it was held that the action would not lie, if the purchaser intended to resell the liquor in Maine in violation of its law, even though the vendor did not know of such intention. At the time of the sales involved in these cases, however, the Maine statute forbade the collection of a claim for intoxicating liquor sold in another state to an inhabitant of Maine, if the latter intended to resell the same in Maine contrary to law, without expressly making the seller's knowledge of the purchaser's unlawful purpose a condition.

By the rules of common law knowledge on the part of one who sold intoxicating liquor in another state to a resident of Massachusetts that the liquor was to be sold or used by the buyer in violation of the law of Massachusetts is necessary to deprive him of his right to recover the price. Reasonable cause to believe that such was the buyer's intention is not enough. *Ely v. Webster*, 102 Mass. 304; *Hotchkiss v. Finan*, 105 Mass. 86; *Lindsey v. Stone*, 123 Mass. 332; *Adams v. Couillard*, 102 Mass. 167.

The mere fact that the parties who purchased liquor in New York were grocers and liquor dealers in Massachusetts, and that the sellers knew it, does not necessarily prove knowledge on the part of the sellers that the purchasers intended to sell the liquor again illegally. *Frank v. O'Neil*, 125 Mass. 473.

In *Starace v. Ross*, 69 Vt. 303, 37 Atl. 1109, and other Vermont cases, *supra*, IV., the court refused to entertain the action without reference to the intention of either party to violate or evade the law of the forum, though both the executory and executed contracts were completed in another state; but these decisions, as before pointed out, rest, not upon the ground of public policy, but upon the ground that the prohibitory statute covered the solicitation of orders within the state.

According to the weight of authority, in the absence of statute, not even knowledge alone of the vendee's unlawful intention is sufficient to defeat recovery, but the vendor must have participated in that intention, or in some way, beyond the mere sale, have done something to assist or facilitate the violation of law, or at least have made the sale with a view to such resale by the vendee in violation of law. See, upon this question, the cases cited in the note to *Graves v. Johnson* (Mass.) 15 L. R. A. 334.

In addition to the cases cited in that note, the above statement of the rule is supported by the following cases: *Sortwell v. Hughes*, 1 Curt. C. C. 244, Fed. Cas. No. 13,177; *Bowman Distilling Co. v. Nutt*, 34 Kan. 724, 10 Pac. 163; *Durkee v. Moses*, 67 N. H. 115, 23 Atl. 793; *Torrey v. Corliss*, 33 Me. 333; *Bancher v. Cilley*, 38 Me. 553.

That the vendor in a sale of liquor made in another state was informed, or believed, that the vendee intended to resell the liquor in violation of the laws of New Hampshire, does not prevent the maintenance of an action in the latter state for the recovery of the purchase price of the liquor. *Corning v. Abbott*, 54 N. H. 469.

Dater v. Earl, 3 Gray, 482, was an action in Massachusetts to recover the purchase price of liquor purchased in New York by a resident of New York, for the purpose, known to both parties, of being resold by the purchaser at retail in violation of the law of New York. The entire transaction took place in New York, and the court held that its validity must be determined by the law of New York, and then applied the rule, as held by the courts of that state, that the mere knowledge by the seller of the purchaser's unlawful intention was not sufficient to prevent a recovery of the purchase price.

In *Gassett v. Godfrey*, 28 N. H. 415, the court said that if it be assumed, for the purposes of the opinion in case of a sale made in another state, that knowledge on the part of the seller that the buyer intended to resell the liquor in violation of law would preclude recovery of the purchase price (as to which the court expressed no opinion), such knowledge could not be inferred from the mere fact that he knew that the purchaser intended to sell the liquor in Massachusetts, in the absence of evidence that he knew the latter intended to do so without a license or otherwise contrary to law.

In *Knowlton v. Doherty*, 87 Me. 518, 33 Atl. 18, it was held that the mere knowledge, imputed to the vendor through his agent, that the purchaser intended to resell the liquor in Maine in violation of law, prevented the maintenance of an action to recover the purchase price, notwithstanding that the sale was made in another state and was valid by the law of that state, and it was expressly found that the vendor did not participate in the seller's unlawful intention, and did nothing beyond the mere sale to assist or facilitate the illegal act. But the decision is expressly based on the language of the Maine statute, which expressly provides that no action shall be maintained upon any claim for intoxicating liquors purchased out of the state with intention to sell the same, or any part thereof, in violation of the law of Maine. The court said: "Were it not for the statute which expressly forbids the maintenance of such an action the price could be recovered, such a sale not being invalid, even if the vendor knew that the purchaser intended to put the thing sold to an illegal use, unless he participated in that intention or in some way, beyond the mere sale, did something to assist or facilitate the violation of law, or at least, in the language of some of the cases, made the sale with the knowledge that the thing sold was to be resold by the purchaser in another state contrary to its laws, and with a view to such resale."

In some of the earlier cases in Vermont cited in subdivision IV., *supra*, it was held, as already shown, that knowledge of the vendee's unlawful purpose was sufficient to defeat a recovery for the purchase price, if the order was accepted in the state, or even if it was merely solicited in the state.

The general proposition that, in the absence of statute to that effect, mere knowledge by the vendor of the vendee's unlawful purpose will not prevent a recovery of the purchase price of liquor, is supported by many analogous cases, a few of which are cited by way of illustration.

Lord Mansfield, in *Holman v. Johnson*, 1 Cowp. 341, laid down the principle, which prevails in England, to the effect that an action will lie for goods sold abroad if the delivery was complete abroad, though the vendor knew that they were to be smuggled into England.

Where an order or proposal for the purchase of guano is sent by letter to dealers in Georgia, who, in compliance therewith, ship the guano on board the cars in that state, consigned to the

purchaser, the sale is complete in Georgia, and, if valid by the laws of that state, may be enforced in Alabama, notwithstanding that the sale would be invalid if made in the latter state for noncompliance with the inspection laws. *Bolt v. Maybin*, 52 Ala. 252.

Mere knowledge by the vendor of oils sold in Missouri to a resident of Arkansas that the latter intended to sell the oil in Arkansas in violation of its statute does not, of itself, prevent a recovery of the purchase price in the latter state, unless the seller was to actively participate or be interested in the unlawful sale in that state. *Parsons Oil Co. v. Boyett*, 44 Ark. 230.

In *M'Intyre v. Parks*, 3 Met. 207, the court took the position that mere knowledge on the part of one who sold lottery tickets in New York, where such sale is lawful, that the buyer intended to sell them in Massachusetts in violation of the law of the latter state, did not prevent him from maintaining an action in Massachusetts to recover possession of real estate under a mortgage assigned to him by the purchaser to secure payment of a note given for the lottery tickets.

While few, if any, of the cases, in the absence of statute, distinctly affirm without qualification that mere knowledge by the vendor of the vendee's intention to violate the law of the forum by the subsequent disposition of the liquor will prevent the former from maintaining the action, some of the cases have attempted verbal distinctions upon this point which seem very tenuous.

Thus, in *Webster v. Munger*, 8 Gray, 584, the court, without expressly affirming that mere knowledge of the vendee's intention was sufficient to prevent the action, held that the seller could not recover if, when he sold the liquors in the other state, he had reasonable cause to believe that they were to be resold by the purchaser contrary to the laws of Massachusetts, and the sales were made by him "with a view to such a resale." So far as the words quoted, considered abstractly, imply anything in addition to knowledge of the vendee's unlawful intention, they seem to refer merely to the vendor's mental attitude toward the transaction. As a matter of fact, however, in the case cited the court pointed out that in one of the written orders the illegal purpose for which the liquor was wanted, and the time it would be wanted for that purpose, were indicated, and the seller was urged not to fall in forwarding it to that end. The implication seems to be that the seller complied with such request, and in so doing aided the accomplishment of the purchaser's unlawful purpose.

So, in *Graves v. Johnson*, 156 Mass. 211, 15 L. R. A. 834, 30 N. E. 818, the court, upon a finding of fact that the liquors were delivered in Massachusetts to a Maine hotel keeper, with a view to their being resold by the latter in Maine against the laws of that state, held that the contract was void, although the violation of the Maine law was not the controlling inducement to the sale, which was made primarily for the money received. Upon a second trial of the foregoing case, the finding was that the seller's agent supposed, rightly, that the purchaser intended to resell the liquors in Maine unlawfully, but that the sellers and their agent were, and were known by the purchaser to be, indifferent to what he did with the goods, and to have no other motive or purpose than to sell them in Massachusetts in the usual course of business. Upon the changed finding, it was held (179 Mass. 53, 60 N. E. 383) that the action could be maintained.

It will be observed that the opinion upon the second appeal in the last case does not repudi-

ate the distinction between a sale with knowledge of the purchaser's unlawful intention to resell contrary to law, and a sale by the vendor "with a view to such a resale" by the purchaser. The court said: "All that is necessary for us to say now is that, in our opinion, a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent closely enough to make the sale unlawful. It will be observed that the finding puts the plaintiffs' knowledge of the defendant's intent no higher than an uncommunicated inference as to what the defendant was likely to do. Of course the defendant was free to change his mind, and there was no communicated desire of the plaintiffs to co-operate with the defendant's present intent, such as was supposed in the former decision, but, on the contrary, an understood indifference to everything beyond an ordinary sale in Massachusetts."

The distinction suggested by the finding in the last case was adopted in *Fuller v. Hunt*, 182 Mass. 209, 65 N. E. 390, though that case did not involve a sale made in another state to a resident of Massachusetts, but a sale made by a wholesale dealer in Massachusetts to a retailer also doing business in Massachusetts.

In *Reynolds v. Geary*, 26 Conn. 179, decided under a statute expressly providing that no action could be maintained for liquor sold in any other state "with intent to enable any person to violate any of the provisions of this act," the court, referring to a sale of liquor made in New York to a party who resold the same in violation of the law of Connecticut, said that had there been on the part of the vendors no more than an opinion or knowledge that the purchase was made with the intent of bringing the liquors to Connecticut for sale, the sale would not have been void, but that the record showed a very material fact beyond this. The court which tried the case found as a fact that the sale was made with a knowledge on the part of the vendors that the liquors were to be sold by defendants in Connecticut, contrary to the provisions of the Connecticut act, and with intent on the part of the vendors to enable the defendant to violate that act. The evidence upon which the latter part of the finding is based does not appear, but it would seem from the opinion that to warrant such a finding there must have been something beyond mere knowledge by the vendors of the purchaser's intent to resell liquor in violation of the act.

In *Fishel v. Bennett*, 56 Conn. 40, 12 Atl. 102, however, the trial court expressly charged, and the appellate court seems to have assumed, that the seller's knowledge of the buyer's unlawful purpose would defeat a recovery under such statute.

In Iowa, under a substantially similar statute. It has been held that while mere knowledge of the purchaser's unlawful intention to resell the liquor in Iowa contrary to law is not enough to avoid or vitiate the contract, it is a fact from which the jury may infer the intention contemplated by the statute,—especially when the other circumstances attending the manner of acquiring that knowledge tend to support such inference. *Tegler v. Shipman*, 33 Iowa, 194, 11 Am. Rep. 118; *Wind v. Her*, 93 Iowa, 310, 27 L. R. A. 210, 61 N. W. 1001; *Davis v. Bronson*, 6 Iowa, 410; *Rindskoff v. Curran*, 34 Iowa, 326.

A sale of intoxicating liquors, made in another state for the purpose and with the intent to enable the purchaser to violate the law of Iowa for the suppression of intemperance, is void. It is otherwise when not made for that purpose. *Dalter v. Laue*, 13 Iowa, 538. The court said that there was no proof to support

the allegation of such intent, nor even that the vendor had any knowledge of the existence of the Iowa law.

In *Whitlock v. Workman*, 15 Iowa, 351, an effort was made to show that a sale of intoxicating liquors, executed beyond the limits of the state, was made for the purpose of enabling the vendee to violate the Iowa act relating to the suppression of intemperance. The court evidently regarded the testimony of one of the vendors that, at the time of the sale, neither he, nor any member of his firm, knew of the Iowa statute in question, as strongly tending to negative any intent to aid in the violation of the statute, if not absolutely conclusive on that point.

Second Nat. Bank v. Curren, 36 Iowa, 555, involved two sales of liquor by a Kentucky firm to a resident of Iowa. One of the sales took place in Iowa and the other in Kentucky. With reference to the Iowa sale, the court said that it would be held illegal without showing any intent upon the part of the vendor to enable the buyer to violate the law; but that such a showing was necessary in order to invalidate the Kentucky sale. The court further held that the mere knowledge, by the vendor, of the Iowa statute would not invalidate the Kentucky sale; that there must have been an intent on the part of the seller to enable the buyer to violate some provision of the Iowa statute, and that, in addition to a knowledge of the Iowa statute, it must appear that the seller knew that the liquors were to be sold in Iowa in violation of law.

Whether or not any sound distinction can be based upon the mere mental attitude of the vendor towards the vendee's known purpose to violate the law of the forum, in the absence of any overt act designed to aid in the accomplishment of such purpose, it is clear that if by any act, other than the sale of the liquor and the acts incidental to such sale, the vendor lends his aid to the accomplishment of such unlawful purpose, he cannot recover the purchase price. See, upon this point, the cases cited in the last subdivision of the *note* to *Graves v. Johnson* (Mass.) 15 L. R. A. 834.

It is no defense to an action in one state for the recovery of the purchase price of liquors sold in another state to a resident of the former state, that the seller knew that they were purchased to be sold in the former state in violation of the law of that state, provided it was not a part of the contract that they should be used for that purpose; and provided, also, that the seller neither did, nor agreed to do, anything in aid or furtherance of the unlawful design beyond the mere sale, with knowledge of the intent of the purchaser. *Green v. Collins*, 3 Cliff. 404, Fed. Cas. No. 5,755.

The validity of a sale of intoxicating liquors is determined by the law of the place at which the sale was made. The modification of this rule is that, even if the sale would be valid where made, yet, if the vendor knowingly aids the vendee in conveying the liquor so sold to another state or place, with a view to its being resold by the vendee contrary to the laws of such state or place, then the sale would be illegal. *P. Schoenhofen Brewing Co. v. Whipple* (Neb.) 89 N. W. 751. This was an action to recover upon a bond for the purchase price of liquor. The sellers in this case did business in Illinois, but the sale and delivery were made in Nebraska.

Where the sale of intoxicating liquors is completed in another state, the mere knowledge of the seller that the vendor intends to resell them in New Hampshire in violation of its law does not prevent him from maintaining an action in the latter state for the recovery of the price; but if it enters at all as an ingredient into the

contract between the parties that the goods shall be illegally sold, or that the seller shall do some act to assist or facilitate the illegal sale, the contract will not be enforced. *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205.

The participation by the vendor must be active to some extent; he must do something, though indirectly, in furtherance of the vendee's design to violate the law. Mere omission to act is not enough, but positive acts in aid of the unlawful purpose, however slight, are sufficient. *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154.

One who sells liquor in New York to a resident of Vermont, and intentionally aids the purchaser in evading the prohibitory law of the latter state by forwarding the liquor to him in a sealed or disguised form calculated to accomplish that object, cannot recover for the purchase price of liquor in Vermont, even though it was not agreed between the parties prior to, or at the time of, or on the occasion of, the sale, that the seller would thus aid the purchaser. *Alken v. Blaisdell*, 41 Vt. 655.

The act of the vendor in packing the liquor in such a manner as to conceal the contents of the package, and thus assist the buyer to accomplish his unlawful purpose, is such a participation in the unlawful purpose as to defeat a recovery. *Felneinan v. Sachs*, 33 Kan. 621, 52 Am. Rep. 547, 7 Pac. 222; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927.

But the vendor's omission to label or mark the packages so as to indicate the contents does not constitute such a participation in the vendee's unlawful design as will prevent a recovery of the purchase price. *Williams v. Davidson*, 64 Kan. 707, 68 Pac. 650. Nor does the vendor's omission, at the purchaser's request, to mark the packages with the latter's name for the purpose of preventing a seizure of the liquor constitute such participation. *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154. But when, in connection with such omission, the vendor marks the packages with a private mark, so that the purchaser will instantly know the packages on their arrival, and be enabled to remove them before the officers have their suspicions awakened, he cannot recover the purchase price. *Ibid*.

No recovery can be had for intoxicating liquors shipped into Iowa to a pharmacist and sold by the latter as a beverage in violation of the state statute, where the seller, knowing of the statute, in order to aid in evading it, forwarded some of the liquors in concealed packages to a fictitious consignee, and furnished false invoices to aid in the commissions of perjury for the concealment of the sales, as well as in other violations of the law, although the sale of the liquor would in itself be legal. *Kohn v. Milcher*, 10 L. R. A. 439, 43 Fed. 641. This decision seems to be upon the assumption that the sale was made in Illinois, though it appears that the order was given and accepted in Iowa. This case was decided after the decision in *Lelsy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681 (original package case), and before the passage of the Wilson act. The court said that, if the defense to the action had been based solely on the fact that the plaintiffs had imported into Iowa, and sold to defendant in original packages, intoxicating liquors, then, under the doctrine announced in *Lelsy v. Hardin*, the court would have been compelled to hold that to importations of that character the statute of Iowa was not applicable. The ground of the decision was the participation by the seller in the purchaser's purpose to evade the law of Iowa.

In *Bancher v. Mansel*, 47 Me. 58, the act of the seller in cautioning the master of the vessel by which the liquors were shipped against the

danger of their seizure, and in advising him how to avoid such seizure, was held a sufficient participation to defeat a recovery.

Recovery back of purchase price.

As already pointed out, a refusal of the court to entertain an action for the recovery of the purchase price of liquor sold in another state by the law of which it was valid, if the vendor participated in the vendee's unlawful intention to keep or resell the liquor in violation of the statute of the forum prohibiting or regulating the liquor traffic, rests, not upon the ground that the sale is invalid, but upon the ground that it is contrary to the public policy of the forum to enforce the contract. It is apparent, therefore, that this principle will not support an action under a statute of the forum by the vendee against the vendor for the recovery back of the amount paid upon the purchase price, if the sale was made in another state by the law of which it was valid, even though the vendor was guilty of such participation in the wrongful purpose of the vendee to resell the liquor in violation of the law of the forum as to have prevented him from maintaining an action at the forum for the recovery of the purchase price. It was so held in *Wind v. Her*, 93 Iowa, 316, 27 L. R. A. 219, 61 N. W. 1001, and *Bollinger v. Wilson*, 76 Minn. 262, 79 N. W. 109. It follows, therefore, that, in order to maintain an action for the recovery back of the amounts paid on the purchase price, the sale itself must be invalid, and it is not sufficient that, under the circumstances, it would be contrary to the public policy of the forum to entertain an action for the purchase price.

VI. New or substituted contract.

So far as the respective rights of the vendor and vendee are concerned, it is immaterial whether the action be based directly upon the sale, or upon a bill or note given for the purchase price. It is true that such a bill or note is to some extent a new contract, and may have a situs of its own different from the situs of the sale; but wherever the situs of the bill or note, its validity, so far as it is affected by the consideration, is necessarily determined by the law of the situs of the consideration, *i. e.*, the law of the place where the sale was made. Therefore, if the sale was invalid by the law of the state in which it was made, a bill or note given for the purchase price is necessarily invalid as between the original parties, though the sale would have been valid if made in the state where the bill or note was made and is payable. In many of the cases cited in the foregoing subdivisions the action was based upon a bill or note given for the purchase price, but in these cases, as well as in those in which the action was based directly upon the sale, the question turned upon the validity or enforceability of the contract of sale without regard to the place where the bill or note was made or payable.

In *Fuller v. Bean*, 30 N. H. 181, the court expressly held that a promissory note given for liquor sold in New Hampshire without a license, although made in Massachusetts, was nevertheless void by reason of the illegality of the consideration.

So, a note given in Michigan for liquors purchased in New York is binding notwithstanding it would be invalid if the liquors had been bought in Michigan. *Monaghan v. Reid*, 40 Mich. 665.

In *Second Nat. Bank v. Curren*, 36 Iowa, 555, the action was upon drafts drawn, by the sellers in Kentucky, upon, and accepted by, the purchaser in Iowa. The court applied the same rules as if the action had been for the purchase price, and the fact that both bills, relatively to

the acceptors, were Iowa contracts was not regarded as material, since the decisions with reference to both drafts turn upon the question as to the validity of the contracts of sale which were the consideration for the drafts, and recovery was allowed on one draft but denied on the other, notwithstanding the drafts themselves, as distinguished from the contracts of sale constituting their consideration, were exactly the same.

Even when the sale was valid according to the law of the state in which it was made, and the refusal of the court of another state to lend its aid to the enforcement of the contract must rest upon grounds of public policy, it is immaterial whether the action is based directly upon the sale or upon a bill or note given for the purchase price; for the same considerations of public policy that would lead the court of the forum to refuse to entertain an action brought directly for the purchase price, would also lead it to refuse to entertain an action based on a bill or note given for the purchase price.

Thus, in *Converse v. Foster*, 32 Vt. 828, it was held that a note for the purchase price of liquor which was sold in Massachusetts, but under such circumstances that an action would not lie in Vermont to recover the purchase price because of the seller's participation in the buyer's intention to resell the liquor in violation of the law of Vermont, was not rendered valid as between the original parties to it, or in the hands of any holder with notice, by reason of the fact that it was made in Massachusetts. It was further held in this case that the illegality of the consideration did not prevent recovery on the note in the hands of an innocent indorsee for value before maturity. The court seems to have assumed that the question whether such indorsee would be protected was to be determined in accordance with the law of Vermont,—at least the decision was not expressly referred to the law of Massachusetts on the subject.

The last point raises the question whether the primary obligor of a bill or note based upon such a sale, to avail himself of the illegality of the sale, as against a bona fide indorsee without notice, is to be determined by the law of the place where the sale was made, or by the law of the place where the primary obligor's contract was made and payable, assuming a conflict.

When the rights of the original parties to the bill or note are alone involved, the question relates to the validity of the consideration solely, and is, therefore, necessarily governed by the law of the situs of the consideration,—that is, the law of the place where the sale was made; but when the rights of a bona fide indorsee are involved, the question does not relate solely to the validity of the consideration, but includes, also, the extent of the protection to which a bona fide indorsee is entitled, assuming that the bill or note would not be enforceable in the hands of the original holder; and it would seem, upon principle, that the extent of such protection ought to depend upon the law of the place where the bill or note was made and payable, rather than upon the law of the place where the sale was made, unless the public policy of the forum goes to the extent of refusing to recognize any contract based upon an illegal sale. There do not seem, however, to be any decisions directly upon this point.

A bill of sale given in Connecticut in payment of the contract price of liquors sold and delivered in another state with knowledge on the part of the vendor that the purchaser intended to bring them into Connecticut and sell them there in violation of the statute for the suppression of intemperance is not rendered invalid by the fact that the Connecticut statute would prevent the maintenance of an action in the courts of that

state for the recovery of the purchase price under such circumstances. *Carter v. Clark*, 28 Conn. 521.

VII. *When sale invalid by law of place where made, but valid by law of forum.*

It has already been shown that the courts of one state will entertain an action for the recovery of the purchase price of liquor sold in another state, by the law of which the sale was valid, although it would be invalid according to the law of the forum, unless under the circumstances of the case, it would be contrary to the public policy of the forum. For the same reason an action will not lie in one state to recover the purchase price of intoxicating liquor sold in another, by the law of which the sale was invalid, without reference to whether it would have been valid or invalid if made at the forum. *Anstedt v. Sutter*, 30 Ill. 164; *Dudley v. Buckfield*, 61 Me. 254; *Kennedy v. Coch-*

rane, 65 Me. 594; *Well v. Golden*, 141 Mass. 364, 6 N. E. 229; *Theo. Hamm Brewing Co. v. Young*, 76 Minn. 246, 79 N. W. 111, 396; *Tredway v. Riley*, 32 Neb. 495, 49 N. W. 268; *Billis v. Brainard*, 41 N. H. 250.

In *Tredway v. Riley*, 32 Neb. 495, 49 N. W. 268, the Nebraska supreme court refused to entertain an action to recover for the purchase price of liquor which was sold in Iowa in violation of the statute of that state, but with the intention on the part of the purchaser to transport it to Nebraska. The court said, in reply to the argument of counsel, that it was true that the defendant was violating no law of Nebraska in going to Iowa and making the contract, and that the seller was violating no law of Nebraska in selling the liquor to be used in that state; but that the validity of the sale was placed upon the ground that the seller violated the law of Iowa, not of Nebraska, in making the sale.

G. H. F.

KENTUCKY COURT OF APPEALS.

City of LOUISVILLE, *Appt.*,

v.

Peter BITZER, Assignee of J. R. Gleason.

Peter BITZER, Assignee of J. R. Gleason,
Appt.,

v.

John A. FULTON, Exr., etc., of Nannie M. Wilson, Deceased.

(.....Ky.....)

1. **Abutting property cannot be assessed for a street improvement to an amount equal to or in excess of its value.**
2. **The court cannot correct an assessment against abutting property for a street improvement, which is annulled because a case of spoliation is established, so as to permit the warrant to be enforced to some extent, where the evidence shows that the property has received no benefit at all from the improvement.**
3. **A statutory provision that a city shall not be liable for a street improvement without the right to enforce the amount against the property benefited does not apply to cases where the city has no power to make the improvement at the cost of the adjacent property.**
4. **An agreement by a contractor for a street improvement that he will look, alone, to the property assessed, and in no event shall he be entitled to recover from the city, will not prevent such recovery, where the city had no authority to make the improvement at the cost of the abutting property, where the agreement was made under a statute which contained a similar exemption, and was re-enacted by the legislature after**

it had been construed not to be applicable to such cases.

(April 24, 1903.)

CROSS-APPEALS from a judgment of the Circuit Court for Jefferson County, Chancery Division, in an action brought to enforce a lien for a street improvement; plaintiff, as surety and assignee of the contractor, appealing from so much of the judgment as refused to enforce the lien against abutting property, and the defendant city appealing from so much as held it liable for any part of the cost of the improvement. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry L. Stone, for appellant city:

Under the express covenants of the written contract sued on the appellee, Bitzer, was not entitled to recover any sum in this action from the appellant, the city of Louisville.

Bellevue v. Hohn, 82 Ky. 1; *Bellevue v. Peacock*, 89 Ky. 495, 12 S. W. 1042; *Murphy v. Louisville*, 9 Bush, 189; *Dill. Mun. Corp. § 480*; *New Albany v. Sweeney*, 13 Ind. 245; *Creighton v. Toledo*, 18 Ohio St. 447; *Quill v. Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *Johnson v. Indianapolis*, 16 Ind. 227; *Whalen v. La Crosse*, 16 Wis. 271; *Fletcher v. Oshkosh*, 18 Wis. 229; *Heller v. Milwaukee*, 96 Wis. 134, 70 N. W. 1111; *Hall v. Chippewa Falls*, 47 Wis. 267, 2 N. W. 279; *Moylan v. New Orleans*, 32 La. Ann. 673; *Lovell v. St. Paul*, 10 Minn. 290, Gil. 229; *Hunt v. Utica*, 18 N. Y. 442; *Swift v. Williamsburgh*, 24 Barb. 427; *Goodrich v. Detroit*, 12 Mich. 279; *Affeld v. Detroit*, 112 Mich. 560, 71 N. W. 151; *Leavenworth v. Rankin*, 2 Kan. 357; *Saxton v. St. Joseph*, 60 Mo. 153; *Keating v. Kansas*, 84 Mo. 415; *German-American Sav. Bank v. Spokane*, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 49 Pac. 542; *Findley v. Hull*, 13 Wash. 236, 43 Pac.

NOTE.—As to effect of agreement of contractor for public improvement to accept assessments in payment, see also, in this series, *Barber Asphalt Paving Co. v. Harrisburg* (C. C. App. 3d C.) 29 L. R. A. 401, and *Weston v. Syracuse* (N. Y.) 43 L. R. A. 678.

As to necessity of benefits as basis of local assessments, see *Smith v. Worcester* (Mass.) 59 L. R. A. 728, and cases in footnote thereto. 61 L. R. A.

28; *Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088; *Central Covington v. Weighans*, 19 Ky. L. Rep. 1979, 44 S. W. 985; *Craycraft v. Selva*, 10 Bush, 696; *Caldwell v. Rupert*, 10 Bush, 179.

The contractor was entitled to an enforcement of his liens upon the property described in the petition for at least a part of the amount of the apportionment warrants sued on.

Bullitt v. Selva, 20 Ky. L. Rep. 599, 47 S. W. 255; *Henning v. Stengel*, 23 Ky. L. Rep. 1793, 66 S. W. 41.

Messrs. Benjamin F. Washer and William Furlong, with Messrs. Bodley, Baskin, & Flexner, for Bitzer:

As the city had authority to contract for the work, but no authority to make it a charge upon abutting property, it was liable to the contractor for the cost of the work.

Louisville v. Nevin, 10 Bush, 550, 19 Am. Rep. 78; *Craycraft v. Selva*, 10 Bush, 696; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625.

Under the charter of the city of Louisville, the organic law of the corporation, it is liable for the cost of any public improvement made under its authority, for the cost of which property holders are not liable.

Louisville v. McNaughten, 19 Ky. L. R. 1695, 44 S. W. 380.

When the contractor entered into his agreement the city had no authority to bind anyone for the cost of constructing the street, except itself. Surrendering his claim against the city amounted to a promise on his part to present to the citizens and city a magnificently improved public way as a gratuity. Such conditions could not have given rise to a contract.

The municipal corporation is under the legal obligation to keep its streets in proper condition under penalty of indictment and the payment of damages.

Com. v. Hopkinsville, 7 B. Mon. 38.

The good of the community cannot be said to be a moving element to support a promise to expend thousands of dollars in constructing a street.

Kearney v. Covington, 1 Met. (Ky.) 339; *Louisville v. Hyatt*, 5 B. Mon. 199; *Memphis v. Brown*, 20 Wall. 289, 22 L. ed. 264; *Barber Asphalt Paving Co. v. Harrisburg*, 29 L. R. A. 401, 12 C. C. A. 100, 28 U. S. App. 108, 64 Fed. 233; *Chicago v. People*, 56 Ill. 327; *Maher v. Chicago*, 38 Ill. 272; *Fisher v. St. Louis*, 44 Mo. 482; *Scotfield v. Council Bluffs*, 68 Iowa, 695, 28 N. W. 20.

The clause of the contract providing that the contractor will look alone to the property does not give to the city complete exemption from liability, because:—The contract provision must be construed as the charter provision has been interpreted; the real agreement of parties fixes a liability on the city; the city had no authority to contract itself out of its charter obligation at the expense of the citizen; there was no consideration to support a contract giving the city exemption.

Murphy v. Louisville, 9 Bush, 193; *Kearney v. Covington*, 1 Met. (Ky.) 339; *Louis-*

ville v. Hyatt, 2 B. Mon. 179, 36 Am. Dec. 594; *Memphis v. Brown*, 20 Wall. 289, 22 L. ed. 264; *Barber Asphalt Paving Co. v. Harrisburg*, 29 L. R. A. 401, 12 C. C. A. 100, 28 U. S. App. 108, 64 Fed. 233; *Chicago v. People*, 56 Ill. 327; *Maher v. Chicago*, 38 Ill. 272; *Fisher v. St. Louis*, 44 Mo. 482; *Scotfield v. Council Bluffs*, 68 Iowa, 695, 28 N. W. 20.

Messrs. Lane & Harrison for Fulton, appellee.

Hobson, J., delivered the opinion of the court:

On September 11, 1897, the general council of the city of Louisville, by ordinance, directed the carriageway of Daisy lane to be improved from the center line of Glenn Mary avenue extended to a line 150 feet southeast of and parallel to it. A contract was made with J. R. Gleason for the work, which was done by the contractor; the cost being \$1,778.48. The amount was apportioned to Nannie M. Wilson, \$757.56; to H. S. & M. S. Barker, \$1,001.10; and, the property owners having refused to pay, this suit was brought to enforce the lien on the property. It was shown by the proof that the Wilson lot is on the hilly side of Daisy lane, or, as it is sometimes called, "Transit avenue." It commences at the intersection of Daisy lane and Glenn Mary avenue, and extends east of this 310 feet. Two thirds of the lot fronting on Daisy lane is from 8 to 10 feet higher than the street, and as it runs back from the street it ascends rapidly. The other third of the lot is a worked-out quarry, 40 or 50 feet higher than Daisy lane, which it is impossible to ascend from the street, except by means of a ladder. The lot is not available for building purposes. The ordinance directed the cost of the street to be assessed against the property owners to a depth of 150 feet. The amount of land against which the cost is assessed under the ordinance is 46,574 square feet, or a little more than an acre. This ground, as shown by the evidence, is worth between \$300 and \$500. The Barker property is from 10 to 12 feet lower than the land which has been laid out for building purposes, and is below the level of the street to such an extent that to fill it up would be so costly that it is practically valueless for building purposes. The amount of this lot which is subject to the lien is 61,871 square feet, or something over an acre and a half, of value from \$300 to \$400 an acre. Neither piece of property is suited for agricultural purposes, and neither, under the evidence, has received any benefit from the improvement. Neither is worth now the amount of the charge against it. The circuit court, therefore, on final hearing, dismissed the petition of the contractor against the property owners on the ground that it was spoliation to enforce the lien; but he entered judgment in favor of the contractor against the city for the amount of the warrants, and from this judgment the city and the contractor's assignee appeal. There is little or no conflict in the evidence, and on the appeal the chief conten-

tion is that the court ought at least to have charged some part of the cost of the improvement to the property, although it might have been improper to charge it all to the property, and that no judgment should have been rendered against the city.

The method of assessment by the foot has been followed so long, and has been so often approved by this court, that it no longer remains an open question. *Preston v. Roberts*, 12 Bush, 570; *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546. The rule, also, is that, while these assessments rest upon the basis of benefits or presumed benefits to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner should be shown; the judgment of the city council being conclusive as to the propriety of the improvement. *Pearson v. Zable*, 78 Ky. 174; *Ludlow v. Cincinnati Southern R. Co.* 78 Ky. 360; *Preston v. Rudd*, 84 Ky. 150; *West Covington v. Schultz*, 16 Ky. L. Rep. 831, 30 S. W. 410, 660; *Allen v. Woods*, 20 Ky. L. Rep. 59; *Bullitt v. Selva*, 20 Ky. L. Rep. 599, 47 S. W. 255. On the other hand, it is held that when, owing to extraordinary facts, the presumption on which the rule rests does not apply, and to force the owner to make the improvement is to confiscate his property without compensation, this is spoliation, and will not be enforced. *Covington v. Southgate*, 15 B. Mon. 491; *Louisville v. Louisville Rolling Mill Co.* 3 Bush, 416, 96 Am. Dec. 243; *Broadway Baptist Church v. McAtee*, 8 Bush, 508, 8 Am. Rep. 480; *Preston v. Rudd*, 84 Ky. 150; *Prantz v. Jacob*, 88 Ky. 532, 11 S. W. 654; *James v. Louisville*, 19 Ky. L. Rep. 447, 40 S. W. 912. In other words, the judgment of the legislative municipal authorities is held conclusive in all cases of doubt as to these matters; but, where the total value of the property taxed after the improvement is made is less or no more than the cost of the improvement, there is no room for difference of opinion,—that to enforce the lien is to take from the owner his property without compensation. In no case decided by this court has this been approved, and, while we are unwilling to extend the rule, it has been so often laid down that it cannot now be departed from. It may be objected that logically the rule should be to reject all assessments in excess of the benefits received by the property owners, and not to confine its operation to cases where the assessment equals the value of the property when improved. But in every system of taxation exact equality of benefits among those taxed is never attainable. The rule of assessment by the foot is no less arbitrary than the rule under consideration. In matters of this sort there must be some settled rule, and it is especially important that the rule should be well defined. The proper legislative authority, not the court, must judge of the propriety of the improvement, and the benefits to the abutting property owners. But no department of the government can take the property of the citizen for public purposes without just compensation, and when the entire property is

taken to pay for a public improvement there is no room for a presumption as to the benefits received, but a case of spoliation is shown.

The proof here showing conclusively that the cost of the improvement far exceeded the entire value of the property assessed after the improvement was made, the circuit court properly refused to enforce the lien upon the property. But it is insisted that, as under Ky. Stat. 1899, § 2834, the court is authorized to make all corrections, rules, and orders to do justice to all parties concerned, it should at least have enforced the warrants to some extent against the property, although the whole amount was not enforceable. The difficulty with this is that we have nothing to guide us, and that to enter any judgment against the property owner would be simply an arbitrary guess. The proof is that the property received no benefit at all from the improvement. The testimony to this effect by the witnesses is supported by the facts shown in the record. We cannot take away from the citizen his property without proof warranting the judgment. When the assessment is enforced on the ground that the judgment of the legislative authorities is conclusive of the question of benefits, the judgment of the court is based upon the decision of the legislative body fixing the boundary on which the burden of the special tax shall fall. But when the decision of the legislative authorities is rejected for the reason that a case of spoliation is established, the court has nothing to guide it in determining how far the property of the citizen is taken for public purposes without just compensation, except the proof in the case; and there can be no judgment against the citizen unless the evidence is sufficient to enable the court to reach a conclusion intelligently. The party on whom the burden of proof rests must make out his case. Without proof the chancellor cannot assume there were benefits to a certain extent, and guess at the amount. The proof here being to the effect that the property was not benefited by the improvement, and there being practically no contrary evidence, the chancellor refused to enter any judgment against the property holders; and, under the evidence, we cannot disturb his conclusion on the facts. If the case had been prepared to present this matter, or even if a motion has been made for leave to take further proof on the subject, a different question would be presented.

It remains to consider the propriety of the judgment against the city. Ky. Stat. 1899, § 2834, provides: "And in no event, if such improvement be made as is provided for, either by ordinance or contract, shall the city be liable for such improvement without the right to enforce it against the property receiving the benefit thereof." It is settled, however, that this statute does not apply to cases in which the city has no power to make the improvement at the cost of the owners of adjacent property, and that where the city has complete authority to contract for the work, but no authority to make a

charge on the abutting property, it is liable to the contractor for the price of his work. *Caldwell v. Rupert*, 10 Bush, 179; *Louisville v. Nevin*, 10 Bush, 549, 19 Am. Rep. 78; *Craycraft v. Selva*, 10 Bush, 696; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625; *Gosnell v. Louisville*, 104 Ky. 212, 46 S. W. 722. The contract under which the work was done, however, contains these words: "It is further agreed by the contractor that for the contract price or cost of all work mentioned above or required to be done by him under any of the provisions of this contract, he will look alone to the lot owners or the property described in the ordinance aforesaid, and that in no event shall he be entitled to recover any part thereof from the city of Louisville." The learned counsel for the city earnestly maintains that the contractor is bound by his contract, and that, having agreed not to look to the city, he cannot recover against it. A number of authorities from other states are relied on as sustaining this position. But the contract was made under the statute, and must be read in connection with it. The language of the contract is certainly no stronger than the language of the statute. Its natural construction is that it conveys the same idea as the statute. The rule is that if a contract is capable of two constructions, by one of which it is illegal, and by the other it is legal, that construction will be preferred which makes the contract legal. The city has authority to contract for the construction of streets. It has also authority in certain cases to contract for their construction at the cost of the abutting property. If the rule is that the city is responsible to the contractor where it is held that the city

had no authority to contract for construction of the street at the cost of the abutting property, then the contractor, in making his bid, will not take into consideration uncertainty of pay as an element in fixing the price at which he will do the work. But if the rule is that only the property owner is to be looked to, and that the contractor will get no pay for his work where the city had no authority to contract for the improvement at his cost, then the contractor, in undertaking the work and fixing the price must take this uncertainty into consideration, and add to the price he would otherwise charge a sum sufficient to cover the risk of nonpayment of the claim. An additional burden will therefore be laid upon the property owner, for in case he is held liable he will have to pay, not only the fair cost of the improvement, but an additional sum to cover the risk of the contract. The legislature aimed to avoid placing this burden on the property holder, and so made the city liable in this contingency, for it re-enacted the present statute with the construction which this court had placed upon it. When the legislature has placed the burden upon the city to avoid injustice to the property holder as well as the contractor, the city cannot by contract relieve itself from the liability thus imposed upon it by law; and, if the contract before us required such a construction, we should be compelled to hold it contrary to the policy of the statute, and not enforceable. The authorities relied on from other states are therefore inapplicable.

Judgment affirmed.

Barker, J., not sitting.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

L. KAREM, Plff. in Err.,
v.

UNITED STATES OF AMERICA.

(121 Fed. 250.)

1. No punishment can be inflicted for violation of the Federal statute declaring that all qualified citizens shall have a right to vote at all elections without distinction of race, color, or previous condition of servitude, unless it is prescribed by statute.
2. Legislation authorized by U. S. Const. Amend. 15, to protect the elective franchise must be addressed to state, and not individual, action, unless the individual assumes to exercise the power of the state.
3. Congress cannot punish mere lawless acts of individuals in preventing colored persons from voting at purely state elections.
4. An act of Congress which covers acts without, as well as within, the jurisdiction of that body, will not be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit and punish.

ited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit and punish.

5. Appropriate legislation for the infringement of U. S. Const. Amend. 15, protecting the elective franchise of colored citizens, is not found in U. S. Rev. Stat. § 5508 (U. S. Comp. Stat. 1901, p. 3712), which provides for punishment of persons who shall conspire to injure a citizen in the free exercise of any rights secured to him by the Constitution or laws of the United States, since it is not limited to state action, which is the only action in respect to such franchise which Congress can prohibit.

(February 24, 1903.)

ERROR to the District Court of the United States for the Western District of Kentucky to review a judgment convicting defendant of conspiring to interfere with the exercise of their franchise by colored voters. *Reversed.*

Statement by **Lurton**, Circuit Judge:

The plaintiff in error has been convicted under an indictment framed under § 5508 of the Revised Statutes (U. S. Comp. Stat.

NOTE.—For Federal control of elections, see also *Lackey v. United States* (C. C. App. 6th C.) 53 L. R. A. 660, and *note*.
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1901, p. 3712). The indictment, in substance, charges that the plaintiff in error and C. H. Watson and G. P. Bohn and others, to the grand jury unknown, combined and conspired together to injure, oppress, threaten, and intimidate certain named persons of color, citizens of the United States and of the state of Kentucky, and lawfully qualified voters under the law of Kentucky, from exercising and enjoying "a right and privilege secured to them . . . by the Constitution and laws of the United States, to wit, the right and privilege to vote at the election hereafter named, without distinction of race, color, or previous condition of servitude." It is then averred that there was held within the state of Kentucky on November 7, 1899, an election for state and municipal offices only, and that at a certain named precinct the defendant Karem was a judge of election, C. H. Watson a clerk, and G. P. Bohn the sheriff holding the election, and that the said persons of color were lawful voters in said precinct, and legally entitled to vote at said election, and that they each appeared at the polls within the time fixed by law and offered to vote in and at said election, but that, in pursuance of the conspiracy aforesaid, the said defendants did prevent them from voting on account of their race, color, and previous condition of servitude. To this indictment the defendant Karem demurred upon the ground that the facts stated did not constitute an offense against the laws of the United States. The demurrer was overruled. The indictment was dismissed as to the alleged conspirator Bohn. The remaining defendants, Karem and Watson, entered pleas of not guilty. At the conclusion of all the evidence each of the defendants moved the court to instruct the jury to find against the government. This motion was allowed as to Watson and disallowed as to Karem, who has sued out this writ to reverse a judgment based upon a verdict of guilty.

Argued before *Lurton, Day, and Severens*, Circuit Judges.

Messrs. W. M. Smith and Swagar Sherley, for plaintiff in error:

At an election where only state officers are voted for, the injury or oppression of a colored voter in the exercise of his suffrage cannot, under any state of the case, constitute an offense of which the Federal court can take jurisdiction, but redress, if any, must be had in the state courts.

The enforcement act does not provide any punishment for its violation.

United States v. Amsden, 10 Biss. 283, 6 Fed. 820; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563.

The right of suffrage (except as to electors and congressmen) is not given by the Federal Constitution or laws, but comes alone from the states.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 589; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Lackey v. United States*, 53 L. R. A. 660, 46 61 L. R. A.

C. C. A. 189, 107 Fed. 114; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *United States v. Morrissey*, 32 Fed. 147; *United States v. Seaman*, 23 Blatchf. 216, 23 Fed. 882; *United States v. Cahill*, 3 McCrary, 200, 9 Fed. 80; *United States v. Harris*, 106 U. S. 636, 27 L. ed. 293, 1 Sup. Ct. Rep. 601; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *United States v. Amsden*, 10 Biss. 283, 6 Fed. 822.

Mr. R. D. Hill, for defendant in error:

The amendment has invested the citizens of the United States with a new constitutional right, which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.

United States v. Reese, 92 U. S. 217, 23 L. ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 589; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

The political organization called the "state" can act only through its agents.

Inspectors of elections represent the state. They exercise the whole power of the state in creating its actual government by the reception of votes, and the declaration of the results of the votes. If they wilfully and corruptly receive illegal votes, reject legal votes, make false certificates by which a usurper obtains an office, the act is in each case the act of the state, and the result must be abided by until corrected by the action of the courts.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; *United States v. Given*, Fed. Cas. No. 15,210; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 234, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *United States v. Butler*, 1 Hughes, 457, Fed. Cas. No. 14,700; *United States v. Crosby*, 1 Hughes, 448, Fed. Cas. No. 14,893; *Brannon*, 14th Amendment, p. 98; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060.

The provision of the 15th Amendment is that the right of citizens to vote shall not be denied or abridged by any state, nor by any law of any state.

Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

When a conspiracy is directed against a citizen in the exercise of a Federal right or privilege, with intent or purpose of preventing or obstructing the exercise or enjoyment of such right or privilege, there is an interference with national authority, and the criminal or unlawful acts done in pursuance thereof are included in the provisions of the statute, and come within the legitimate cognizance of the United States and their courts.

United States v. Patrick, 54 Fed. 339; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

Lurton, Circuit Judge, delivered the opinion of the court:

Many errors have been assigned and argued, but, inasmuch as we are of opinion that no offense was charged against the United States in the indictment, it is wholly unnecessary to pass upon any of the other questions of either fact or law.

If Congress has not declared the acts charged to have been done by Kareem to be an offense against the United States, the courts have no power to treat them as such, even though the Congress may have the constitutional power to make such acts a crime against the United States. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563.

The contention of the government is that the acts charged constitute an offense indictable and punishable under §§ 2004 and 5508 (U. S. Comp. Stat. 1901, pp. 1272, 3712). Those sections are in these words:

"Sec. 2004. All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding."

"Sec. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured,—they shall be fined not more than \$5,000 and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Neither the act from which § 2004 (U. S. Comp. Stat. 1901, p. 1272) is taken, nor any section of the Revised Statutes, undertakes, in terms, to make its violation an offense against the United States, or provide for any punishment. It does nothing more than the amendment does *proprio vigore*. As said in *Ex parte Yarborough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152, the amendment annulled the discriminating word "white," wherever it was found in a state constitution or election law, and thus placed the colored person in the enjoyment of the same right as white persons. "And," said Justice Miller, in the same case, "such would be the effect of any future constitutional provision of a state which should give the right of voting exclusively to white people, whether they be men or women."

But if § 2004 be regarded as anything more than a declaration of the effect of the 15th Amendment, no penalty is provided for

its violation. In *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, 564, the court said: "If Congress has not declared an act done within a state to be a crime against the United States, the courts have no power to treat it as such."

Referring to this § 2004, then the 1st section of the act of 1870 (Act May 31, 1870 [16 Stat. at L. 140, chap. 114, U. S. Comp. Stat. 1901, p. 503]), the court said: "It is not claimed that there is any statute which can reach this case, unless it be the one in question. Looking, then, to this statute, we find that its 1st section provides that all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election, . . . shall be entitled and allowed to vote thereat, without distinction of race, color, or previous condition of servitude, any Constitution . . . of the state to the contrary notwithstanding. This simply declares a right, without providing a punishment for its violation."

The indictment in this case must therefore be predicated wholly upon § 5508 (U. S. Comp. Stat. 1901, p. 3712), or the acts charged have not been constituted an offense punishable by the United States. But the constitutional authority for the legislation embodied in this section is very much broader than the 15th Amendment. It was the 6th section of the enforcement act of 1870 (Act May 31, 1870 [16 Stat. at L. 141, chap. 114]). The character of the "rights and privileges" protected is best illustrated by some of the cases in which it has been construed and enforced. The right of a qualified voter to vote for a member of Congress is a right "secured by the Constitution or laws of the United States," within the meaning of § 5508 of the Revised Statutes. *Ex parte Yarborough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152. In the case cited the indictment was brought under §§ 5508 and 5520 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 3712, 3715). The indictment in that case charged that the conspiracy was to deprive certain qualified colored voters, on account of their color, race, or previous condition of servitude, of the "enjoyment of the right and privilege of suffrage in the election of a lawfully qualified person as a member of the Congress of the United States, . . . which said right and privilege of suffrage was secured to the said Berry Saunders by the Constitution and laws of the United States." The Supreme Court held that the right to vote in a congressional election was a right secured by, and dependent upon, the Constitution and laws of the United States. In *Lackey v. United States*, 53 L. R. A. 660, 40 C. C. A. 189, 107 Fed. 114, after quoting from the opinion the argument for that conclusion, we said: "The judgment of the court was also rested, in part, upon the broader ground that the Congress had the general implied 'power to protect the elections on which its existence depends from violence and corruption.' But all that is said in that case upon this aspect of the question was said of elections at which

electors or Congressmen are to be chosen, and of the direct interest of the United States in securing such elections from violence, corruption, and fraud. But whether the power of Congress to legislate in respect to congressional elections depends upon the effect of the 2d and 4th sections of article 1 of the Constitution, or arises out of the implied power to protect such elections against violence and fraud because they are Federal elections so far as Federal officials are thereby directly chosen, it is very obvious that, whether such power be attributed to either the one or the other source, it furnishes no reason for any interference at a purely state election."

In *United States v. Waddell*, 112 U. S. 70, 28 L. ed. 673, 5 Sup. Ct. Rep. 35, an indictment under this section was also sustained. "The particular right held in that case to be dependent on and secured by the laws of the United States, and to be protected by § 5508 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3712), against interference by individuals, was the right of a citizen, having made a homestead entry on public land, within the limits of the state, to continue to reside on the land for five years, for the purpose of protecting his title."

In *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617, it was held that a citizen of the United States, in the custody of a marshal of the United States under a lawful commitment to answer an offense against the United States, has the right to be protected by the United States against lawless violence, and that this right is a right secured to him by the Constitution and laws of the United States, and that a conspiracy to prevent his enjoyment of this right of protection is indictable under § 5509 (U. S. Comp. Stat. 1901, p. 3712).

None of the cases in which an indictment under this section has been sustained involved a discrimination against voters in a purely state election on account of race, color, or previous condition of servitude. It is plain that resort can be had to this section only upon the theory that the right to vote at a purely state election is a right or privilege secured by the Constitution or laws of the United States. But the power of Congress to legislate at all upon the subject of voting at purely state elections is entirely dependent upon the 15th Amendment. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588. The plain purpose of that amendment was to prevent all discrimination by the United States and by the states in the exercise of the suffrage on account of "race, color, or previous condition of servitude." The amendment reads thus:

"Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

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The well-settled construction of the article is that it does not confer the right of suffrage upon anyone. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

In the case last cited the opinion in the circuit court was by Justice Bradley, and is reported as *United States v. Cruikshank*, 1 Woods, 308, Fed. Cas. No. 14,897. In the opinion referred to, the learned justice, referring to the amendment, said: "It does not confer the right to vote. That is the prerogative of the state laws. It only confers a right not to be excluded from voting by reason of race, color, or previous condition of servitude, and this is all the right that Congress can enforce." Referring to the power of Congress to enforce this amendment by appropriate legislation, he said: "It is not the right to vote which is guaranteed to all citizens. Congress cannot interfere with the regulation of that right by the states, except to prevent, by appropriate legislation, any distinction as to race, color, or previous condition of servitude. The state may establish any other conditions and discriminations it pleases, whether as to age, sex, property, education, or anything else."

In *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, the court said: "The 15th Amendment does not confer the right of suffrage upon anyone. It prevents the states, or the United States, however, from giving preference in this particular to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race, having certain qualifications, are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment there was no constitutional guaranty against this discrimination. Now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right, which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the 2d section of the Amendment, Congress may enforce by 'appropriate legislation.'"

In *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588, the court said: "In *Minor v. Happersett*, 21 Wall. 178, 22 L. ed. 627, we decided that the Constitution of the United States has not conferred the right of suffrage upon anyone, and that the United States have no voters of their own creation in the states. In *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, we hold that the 15th Amendment has invested the citizens of the United States with a new constitutional right which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition

of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been."

The 15th Amendment is therefore a limitation upon the powers of the states in the execution of their otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and laws of the state, the power of the state to prescribe qualification being limited in only one particular. The right of the voter not to be discriminated against at such elections on account of race or color is the only right protected by this amendment, and that right is a very different right from the affirmative right to vote.

There are certain very obvious limitations upon the power of Congress to legislate for the enforcement of this article: First, legislation authorized by the amendment must be addressed to state action in some form, or through some agency; second, it must be limited to dealing with discrimination on account of race, color, or condition. These in their order:

1. That state, and not individual, action, is the subject of this article, would seem clear from many considerations. The right to vote in a purely state election, being, as we have seen, a right granted by and dependent upon the law of the state, is therefore a right which can only be denied or abridged by the state. The amendment is therefore, in terms, addressed to state action. Action by the United States and by the state in contravention of this right of nondiscrimination on account of race, color, or condition is inhibited. It has been argued that the amendment operates only to annul discriminations in existing constitutions and laws, and to prohibit all future legislation denying or abridging the right of suffrage on account of race, color, and condition, and that the power of Congress to enforce it is therefore limited to legislation appropriate to the prevention and punishment of conduct based upon discriminating legislation. We think this too narrow a view of the article. Although it has reference to state, and not individual, action, it has a wider scope than the mere nullification or inhibition of state legislative action, and avoids and inhibits, not only state legislation, but all state action of every kind, and by everyone assuming to exercise the power of the state, whether the state's authority be exceeded or not. When the Constitution speaks of a state, and inhibits the doing of certain

things, it sometimes includes under the term "state" every instrumentality or agency of the state which presumes to act by authority of the state, and in other cases the action of the state in its sovereign or legislative character is alone referred to. This amendment is not limited to the prohibition of "laws" denying or abridging the elective function. For this very reason we conclude that legislation enforcing it may be corrective of any state action, whether based on state laws authorizing discrimination or not. With the exception of the 1st clause of the 1st section of the 14th Amendment, that section is, like the 15th Amendment, addressed broadly to the state. The other clauses of that section read as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Each of the clauses quoted above has been authoritatively construed as addressed to state action in some form, and not to mere individual conduct. *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Harris*, 106 U. S. 629, 638, 27 L. ed. 290, 293, 1 Sup. Ct. Rep. 601; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *Civil Rights Cases*, 109 U. S. 3, 11, 27 L. ed. 835, 839, 3 Sup. Ct. Rep. 18; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

In *United States v. Cruikshank*, the chief Justice said: "The 14th Amendment prohibits a state from depriving any person of life, liberty, or property without due process of law [or from denying to any person the equal protection of the laws]; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society." In *Virginia v. Rives*, the court said: "The provisions of the 14th Amendment of the Constitution we have quoted all have reference to state action, exclusively, and not to any action of private individuals." In *United States v. Harris*, Justice Woods, after citing and commenting upon the earlier cases, said of the 14th Amendment: "The language of the amendment does not leave this subject in doubt. When the state has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the state, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all per-

sons,— the amendment imposes no duty and confers no power upon Congress." Referring to *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676, where a law of Congress prohibiting discrimination in jury service on account of race, color, etc., was upheld, as warranted by the last clause of the 1st section of the 14th Amendment, the court, in the *Civil Rights Cases*, 109 U. S. 3, 151, 27 L. ed. 835, 3 Sup. Ct. Rep. 18, 24, said: "In *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676, it was held that an indictment against a state officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the state government, carry into effect such a rule of disqualification. In the *Virginia case*, the state, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute book of the state actually laid down any such rule of disqualification or not, the state, through its officer, enforced such a rule; and it is against such state action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to devert it of any unconstitutional character, and makes it differ widely from the 1st and 2d sections of the same act which we are now considering." In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, it is said, referring to the 14th Amendment: "That the prohibitions of the 14th Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities; and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state." In *Logan v. United States*, 144 U. S. 263, 293, 36 L. ed. 429, 439, 12 Sup. Ct. Rep. 617, 628, the cases cited above were reviewed, and the doctrine to be deduced from them thus formulated: "The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the states, as the case may be, and cannot, therefore, be affirmatively enforced by Congress against unlawful acts of individuals, yet that every right created by, arising under, or dependent upon, the Constitution of the United States may be protected and enforced by Congress by such means and in such manner as Con-

gress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible and best adapted to attain the object."

The principles of interpretation applicable to the 1st section of the 14th Amendment are equally applicable to the construction of the 15th Amendment. The amendment simply limits state power in respect to suffrage at state elections by prohibiting discrimination in the enjoyment of the elective franchise on account of race, color, or condition. The right to vote in its own election can be conferred only by the state. No one, therefore, but the state, can "deny or abridge" the right to vote. The amendment is therefore properly addressed to the state. Individuals may by unlawful force or fraud prevent an otherwise lawful voter from voting. But it would simply be an act of lawless violence. The right of suffrage would not be denied or abridged. Individuals cannot deny or abridge the right of suffrage, for they cannot confer it. It is a right which is secured by, and dependent upon, law. Individuals cannot "deny or abridge" a right of suffrage confirmed by law by a mere lawless act of fraud or intimidation or violence. To deny or abridge it in the sense and meaning of the 15th Amendment, there must be some act of the state, through its legislative, judicial, or executive departments. Someone exercising the power of the state, whether with or without the sanction of the law of the state, must deny to otherwise qualified voters the right to vote on account of race, color, or condition. That would be an act of the state, and such act might be made an offense, against the United States by virtue of the power granted by the 15th Amendment. To justify legislation directed to the mere lawless acts of individuals at a purely state election, even though such acts be based upon color or race, would be to enter the domain of the police power of the state. We speak only of purely state elections, for the power of Congress over its own elections rests upon altogether different principles. There is no more reason for assuming that this amendment authorizes legislation for the punishment of the lawless act of an individual in preventing the enjoyment of the right to vote in a state or municipal election, even though the intimidation be grounded upon race, color, or previous condition of servitude, than there would be for legislation punishing a trespass upon property upon the ground that such a trespass would be a denial of due process of law. Both the 14th and the 15th Amendments are addressed to state action through some channel exercising the power of the state.

2. Appropriate legislation grounded on this amendment is legislation which is limited to the subject of discrimination on account of race, color, or condition. The act commonly known as the "enforcement act" (being the act of May 31, 1870 [16 Stat. at L. 140, chap. 114, U. S. Comp. Stat. 1901, p. 503]), contained a number of sections which

were plainly intended to enforce the provisions of the 15th Amendment. These sections were the 1st, 3d, 4th, and 5th. The 1st has been carried into the Revised Statutes as § 2004 (U. S. Comp. Stat. 1901, p. 1272). The 3d, having been held unconstitutional, is dropped out. The 4th, in a somewhat changed form, is carried into the Revised Statutes as § 5506, and the 5th section is § 5507 (U. S. Comp. Stat. 1901, p. 3712) of the Revised Statutes. The 3d, 4th, and 5th sections of that act have been held to have been in excess of the jurisdiction of the Congress under the 15th Amendment, and therefore null and void. The ground upon which this conclusion was reached was that neither section was confined in its operation to discriminations on account of race, color, or previous condition of servitude, and all were broad enough to cover wrongful acts both within and without the jurisdiction of Congress under the article. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Lackey v. United States*, 53 L. R. A. 660, 46 C. C. A. 189, 107 Fed. 114.

3. It may be conceded that the Congress has power to provide for the indictment and punishment of any person exercising the power of the state who should exclude, on account of race, color, or previous condition of servitude, the vote of lawfully qualified voters, even at a purely state election. But has Congress so legislated? Section 5508 (U. S. Comp. Stat. 1901, p. 3712) is plainly not limited to acts done by persons acting under and exercising the power of the state. The indictment charges that the defendant conspirators were officers of election, and, as such officers, excluded colored voters from voting on account of race, color, etc. If the case made by the indictment is within this section, it is not because it provides specifically for the punishment of the offense charged, but because it comes under the general provision providing for the punishment of any unlawful interference with the free enjoyment of some right or privilege secured by the Constitution or laws of the United States. This section has for its object the punishment of all persons who conspire to prevent the free enjoyment of any right or privilege secured by the Constitution or laws of Congress, without regard to whether the persons so conspiring are private individuals or officials exercising the power of the United States or of a state. Neither does it draw any distinction between a conspiracy directed against the exercise of the right of suffrage based upon race or color, and a conspiracy not so grounded. It is therefore not legislation appropriate to the enforcement of the 15th Amendment; and, if the only warrant for its enactment was that article, we should be obliged to hold that Congress had exceeded its jurisdiction, because broad enough to cover wrongful acts without, as well as within, its jurisdiction. That it is not within the province of the courts to so limit an act by judicial construction as to make it operate only on that which Congress may rightfully

prohibit and punish is now a well-settled principle of constitutional interpretation. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Trade-Mark Cases*, 100 U. S. 82, *sub nom. United States v. Steffens*, 25 L. ed. 550; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *Lackey v. United States*, 53 L. R. A. 660, 46 C. C. A. 189, 107 Fed. 114.

The case of *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, is very much in point. The court had under consideration the constitutionality of §§ 3 and 4 of the act of May 31, 1870, now constituting § 5506 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3712). The indictment charged two inspectors of a municipal election in the state of Kentucky with refusing to receive the votes of certain colored voters, in contravention of the terms of the 3d section of the act. The section in question was directed to the conduct of election judges and inspectors, but did not limit the operation of the act to exclusions from suffrage on account of race, color, or condition. The court said, in speaking of the section then under consideration: "We find there no words of limitation, or reference, even, that can be construed as manifesting any intention to confine its provisions to the terms of the 15th Amendment. That section has for its object the punishment of all persons who, by force, bribery, etc., hinder, delay, etc., any person from qualifying or voting. In view of all these facts, we feel compelled to say that, in our opinion, the language of the 3d and 4th sections does not confine their operation to unlawful discriminations on account of race, etc. If Congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise, without regard to such discrimination, the language of these sections would be broad enough for that purpose. It remains now to consider whether a statute so general as this in its provisions can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc. There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language, broad enough to cover wrongful acts without, as well as within, the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconsti-

tutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those which are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will, when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and, when called upon in due course of legal proceedings, must, annul its encroachments upon the reserved power of the states and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. We must therefore decide that Congress has not as yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment, and that the circuit court properly sustained the demurrers and gave judgment for the defendants."

In *United States v. Harris*, 106 U. S. 629, 637, 27 L. ed. 290, 293, 1 Sup. Ct. Rep. 601, § 5519 (U. S. Comp. Stat. 1901, p. 3714) was held void, as not warranted by the Constitution. That section is in these words: "Sec. 5519. If two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws, each of such persons shall be punished by a fine of not less than five hundred, nor more than five thousand, dollars, or by imprisonment, with or without hard labor, not less than six months, nor more than six years, or by both such fine and imprisonment." It was sought to be supported under the 13th, 14th, and 15th Amendments. The court said: "It is clear that the 15th Amendment can have no application. That amendment, as was said by this court in the case of *United States v. Reese*, 92 U. S. 214, 61 L. R. A.

23 L. ed. 503, 'relates to the right of citizens of the United States to vote. It does not confer the right of suffrage on anyone. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous condition of servitude.' See also *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588, 1 Woods, 308, Fed. Cas. No. 14,897. Section 5519 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3714) has no reference to this right. The right guaranteed by the 15th Amendment is protected by other legislation of Congress, namely, by §§ 4 and 5 of the act of May 31, 1870, chap. 114, and now embodied in §§ 5506 and 5507 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3712). Section 5519, according to the theory of the prosecution, and as appears by its terms, was framed to protect from invasion by private persons the equal privileges and immunities, under the laws, of all persons and classes of persons. It requires no argument to show that such a law cannot be founded on a clause of the Constitution whose sole object is to protect from denial or abridgment by the United States or states, on account of race, color, or previous condition of servitude, the right of citizens of the United States to vote." The court further held that the act was not warranted by either of the other amendments, because it covered cases both within and without the authority of Congress. Referring to the claim that it might be supported by the 14th Amendment, the court said: "As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the state, or their administration by her officers, we are clear in the opinion that it is not warranted by any clause of the 14th Amendment."

Assuming that exemption from discrimination at a state election is a "right of privilege secured by the Constitution or laws of the United States," it is a right which originates only in the 15th Amendment, and can only be enforced by legislation directed to state action in some form, by which otherwise qualified voters are denied the elective franchise on account of race or color. This is the limit of the power of Congress under the article. Section 5508 (U. S. Comp. Stat. 1901, p. 3712) is not so limited, and is not, therefore, appropriate legislation for the enforcement of the 15th Amendment. The warrant for the section is found in other provisions of the Constitution, and other sections of the act of 1870, from which this section was taken, carried into the Revised Statutes as §§ 5506 and 5507 (U. S. Comp. Stat. 1901, p. 3712), were intended to enforce this amendment. We therefore conclude that the offense charged in the indictment is not included within or covered by § 5508 (U. S. Comp. Stat. 1901, p. 3712).

The judgment must be reversed, with directions to sustain the defendant's demurrer to the indictment.

MICHIGAN SUPREME COURT.

Joseph MCBRIDE, *Plff. in Err.*,
v.
John SCOTT *et al.*

(.....Mich.....)

A reservation of the right to proceed against the others will not prevent a settlement with, and release of, one of several joint tort feorsors from operating as a discharge of all.

(January 27, 1908.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendants in an action brought to recover damages for the commission of a tort. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. S. E. Engle, for plaintiff in error:

Our claim is based upon the fact that it has never been paid in full. There has not been a "satisfaction" of it.

Where the claim is unliquidated, any sum may constitute a full satisfaction, if so understood and intended in fact.

Chamberlin v. Murphy, 41 Vt. 110.

The receipt of money in settlement of the action against one does not discharge the others unless it was as satisfaction for the whole injury.

Pogel v. Meilke, 60 Wis. 248, 18 N. W. 927; *Matthews v. Chicopee Mfg. Co.* 3 Robt. 711; *Price v. Barker*, 1 Jur. N. S. 775; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Missouri, K. & T. R. Co. v. McWhorter*, 59 Kan. 345, 53 Pac. 135; *Sloan v. Herrick*, 49 Vt. 328; *Chicago v. Babcock*, 143 Ill. 366, 32 N. E. 271; *Bloss v. Plymale*, 3 W. Va. 404, 100 Am. Dec. 752; *Knapp v. Roche*, 94 N. Y. 334; *Durrell v. Wendell*, 8 N. H. 369; *Moore v. Stanwood*, 98 Ill. 605; *Parmelee v. Lawrence*, 44 Ill. 405; *Merchants' Bank v. Curtiss*, 37 Barb. 317; *De Zeng v. Bailey*, 9 Wend. 337; *Rowley v. Stoddard*, 7 Johns. 209; *Prink v. Green*, 5 Barb. 459; *Bank of Catskill v. Messenger*, 9 Cow. 38.

A plaintiff who releases his whole debt on receipt of a part of it only, if he does it by a release under seal, is estopped from denying to any degree whatever the said release or the extinguishment of the debt. Such a release is presumed to extinguish entirely the subject-matter of it. Releases not under seal have no such effect, either in ancient or modern times, and the intention may be shown, and the consideration inquired into.

Harrison v. Close, 2 Johns. 448, 3 Am. Dec. 444; *Irvine v. Millbank*, 56 N. Y. 636; *Ellis v. Eason*, 50 Wis. 138, 36 Am. Rep. 330, 6 N. W. 518; *Winston v. Dalby*, 64 N. C. 299.

NOTE.—As to effect of release of one joint tort feorsor upon liability of others, see also *Abb v. Northern P. R. Co.* (Wash.) 58 L. R. A. 293, and note.
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Even a "discharge under seal" of one of two makers of a note pending suit has been held not to discharge the other. In case of doubt the instrument will not be construed as a release.

Russell v. Adderton, 64 N. C. 417; *Aylesworth v. Brown*, 31 Ind. 270; *Schramm v. Brooklyn Heights R. Co.* 35 App. Div. 334, 54 N. Y. Supp. 945; *Pond v. Williams*, 1 Gray, 630; *Miller v. Fenton*, 11 Paige, 18; *Haney & C. Mfg. Co. v. Adasa Co-op. Creamery Co.* 108 Iowa, 313, 79 N. W. 79; *Willis v. De Castro*, 4 C. B. N. S. 216; *North v. Wakefield*, 13 Q. B. 536.

In the cases where it has been held that a release of one is a release of all it will be found that the facts were such that there was an actual satisfaction of the debt, either admitted by the pleadings or found by the court or the jury; or that the release was under seal; or other circumstances that clearly distinguish this class of cases from the case at bar.

On petition for rehearing.

The plaintiff could let anyone go he chose, crediting the rest with whatever he had received, holding them only for the balance, to be agreed on or left to a jury.

Bailey v. Berry (Ohio) 8 Am. L. Reg. N. S. 270.

The release to one, which, in effect, is held to discharge third parties, always means "a deed of conveyance in the form of a written release under seal."

Brown v. Marsh, 7 Vt. 320.

A note in *Abb v. Northern P. R. Co.* (Wash.) 58 L. R. A. 293, shows that it always depends on whether there was a satisfaction, before it can be said that third parties are discharged.

Messrs. Earl D. Pabst and Otto Kirchner, for defendants in error:

It is important to observe clearly the distinction between a liquidated and unliquidated claim.

Tanner v. Mcrrill, 108 Mich. 60, 31 L. R. A. 171, 65 N. W. 664.

The release of one of several joint wrongdoers operates, in law, to discharge the others.

Boardman v. Acer, 13 Mich. 77, 87 Am. Dec. 736; *Kenyon v. Woodruff*, 33 Mich. 310; *Grimes v. Williams*, 113 Mich. 450, 71 N. W. 835.

It is not competent for a party who claims to be aggrieved by the act of several joint wrongdoers, by his own act or contract to defeat the legal effect and operation of receiving satisfaction from one of them.

Bacon, in his *Abridgment*, title *Release*, subd. G, said: If divers commit a trespass, though this be joint and several, at the election of him to whom the wrong is done, yet, if he releases to one of them, all are discharged, because his own deed should be taken most strongly against himself. Also such release is a satisfaction in law, which is equal to a satisfaction in fact.

Co. Litt. § 376, p. 232a; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Brown v. Kencheloe*, 3 Coldw. 192; *Ruble v. Turner*, 2 Hen. & M. 38; *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370.

Messrs. Brennan, Donnelly, & Van De Mark, Gray & Gray, and Walker & Spalding also for defendants in error.

Montgomery, J., delivered the opinion of the court:

The plaintiff brought this suit against a large number of defendants. The defendants demurred to the declaration. Judgment passed for the defendants. The case was appealed to this court, reversed, and remanded. At this stage of the proceedings two of the defendants, Moore and Wiggins, paid to the plaintiff \$1,507.68, and were given a release in the following terms: "Whereas, the supreme court has held that in the various Wonderland cases all the defendants were liable upon the allegations in the plaintiff's declaration; and whereas, James H. Moore and Enoch W. Wiggins are desirous of settling for their own individual liability, and to be therefore released from any further liability as to themselves personally, and they having paid to me the sum of \$1,507.68, to be applied upon my claim for damages in this cause, I do hereby release the said Moore and Wiggins from all further liability, but reserving distinctly and expressly all my rights and claims against each and all of the other defendants for any and all sums in addition to the sum above paid, which I may be found entitled to. In other words, it is distinctly understood that no rights whatever are released as against the other defendants, and that the only benefit they may or shall receive by reason hereof is such as allowed by law in giving to them the benefit of the sum above paid by way of reduction *pro tanto* of the damages for which this suit was brought. The said Moore and Wiggins, in further consideration hereof, agree each to attend and give his testimony when called upon by due legal subpoena, and to furnish such plans, specifications, contracts, deeds, or other documents of any description whatever which may be required upon the trial relating to the matter in this suit, should the same be within their possession or control." The case was thereupon discontinued as to Moore and Wiggins. The other defendants interposed a plea *puis darrein continuance*, setting up this discharge of Moore and Wiggins as a bar to the action. The replication to this plea set out the agreement above quoted. The defendants demurred to the replication. Judgment passed for defendants on the demurrer, and the plaintiff brings error.

The question is very clearly presented by the record as to whether a discharge of one or more of numerous joint tortfeasors is a bar to a further action against the remaining tortfeasors in a case where the plaintiff in form reserves the right to proceed against the remaining tortfeasors, and where the plaintiff does not acknowledge full satisfaction for the wrong complained of. The ques-

tion never has been directly determined by this court, and it is not free from doubt. In 8 Bacon, Abr., title *Release*, p. 277, it is said: "If divers commit a trespass, though this be joint or several, at the election of him to whom the wrong is done, yet, if he releases to one of them, all are discharged; because his own deed shall be taken most strongly against himself. Also, such release is a satisfaction in law, which is equal to a satisfaction in fact." That such is the effect of a bare release at the present day, plaintiff's counsel concedes. But it is urged that, as the plaintiff had the right originally to proceed against one or all of the wrongdoers until full satisfaction is obtained, no one of the defendants has a right to complain of any arrangement made with his co-defendant for an adjustment of the plaintiff's demand as against such codefendant, unless either by a formal release under seal, which conclusively imports full satisfaction, or full satisfaction in fact. And authorities are not wanting which sustain this contention. On the other hand, it is contended that the discharge of one of several tortfeasors amounts in law to a satisfaction of the plaintiff's demand, and this without regard to the question of whether the release be by instrument under seal or by parol agreement. One of the earliest American cases upon the subject is *Ruble v. Turner*, 2 Hen. & M. 38, in which several had been guilty of an assault. An agreement, not under seal, was made between the plaintiff and one defendant, by which satisfaction was acknowledged for the part which one defendant took, and attempt was made to reserve the right as to the other defendants. The court held this reservation inoperative. Mr. Justice Tucker saying: "It is a rule of construction that, if there be any clause or condition in a deed which is either contrary to law or repugnant to the nature of the estate created, it is void. Now, here the question is whether, by the first clause in this instrument of writing, Joel Motley was thereby discharged, and the plaintiff barred of his action against him; and I hold that he was, for the reasons already given. What, then, is the effect of this? The law says that, if one joint trespasser be released, or make accord and satisfaction, it shall bar a recovery against all the others. The plaintiff can no more change the law, in this particular, by any subsequent proviso or condition, than he could, after a grant in fee simple by deed, restrain his grantee from selling the lands, or change the course of descents prescribed by law; neither of which will it be contended that he could do. The proviso, then, is merely void, and cannot prevent the legal effect of the accord and satisfaction made by one of the defendants." In 9 Bacon, Abr. Bouvier's ed. p. 547, appears the following: "Trespass against five. The plaintiff accepts a note from two, for a sum to be paid at a future day, in satisfaction as to them, but not to operate as a satisfaction for the other defendants. The right to recover damages is gone as to all." In *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec.

534, it appeared that there were several joint defendants. A note was executed, of which the court said it was executed and received with the intent and for the purpose of discharging Williams and Adkins, the makers, from all further liability on account of their being jointly concerned with the defendants in the trespass, but with the express stipulation that it should not discharge the other cotrespassers. The court said: "An accord and satisfaction of a joint trespass by one is good for all concerned. The act of one of several joint trespassers is the act of all. They all unite to do an unlawful act, and each is responsible for the acts of the others. The plaintiff may elect to sue them jointly or separately, and may pursue them until he has obtained satisfaction, but he can have but one recompense in damages for the same injury. The plaintiff here agreed to take the note of Williams and Adkins, two of the trespassers, for \$150, and to forbear to sue them. The note was given, and it was understood they were fully discharged, and he has thus made his election, not only as to the amount he would receive as a recompense for the injury he sustained from the assault and battery committed by the defendants jointly with Williams and Adkins, but also of the persons from whom he would recover that recompense. . . . The accord and satisfaction mentioned in the third plea operated in law as a discharge of these defendants from liability for the injury complained of by the plaintiff, and it was not in the power of other persons to deprive them, by any agreement of theirs, of the benefit of this legal discharge." *Brown v. Kencheloe*, 3 Coldw. 193, was decided in 1866. In this case the record does not clearly show a distinct reservation of the right of action as against the other wrongdoers, but it discloses a settlement and discharge of several of the joint tortfeasors, and it was held that a discharge of one discharged all. To the same effect is *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370. See also *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504.

The plaintiff cites *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752. In this case there were several wrongdoers, and joint receipt was given to one in full of all dues, debts, and demands to date. The court declined to follow *Ruble v. Turner*, 2 Hen. & M. 38, and, basing its decision upon *Herrington v. Harkins*, 1 Rob. (Va.) 591, held that the payment did not discharge the other wrongdoers. The case of *Matthews v. Chicopee Mfg. Co.* 3 Robt. 712, is much relied upon. In this case there was a reservation in the following words: "It being expressly understood and agreed that I do not hereby release or prejudice any claim, suit, or demand which I may have against any other person or persons or corporation for any matter or thing arising out of, or connected with, or relating to, any shipment or consignment," etc. The court held that this release of one joint wrongdoer did not discharge the other defendant. The value of this case as an authority is much impaired 61 L. R. A.

by a decision of the appellate division of New York in *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1060. This was a case in which the question was directly presented. There were two joint trespassers. The defendant pleaded release to Duncan, a co-tortfeasor. The release of Duncan was read in evidence, and plaintiff reserved therein the right of action to any claim for damages for negligently causing the death of plaintiff's intestate against the defendants and all other persons who controlled the premises. The court held this release to be a bar, because the defendants were joint tortfeasors. The authority of *Matthews v. Chicopee Mfg. Co.* was also directly questioned in *Mitchell v. Allen*, 25 Hun, 543. In that case three were sued for negligence. One was discharged upon payment of \$285, but with the stipulation reserving the right of action against the other defendants. It was contended that this release did not amount to a discharge of the other defendants, for the reason that it was not a technical release under seal, the plaintiff's relying upon *Matthews v. Chicopee Mfg. Co.* The court say of *Matthews v. Chicopee Mfg. Co.*: The record of the case is meager. Neither the nature of the action nor the contents of the release are stated. The court further says: "This stipulation, not being under seal, cannot operate as a release, but it acknowledges a payment from Markham for which it releases him from further claim of the plaintiff. So far as he is concerned, the stipulation was an accord and satisfaction for the tort. . . . There is no doubt that the plaintiff is entitled to but one satisfaction for her injury. . . . It is not necessary that this satisfaction be by way of a judgment, . . . and satisfaction from one party discharges the others. . . . The plaintiff, not seriously denying all this, insists that her discharge of Markham arises solely out of her contract, and can extend no further than the express provision of the contract will permit. But, while Markham was discharged from his liability by the contract, the discharge of Allen and Porter arises as a necessary legal result from the satisfaction by and discharge of the joint tortfeasor. When Markham was discharged, the action as to them was barred as matter of law, and no contract between plaintiff and Markham can prevent the legal effect of his satisfaction." Another case, which, to a certain extent, supports the contention of the plaintiff, is *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518. The opinion is by Mr. Justice Taylor, and, because of his great ability, is entitled to considerable weight. He rests his decision, however, in part upon the case in 3 Robt. which, as we have seen, has not been followed by the courts of New York. Furthermore, the court in *Ellis v. Esson* distinctly reserves the question as to the effect of a release of one tortfeasor with a reservation of the right of action as against the others "in an action for assault and battery, false imprisonment, or similar actions," such as the present, "in which the damages rest

mainly in estimation and opinion." This reservation in the opinion of the court upon this subject detracts very materially from the force of the case as an authority, for it is difficult to conceive in principle how any such distinction can be drawn. If the discharge of one tortfeasor as matter of law operates to discharge his co-tortfeasor in any case, we are not able to see how the question of difficulty in establishing the exact damages can affect the holding in the particular case.

We are of the opinion that the better rule is that contended for by defendants in this case; that to admit of a settlement with one tortfeasor under such circumstances as

are here presented, and to hold that a reservation such as is here attempted saves the right as to other tortfeasors, would open the door for the plaintiff in any case to acquire by successive settlements more than just compensation; or, as is said by *Brown v. Kencheloe*, 3 Coldw. 193: "The plaintiff in many instances would operate upon the fears of defendants, and get from each the full amount of the trespass committed."

The judgment will be affirmed, with costs.

Grant, J., did not sit. The other Justices concur.

Rehearing denied.

MINNESOTA SUPREME COURT.

John DIAMOND, Resp't.,
v.

City of MANKATO et al., Appts.

(.....Minn.....)

*The charter of the city of Mankato provides that the paving of its streets at the cost of lots benefited thereby may be initiated on the petition of a majority of the lot owners, but the city council may, in cases where in its judgment public necessity requires it, make the improvement without any petition. The work, however, must be awarded to the lowest reliable bidder, after advertising for bids for the work on the basis of the plans and specifications therefor. *Held*:

1. The power to determine the question whether public necessity requires the making of such improvement without a petition therefor is committed to the discretion of the council, and its decision in the premises is final, unless it is made to appear that its action is arbitrary or fraudulent.

2. It does not appear from the evidence that the council acted either arbitrarily or fraudulently in ordering the work here in question.

3. Where, as in this case, municipal authorities can only let a contract for public work to the lowest bidder after advertising for bids, the specifications must be so framed as to secure fair competition upon equal terms to all bidders. And any contract entered into with the best bidder, containing substantial provisions beneficial to him which were not included in the specifications, is void, for it is not the contract offered to the lowest bidder by the advertisement.

4. The finding and conclusion of the trial court to the effect that this rule

*Headnotes by **START, Ch. J.**

NOTE.—For other cases in this series as to specification in contract for street improvement of material under single dealer's control, see *Fishburn v. Chicago* (Ill.) 39 L. R. A. 482, and *Holmes v. Detroit* (Mich.) 45 L. R. A. 121.

As to municipal contract for work or articles which embody patented invention, see *Kilvington v. Superior* (Wis.) 18 L. R. A. 45, and *note*.

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was violated in awarding the contract in this case are sustained by the evidence.

(*Brown, J., dissents.*)

(February 27, 1903.)

APPEAL by defendants from an order of the District Court for Blue Earth County denying a motion for new trial after verdict in plaintiff's favor in an action brought to restrain the execution of a contract for the improvement of a city street. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. O. Dailey and William N. Plymat, for appellants:

The power to determine the necessity for improving streets, vested in a municipal body, is exclusive, and cannot be reviewed when exercised within the authority given and without fraud or oppression.

Devey v. Des Moines, 101 Iowa, 416, 70 N. W. 605; *Com. ex rel. Snyder v. Mitchell*, 82 Pa. 350; *Field v. Western Springs*, 181 Ill. 186, 54 N. E. 929.

The question of special benefit is a question of fact, and, when the legislature determines it in a case within its general power, the case is final.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 703, 8 Sup. Ct. Rep. 921; *State v. Robert P. Lewis Co.* 82 Minn. 402, *sub nom. Ramsey County v. Robert P. Lewis Co.* 53 L. R. A. 421, 85 N. W. 207, 86 N. W. 611; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *State ex rel. St. Paul v. Ramsey County Dist. Ct.* 75 Minn. 292, 77 N. W. 968; *State v. Robert P. Lewis Co.* 72 Minn. 87, *sub nom. Ramsey County v. Robert P. Lewis Co.* 42 L. R. A. 639, 75 N. W. 108.

It is within the power of the legislature of a state to create special taxing districts, and to charge the cost of local improvement in whole or in part upon the property in said district, either according to valuation or superficial area of frontage.

Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623.

A city has the power to specify the cer-

tain kinds of brick to be used in its paving, though there is a monopoly in the sale of such brick, thereby preventing competition in bids.

Holmes v. Detroit, 120 Mich. 226, 45 L. R. A. 121, 79 N. W. 200.

Messrs. M. J. Severance, Jean A. Flittie, H. L. Schmitt, and J. W. Schmitt, for respondent:

The question of necessity is a jurisdictional one and was intended to apply only in cases of emergency, where, on account of the danger to public safety, there is no time or opportunity to wait for a petition to be filed and acted upon under the general provision of the charter.

Milwaukee & St. P. R. Co. v. Faribault, 23 Minn. 167; *Smith v. Minto*, 30 Or. 351, 48 Pac. 166; *Shannon v. Portland*, 38 Or. 382, 62 Pac. 50; *Dill. Mun. Corp.* 4th ed. § 82.

The council has no authority arbitrarily to determine the question of necessity.

Elliot v. Minneapolis, 59 Minn. 111, 60 N. W. 1081.

The courts have a right to inquire into questions of discretion vested in municipal officers where such discretion is abused.

Dewey v. Des Moines, 101 Iowa, 416, 70 N. W. 605; *Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359; *Elliot v. Minneapolis*, 59 Minn. 111, 60 N. W. 1081.

Property owned by the city of Mankato is not exempt from special assessments for local improvements.

2 Dill. Mun. Corp. 777; *Ross v. New York*, 3 Wend. 333; *Adams County v. Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624; *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44; *State ex rel. Gotzian v. Ramsey County Dist. Ct.* 77 Minn. 248, 79 N. W. 971; *Washburn Memorial Orphan Asylum v. State*, 73 Minn. 343, 76 N. W. 204.

Where a part of real estate is purposely omitted from a tax or assessment, part of which it should bear, the whole proceedings connected therewith are void.

Weeks v. Milwaukee, 10 Wis. 242; *Hasen v. Rochester*, 65 N. Y. 518; *State ex rel. Burger v. Ramsey County Dist. Ct.* 33 Minn. 295, 23 N. W. 222; *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440; *Norwood v. Baker*, 172 U. S. 269, 279, 43 L. ed. 443, 447, 19 Sup. Ct. Rep. 187; *Fay v. Springfield*, 94 Fed. 409.

Fair and free competition in bidding on the contract in question was, by the specifications therefor, intentionally prevented and excluded.

Wickwire v. Elkhart, 144 Ind. 305, 43 N. E. 216; *Smith v. Syracuse Improv. Co.* 161 N. Y. 484, 55 N. E. 1077; *Fishburn v. Chicago*, 171 Ill. 338, 39 L. R. A. 482, 49 N. E. 532; *Carroll v. Philadelphia*, 6 Pa. Dist. R. 397.

The guaranty for repairs for ten years, as drawn in the specifications, must be construed to be a guaranty against all repairs, no matter from what cause they may arise.

Brown v. Jenks, 98 Cal. 10, 32 Pac. 701; 61 L. R. A.

Excelsior Paving Co. v. Leach (Cal.) 34 Pac. 116; *State ex rel. Wheeler v. Ramsey County Dist. Ct.* 80 Minn. 293, 83 N. W. 183.

Where the law provides that the authorities must advertise for bids, and let the contract to the lowest bidder, the contract, if made, must conform to the specifications upon which bids were invited.

Minn. Special Laws 1891, chap. 47, § 27, p. 428; *Nash v. St. Paul*, 11 Minn. 174, Gil. 110; *Tiedeman, Mun. Corp.* 172; 20 Am. & Eng. Enc. Law, 2d ed. p. 1165; *People ex rel. Ream Par. Co. v. Union Street Bd. of Improvement*, 43 N. Y. 227; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Wickwire v. Elkhart*, 144 Ind. 305, 43 N. E. 216.

Start, Ch. J., delivered the opinion of the court:

The plaintiff is a taxpayer of the city of Mankato, and the owner of land fronting on that portion of Broad street lying between Lincoln and Vine streets, in the city, which the proper municipal officers determined to pave with asphalt. He brought this action to restrain such officials from entering into any contract on behalf of the city for the making of such improvement. On April 18, 1902, a temporary injunction was issued in the action, restraining such officials from entering into any contract for the proposed work whereby any liability on the part of the city would be incurred therefor, which would necessitate payment during the fiscal year 1902, or any following fiscal year whatever, from the current funds of the city, except such as could be lawfully raised by special assessments upon property benefited by the improvement other than property belonging to the city. After the injunction was served, and on April 23, 1902, such officials entered into a contract for the work with the Barber Asphalt Paving Company, hereafter designated as the "contractor," which contained this provision: "The payment for said work to be made after the completion of same, and acceptance by the board of public works of said city out of the money lawfully raised by special assessment upon real estate and property benefited by said improvement other than real estate belonging to said city of Mankato." On May 17, 1902, the plaintiff made and served a supplemental complaint, alleging the making of the contract and other facts which it is claimed rendered the contract void, and praying that, in addition to the relief asked for in the original complaint, the contract be adjudged null and void. The cause was tried by the court without a jury, and findings of fact and conclusions of law were made to the effect that the plaintiff was entitled to the relief demanded. The defendants appealed from an order denying their motion for a new trial.

1. The trial court, after finding certain evidentiary facts, made this further finding: "That, because of the matters and things herein found, it was not necessary that said improvement be ordered or contracted for, 29

all of which at all times . . . was well known to the defendant officers of said city, . . . and they did not in good faith consider that it was necessary, proper, or advisable that said improvement be made . . . or that public interests would be best subserved thereby." It is the contention of the defendants that this finding of the ultimate facts as to the necessity for ordering the improvement made is not justified by the evidence. The charter of the city provides that the paving of any of its streets at the charge of the land to be benefited by the improvement may be initiated upon a petition signed by a majority of the property owners who would probably be assessed for the expenses thereof, and that the council shall not be required to proceed with the work unless such a petition is presented to it. "Provided that the common council, by a two-thirds vote of its members, may, in cases where, in the judgment of said council, the public necessity required it, order the matter of any contemplation [sic] improvement and the advisability of doing the same to the board of public works for their consideration, without a petition." Special Laws 1891, chap. 47, subc. 6, tit. 2, § 5. The plaintiff claims that the proviso only authorizes the council to initiate the improvement on its own motion when some emergency arises "where, on account of the danger to public safety, there is no time or opportunity to wait for a petition to be filed and acted upon under the general provisions of the charter." Clearly this is not a correct construction of the proviso. The paving of a street is not an emergency remedy for the repair of a dangerous public way, but a permanent improvement thereof. The meaning of the charter provisions in question is quite obvious. They provide, in effect, that the council is not bound to take any steps to secure the making of the proposed improvement, unless the petition therefor is signed by a majority of the property owners to be affected thereby; but if, in the exercise of its fair and deliberate judgment, evidenced by a two-thirds vote of its members, it concludes that the public necessity requires any particular authorized improvement to be made, the council may initiate and carry on the work without any petition therefor. The power to determine the question whether public necessity requires a particular improvement to be made without any petition therefor is committed by the charter, not to the courts, but to the sound discretion of the city council. And its decision in the premises is final, unless it is made to appear that its action is arbitrary or the result of fraud or of demonstrable mistake of fact. *Rogers v. St. Paul*, 22 Minn. 494; *State ex rel. Cunningham v. Ramsey County Dist. Ct.* 29 Minn. 62, 11 N. W. 133; *State ex rel. Lewis v. Ramsey County Dist. Ct.* 33 Minn. 164, 22 N. W. 295; *Janeway v. Duluth*, 65 Minn. 292, 68 N. W. 24. Hence the question is not whether there was evidence fairly tending to support the finding that public necessity did not require the paving of the street in ques-

61 L. R. A.

tion, or whether the finding complained of is manifestly against the weight of the evidence. The question is, Does the evidence clearly establish the fact that the city authorities, in ordering the improvement, acted arbitrarily or fraudulently, or under a demonstrable mistake of fact? There was no petition for the paving of the street in this case, and the work was ordered by the requisite vote of the council, against the protest of a large majority of the property owners whose land would be assessed for the expenses thereof. The question whether the finding of fact now under consideration is sustained by the evidence must be tested by the rule we have stated, and not by the ordinary rule applicable to findings of fact by judge or jury. We have examined the evidence relevant to the question, and find that it is not sufficient to establish the fact that the decision of the council as to the necessity for the proposed improvement was arbitrary, or the result of fraud or a demonstrable mistake of fact. The evidence tends to show that there was no pressing necessity for the improvement, and that, in view of such fact, and the financial condition of the city, it was unwise to force it upon the protesting property owners whose real estate was to be charged with the expenses thereof. But this is not sufficient to warrant the conclusion that the city council acted arbitrarily or fraudulently in ordering the work to be done. We accordingly hold that the finding is not sustained by the evidence within the rule.

2. The trial court further found, in effect, that the city owned land which had a frontage of 282 feet on the line of the proposed improvement, which would be benefited thereby proportionately with all other property fronting thereon, and that, pursuant to the terms of the contract, it was the purpose of the city council to assess the entire cost of the improvement upon the private property fronting on the part of the street to be paved. And as a conclusion that such an assessment would be unjust and illegal, this finding and conclusion are assigned as error by the defendants. The validity of such an assessment has been fully discussed in briefs of counsel, but the discussion is premature. If a special assessment is ever levied against the plaintiff's land for the paving in question, and it is made for no more than his fair proportionate share of the cost of the improvement, he will have no cause for complaint. But if it prove otherwise he has, by virtue of the charter provisions, an ample remedy for the wrong, and cannot resort to a court of equity in an independent action to enjoin the making of the proposed assessment. Special Laws 1891, chap. 47, subc. 6; *Fajder v. Aitkin*, 87 Minn. 445, 92 N. W. 332, 934. In view of this conclusion, we neither discuss nor decide the question of the validity of the proposed special assessment.

3. The trial court also found: That there is asphaltum other than Pitch lake and Bermudez asphaltum as available, and equally as good for paving purposes, as Pitch lake

and Bermudez asphaltum, and that there are persons, firms, or corporations seeking contracts for paving streets in Minnesota and elsewhere who use in such work asphaltum other than Pitch lake or Bermudez asphaltum, and who cannot procure Pitch lake or Bermudez asphaltum. That by limiting the asphaltum to be used in said improvement to Pitch lake and Bermudez asphaltum, and by other restrictions and provisions in the specifications therefor, and by the changes and alterations made in said specifications by the officers of defendant city, as herein found, fair competition in bidding upon the contract for said improvement was prevented and excluded, and firms who wished to, and would, have filed bids therefor, were prohibited from so doing." And, further, that the contract was null and void as against the city. If this finding and conclusion are supported by the evidence, it necessarily leads to an affirmance, notwithstanding the trial court's finding on the question of the necessity for initiating the improvement is not justified by the evidence. The question is, then, whether the finding of the facts upon which the conclusion is based is manifestly, and palpably against the weight of the evidence. The law is well settled that where, as in this case, municipal authorities can only let a contract for public work to the lowest responsible bidder, the proposals and specifications therefor must be so framed as to permit free and full competition. Nor can they enter into a contract with the best bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited. The contract must be the contract offered to the lowest responsible bidder by advertisement. *Nash v. St. Paul*, 11 Minn. 174, Gil. 110; *Schiffman v. St. Paul* (Minn.) 92 N. W. 503; *Wickvoire v. Elkhart*, 144 Ind. 305, 43 N. E. 216; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; 20 Am. & Eng. Enc. Law, pp. 1165-1169. This rule should be strictly enforced by the courts, for, if the lowest bidder may by an arrangement with the municipal authorities have incorporated into his formal contract new provisions beneficial to him, or have onerous ones excluded therefrom which were in the specifications upon which bids were invited, it would emasculate the whole system of competitive bidding. It would also lead to abuses by opening wide the door of opportunity to award the contract to a favorite or generous contractor,—generous at the cost of the taxpayer. To secure such a result it would only be necessary to make the terms and specifications upon which bids were invited burdensome for bidders, and for the favored one to make his bid upon the secret understanding that such terms would be modified in making the formal contract. In this case the evidence does not justify the conclusion that there was any such secret understanding, or that the municipal authorities acted corruptly in the premises. If, however, the forbidden act was in fact done, the contract is void with-

out reference to the intent with which it was done, for the purpose of the rule is to secure fair competition upon equal terms to all bidders, and to remove all temptation for collusion, and opportunity for gain at the expense of the property owners by the municipal authorities.

We come now to the consideration of the evidence in the light of this rule. The street was to be paved with asphalt. The city charter required that the municipal authorities should advertise for bids for the doing of the work on the basis of the plans and specifications, and award the contract to the lowest reliable bidder. This action was commenced March 31, 1902. A temporary injunction to restrain the municipal authorities from entering into the contract for the paving of the street was prayed for in the complaint. The municipal authorities, on March 17, 1902, invited by a proper advertisement sealed bids for doing the work, upon the basis of the specification, to be filed on or before April 2d. On April 18th the temporary injunction was issued, and served on April 23d, and on the same day the formal contract was entered into. The specifications for the improvement limit the kind of asphalt to be used to Trinidad "Pitch lake" asphaltum obtained from the "Pitch lake" in the Island of Trinidad, or Bermudez asphaltum. The evidence does not justify the conclusion that there was a monopoly of either Pitch lake or Bermudez asphaltum. But the evidence, although conflicting, tends to show that there was other Trinidad asphaltum just as good, and that the formula prescribed in the specifications for the making of the pavement was applicable only to Trinidad Pitch lake asphaltum, and that for this reason contractors were deterred from bidding on the work. The specifications contained a provision to the effect that the city should not be liable for any delay or stoppage of the work by reason of any injunction or legal proceedings whatever, and a further one to the effect that a penalty of \$20 per day would be exacted for every day's delay in finishing the work after August 1, 1902. The contract was changed by adding the words, "providing such failure or delay is not through unavoidable causes." The evidence tends to show that at least one party was deterred from bidding on the work by reason of these provisions in the specifications. In view of the pendency of the action and the opposition of the property owners to the improvement, they were well calculated to deter bidders, unless they added a substantial sum to the amount they would have otherwise named in their bids for the loss they might incur by reason of these provisions of the specifications. Again, the evidence shows that by the specifications payments for the work should not be made earlier than one hundred and twenty days after the completion and acceptance of the work, out of money received from assessments duly made on account of the improvement; and

that the time of payment was changed in the contract, so that the payment of the work should be made, after the completion and acceptance thereof, out of assessments therefor on property benefited thereby other than that owned by the city. This difference in the time,—some four months,—for the payment of the contract price was substantial, and was manifestly for the benefit of the contractor, as the evidence shows that the estimated cost of the work was over \$50,000. But this advantage was not offered to other bidders by the invitation to bid on the basis of the specifications. The evidence tends to show that in other material respects the specifications were not followed in the contract, and that the changes were beneficial to the contractor. Upon the whole evidence, we are of the opinion that the finding in question is fairly sustained by the evidence, and we accordingly hold that the contract was void.

There are several assignments of error as to the finding and conclusion of the trial court with reference to the paving of the intersections of the street. We do not consider them, for the reason that they are immaterial in view of the ground upon which we sustain the conclusion of the trial court that the contract is void.

Order affirmed.

Brown, J., dissenting:

If the court is to be understood as holding that public authorities engaged in a lawful public improvement may not, as to such details as are here involved, in the exercise of a sound judgment, in good faith and without fraud or collusion, change and modify the terms and provisions of the contract under which the work is to be performed from the specifications and conditions made part of the proposal and invitations to bidders, I dissent. That whatever changes and modifications were made in the terms of the contract here under consideration were not the result of fraud or collusion, the court expressly states, yet holds that the authorities had no power to make them. This strips the officers of all discretion in such matters, is too strict an application of legal principles, and wholly unnecessary for the protection of the public. Of course, an agreement between the authorities and the successful bidder before the bid is presented, to the effect that particular changes will be subsequently made, would prevent fair competition, and amount to a fraud which would vitiate the contract; but there was no such agreement in this case.

Rehearing denied.

MISSOURI SUPREME COURT.

Ella LUCAS, *Respt.*,
v.

ST. LOUIS & SUBURBAN RAILWAY
COMPANY, *Appt.*

(.....Mo.....)

1. There is no negligence on the part of a street car company in building in a public street, for the accommodation of its passengers, a platform around the stump of a pole which had been left by an electric light company, and which the railroad company had no right to remove, which will render it liable to one who stumbles over it and is injured in attempting to board a car.
2. A street car company does not maintain the stump of an electric light pole in its platform so as to render it liable for injuries thereby caused to a person attempting to board its car, where, for the accommodation of its passengers, it merely builds in a public street a platform around the stump, which had been left there by an electric light company, and which it had no right to remove.

(March 18, 1903.)

NOTE.—As to measure of care that carrier must exercise to keep platforms and approaches safe, see also, in this series, *Johns v. Charlotte, C. & A. R. Co.* (S. C.) 20 L. R. A. 520, and *note*; also *Jordan v. New York, N. H. & H. R. Co.* (Mass.) 32 L. R. A. 101, and *Herrman v. Great Northern R. Co.* (Wash.) 57 L. R. A. 390.
61 L. R. A.

APPEAL by defendant from a judgment of the St. Louis Circuit Court in favor of plaintiff in an action brought to recover damages for personal injuries which were alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Marshall, J.**:

This is an action for damages for personal injuries. There was a verdict for \$3,000, and the defendant appealed. The constitutionality of the jury law is called in question, and that gives this court jurisdiction. The negligence charged on the petition is "that at or near the intersection of Euclid avenue and defendant's right of way in the city of St. Louis the defendant at the times herein mentioned was maintaining a platform to enable passengers to get on its cars bound east; that in the said platform, which was of granitoid, there was a stump about 11 inches in height, and defendant was negligently maintaining said platform at said times with said stump therein, which was a dangerous obstruction to passengers intending to get upon defendant's cars from said platform; that on the 1st day of January, 1900, the plaintiff was upon said platform, intending to become a passenger upon defendant's east-bound car, and, whilst she was signaling the car to stop for her as a passenger, her foot struck said stump, and she fell from said platform upon defendant's track, and was struck and dragged by defendant's east-bound car, and was thereby

greatly and permanently injured." The answer is a general denial and a plea of contributory negligence.

The case made is this: The parties stipulated that in 1857 Charlotte Lay dedicated to the county of St. Louis a strip of land 80 feet wide, running north and south, as a public road, and called it "Lay avenue." At that time there was no railroad there. Subsequently the Narrow Gauge Railroad was built, and it crossed the said road. The defendant is the mesne grantee of that railroad, and operates a street railroad across said strip of land. When the city limits were extended so as to embrace this territory, the city changed the name to "Euclid avenue." At that time the street was an unimproved dirt road, and there were no sidewalks. At a time not disclosed by the evidence, the Missouri Edison Electric Lighting Company placed one of its poles in the sidewalk on the east side of said Euclid avenue. The pole was about 12 inches in diameter, and stood a little to the right of the middle of the sidewalk. The defendant owns its own right of way, but, of course, does not own the street. It only crosses the street by permission. The pole stood entirely within the lines of the street, and no part of it was upon the defendant's right of way. Formerly, for the convenience of the traveling public, the defendant constructed a wooden platform, 7 or 8 yards in length, and 3 or 4 feet wide, and which ran parallel with its tracks, and which was partly upon its right of way and partly upon the sidewalk—in fact, extending across the sidewalk on the east side of Euclid avenue. The pole aforesaid being already there, the platform was built around the pole. The platform was raised from 4 to 6 inches above the ground. Thereafter the lighting company sawed down the pole and beveled the edges, but left the stump of the pole projecting about 11 inches above the platform. The lighting company then put up a pole in the sidewalk, to the east of the stump, and nearly touching it, and nearer the east side of the sidewalk. Thereafter the defendant removed the wooden platform, and replaced it with a granitoid platform, and left the stump and the new pole standing; building the granitoid platform around them. Immediately south of the granitoid platform there is an alley running eastwardly, which is paved with brick. Immediately south of the alley there is a drug store, and south of that a butcher shop, both of which have large glass windows, and are brightly lighted. In front of these two stores there is a cement sidewalk. South thereof there does not appear to be any improved sidewalk, and the street does not appear to be improved. The plaintiff's daughter lives, and has for some time lived, on the east side of Euclid avenue, just a short block south of the railroad. On the tall pole aforesaid there was an electric light. The defendant's car that was approaching had a headlight. So that between the lights in the windows of the drug store and the butcher shop, and the electric light on the tall pole, which was

almost touching the stump, and the headlight on the approaching car, the place was well lighted, and the stump could have been easily seen. The plaintiff was familiar with the place, and knew of the existence of the stump on the platform, and had frequently spoken of it and wondered why it was allowed to remain there. She visited her daughter frequently, and always got off and on the car at that place. On January 1, 1900, she visited her daughter. About half past 5 o'clock she started home. It was dusk, but not dark. As she approached the platform she saw the car coming from the west, and, fearing she would be left, when she was 70 or 80 feet from the track she increased her pace and ran, signaling the car as she ran. She reached the platform, got up on it in safety, and while signaling the car to stop, she stumbled against the stump of the old pole, and was thrown against the side of the car, near the rear portion thereof, and seriously injured.

For the plaintiff the court gave the following instructions, which are claimed to be erroneous:

"If the jury find from the evidence in this case that the defendant on the 1st day of January, 1900, was a carrier of passengers for hire by street railroad, and, as such, had erected and was maintaining the platform mentioned in the evidence for the purpose of receiving passengers therefrom bound east from Euclid avenue, then the defendant was bound, in duty, to exercise ordinary care to keep said platform reasonably secure and safe for passengers who should be thereon for the purpose of entering defendant's cars therefrom; and if the jury find from the evidence that on said day there was existing in said platform a stump of a post, extending above the surface of said platform, and that said stump in said platform made it dangerous for persons on said platform for the purpose of entering upon defendant's cars as passengers; and if the jury further find from the evidence that defendant did not exercise ordinary care in maintaining said platform for passengers in such condition; and if the jury further find from the evidence that on said day the plaintiff was on the said platform for the purpose of becoming a passenger upon defendant's east-bound car, and that whilst so upon said platform for said purpose she stumbled over said stump, and was thereby caused to fall and be injured by defendant's car; and if the jury believe from the evidence that the plaintiff was exercising ordinary care at the time of her injury—then the plaintiff is entitled to recover, although said stump, or the post of which it was a stump, had been planted in said place by some other person or corporation than the defendant."

"No. 3. The court instructs the jury that the mere fact that the plaintiff knew that the stump mentioned in the evidence existed in the platform, and that she stumbled over it (if she did stumble over it) and was injured, will not defeat a recovery in this case."

At the close of the plaintiff's case, and also at the close of the whole case, the de-

fendant asked peremptory instructions to the jury to find for the defendant, and also asked other instructions, which, in the view taken of the case, it is unnecessary to set out or refer to.

Messrs. McKeighan & Watts and Robert A. Holland, Jr., for appellant:

The plaintiff's petition does not state a cause of action.

St. Louis v. Connecticut Mut. L. Ins. Co. 107 Mo. 92, 17 S. W. 637; 2 Shearn. & Redf. Neg. § 343.

The testimony failed to establish any negligence on the part of the defendant.

Ibid.

If the plaintiff knew of the presence of said stump in said platform, and nevertheless ran toward and upon the platform, and was guilty of negligence in so doing, she cannot recover.

Gerdes v. Christopher & S. Architectural Iron & F. Co. 124 Mo. 346, 25 S. W. 557, 27 S. W. 615; *Flynn v. Neosho*, 114 Mo. 567, 21 S. W. 903; *Cohn v. Kansas City*, 108 Mo. 387, 18 S. W. 973.

Mr. A. R. Taylor, for respondent:

The appellant owed the duty to respondent, as an intending passenger, of using ordinary care to have its platform, on which she was invited to take passage on its car, reasonably safe for that purpose, and the maintaining of the platform with this stump in it was not such care.

Hutchinson, Carr. 2d ed. § 516.

The mere fact, alone, of knowledge of a defect in a street or platform, will not defeat a recovery.

Gerdes v. Christopher & S. Architectural Iron & F. Co. 124 Mo. 355, 25 S. W. 557, 27 S. W. 615; *Flynn v. Neosho*, 114 Mo. 572, 21 S. W. 903; *Kane v. Northern C. R. Co.* 128 U. S. 96, 32 L. ed. 341, 9 Sup. Ct. Rep. 16; *Graney v. St. Louis*, 141 Mo. 185, 42 S. W. 941.

The theory of the petition was that it was the duty of appellant, as a carrier of passengers, to use reasonable care that its platform, to which passengers were invited to take passage, should be ordinarily safe. That this is the law no one will dispute.

Hutchinson, Carr. 2d ed. 516; *Fullerton v. Fordyce*, 121 Mo. 11, 25 S. W. 587, 144 Mo. 530, 44 S. W. 1053; *Jarvis v. Brooklyn Elev. R. Co.* 40 N. Y. S. R. 825, 16 N. Y. Supp. 96, Affirmed in 133 N. Y. 623, 30 N. E. 1150; *Missouri P. R. Co. v. Neiswanger*, 41 Kan. 626, 21 Pac. 582.

Marshall, J., delivered the opinion of the court:

The plaintiff predicates a right to recover solely upon the charge that the defendant maintains the stump in the granitoid platform. The stump is within the lines of a public street, and not upon the defendant's property. It was placed there by the lighting company, and the defendant had nothing to do with its being placed there. It is on public property, and the defendant is under no duty and has no right to remove it. The defendant built a wooden platform, and left the stump projecting above it, on the public

highway, for the benefit of the traveling public. It was under no duty to build the platform. Subsequently it replaced the wooden platform with a granitoid platform. This is the sum of its offending. Yet it is sued, and a recovery had against it, on the charge and theory that it maintains the stump in the platform, and that this makes it dangerous. Webster's International Dictionary defines "maintain" to mean: "(1) To hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up; not to suffer to fail or decline. . . . (2) To keep possession of; to hold and defend; not to surrender or relinquish. (3) To continue; not to suffer to cease or fail. (4) To bear the expense of; to support; to keep up; to supply with what is needed." It is demonstrable that the defendant has done nothing which would bring it within any of these meanings of the word "maintain." It did not put the pole or stump there. It was under no obligation to remove it. It has done nothing to keep it there, or to prevent it from failing or declining. The pole was put there by the lighting company, and was cut down and the stump left there by that company, and the stump has kept itself there ever since. It is located upon a public highway. It was there before there was any platform. Neither the wooden nor the granitoid platform affected the stump, or the dangers arising therefrom, in any manner whatever. If an owner raises up, or permits anyone else to do so, or keeps up or fails to remove, a nuisance, on his own premises, by which anyone suffers injury, he is liable, because he violates his duty as a citizen. If anyone creates a nuisance on a public highway, he is primarily liable to anyone who is injured thereby, because he has violated his duty as a member of society, and has been guilty of a wrongful act for which he is primarily liable. But no citizen is under any personal, legal obligation to remove a nuisance from a public highway, notwithstanding he may know it is calculated to do injury to a traveler on the highway if it is allowed to remain there. To make any man liable for a tort, he must have done or omitted to do a duty imposed upon him by law. In the absence of such a duty, there is no liability. The law imposes no duty upon the defendant to remove a nuisance in a public highway which it did not put there, and has nothing more to do with than any other citizen. The building the platform around the stump neither increased nor diminished the danger. The proximate cause of the accident in this case was the stump. The platform in no way had anything to do with the accident. The proximate cause would be the same whether there had been a platform there, or whether it had been allowed to remain a dirt walk, as it was when the pole was put up, when it was sawed off, and when the stump was left there. The defendant maintains the platform, but it does not maintain the stump. The stump, and not the platform, caused the accident. The only thing the defendant did with respect to the

stump was to leave it in the highway, where someone else had placed it; and, being under no legal duty to remove it, it cannot be adjudged guilty of negligence in failing to remove it, or in building the platform around it.

All of the adjudicated cases wherein a citizen has been held liable for an obstruction or nuisance in a highway have been cases where the person held liable placed the obstruction or nuisance on the highway, or was under some duty to remove it. *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Waltemeyer v. Kansas City*, 71 Mo. App. 354; *Donoho v. Vulcan Iron Works*, 75 Mo. 401; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Grogan v. Broadway Foundry Co.* 87 Mo. 321; *Merrill v. St. Louis*, 83 Mo. 244, *loc. cit.* 255, 53 Am. Rep. 576; *Campbell v. Pope*, 96 Mo. 468, 10 S. W. 187. Of course, if one creates the nuisance, and another adopts it, and continues it, and keeps it up, as where one constructs a coal hole in a sidewalk, and another uses it and maintains it, both are liable. *Merrill v. St. Louis*, 83 Mo. *loc. cit.* 255, 256, 53 Am. Rep. 576. The general rule is thus stated in 2 Smith's Modern Law of Municipal Corporations, § 1525: "The general rule is that the primary duty to keep highways and streets in repair rests upon the municipal corporations within whose limits they are, this duty being implied in the acceptance of a charter from the state. Such duty is not discharged by the fact that a duty is also imposed upon abutting owners to keep the highway in repair in front of their land. A lot owner's obligation to repair streets or sidewalks does not exist at common law, but is statutory or arises from contract. It seems well settled that the neglect of an abutting owner to keep the sidewalk in repair, and to keep it free from snow and ice, as required by a city ordinance, does not render him liable to a party injured or to the city itself, unless such owner himself caused the defect." (The italics are added.) In support of the text the author cites *St. Louis v. Connecticut Mut. L. Ins. Co.* 107 Mo. 92, 17 S. W. 637, and cases from New York, Massachusetts, Wisconsin, New Jersey, Maryland, Rhode Island, Connecticut, California, Kansas, and Iowa. This defendant never caused this defect in the sidewalk; never adopted it, used it, continued it, or maintained it. It did not remove it, it is true, but it owed no duty to the city or its citizens to remove it. It was neither the active, primary, nor remote cause of its being there, and it did not keep it there for its own use or benefit or at all. It simply left it where it found it, and let it remain in no more dangerous condition than it was when it found it.

It follows that the defendant is not liable for the plaintiff's injuries, and the trial court should have so peremptorily charged the jury.

The judgment of the Circuit Court is therefore reversed.

All concur.

Rehearing denied.

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Wendell ROTH, Jr., et al., Appts.,
v.
August RAUSCHENBUSCH et al., Respts.
(.....Mo.....)

A fee simple is conveyed by a devise to one absolutely and forever, and is not cut down by a subsequent clause directing the disposition of any remainder which may be undisposed of at the death of the devisee.

(March 31, 1903.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Sainte Genevieve County in favor of defendants in an action brought to set aside certain deeds. *Affirmed.*

Statement by Gantt, J.:

Plaintiffs, who claim to be the nearest "blood relations" of Jacob Roth, deceased, bring this suit to set aside two deeds executed by Bridget Roth, his widow,—one to defendant August Rauschenbusch, dated August 3, 1876, and a subsequent one to defendant Huck, dated April 10, 1894, conveying certain real estate, which belonged to said Jacob Roth at the time of his death.

The rights of the parties litigant depend upon the construction of the will of the said Jacob Roth, deceased, which was executed on the 12th day of August, 1845, and probated on the 9th day of April, 1875. The second and third paragraphs of said will, which are set out in the petition, are as follows:

"Second. I give, devise, and bequeath to my beloved wife, Bridget Roth, formerly Bridget Hook, the whole of my estate, real, personal, and mixed, absolutely and forever.

"Third. It is my will, however, that after the decease of my said wife, if any of said property shall remain undisposed of by her, then such property—that is to say, such of the property herein bequeathed to her as may not have been disposed of by her at the time of her death—shall go and descend to and be divided among my blood relations, according to the rules of descents and distributions in the state of Missouri now in force."

Jacob Roth' left no descendants. His widow died on the 24th day of May, 1895. This suit was instituted in October, 1898.

The petition is divided into two counts, or, at least, there are two separate prayers for relief. It is charged in the first that Bridget Roth was induced by defendant Rauschenbusch, a prominent minister of the church to which she belonged, to convey to him the real estate described in the petition, for a nominal consideration of \$1; that he represented to her that he desired said property

NOTE.—As to effect of subsequent words to cut down absolute bequest, see also cases in note to *Hall v. Palmer* (Va.) 11 L. R. A. 610, and *Snider v. Baer* (Pa.) 13 L. R. A. 359.

As to effect of power of disposal to make an estate absolute, see *Peckham v. Lego* (Conn.) 7 L. R. A. 419, and note; *McCullough v. Anderson* (Ky.) 7 L. R. A. 836, and note; *Bills v. Bills* (Iowa) 8 L. R. A. 696; and *Cornwell v. Wulff* (Mo.) 45 L. R. A. 53.

to assist him in building up and fostering the interest of his and her church, and particularly for the purpose of building some kind of an asylum. Plaintiffs claim to be remaindermen, and charge that said defendant induced Bridget Roth to enter into a conspiracy to cheat and defraud them out of said real estate, and thereby procured from her a warranty deed conveying the said property to him without any consideration therefor. The second count alleges that defendant Huck subsequently obtained a deed from her conveying to him said real estate, and charges that said Bridget Roth was induced to execute the same by undue and improper influences, and without consideration.

Each of the defendants filed a separate demurrer to the petition, assigning: First. A misjoinder of parties and causes of action. Second. That the petition fails to state facts sufficient to constitute a cause of action, as it appears from the face of the petition that the parties plaintiff have no interest in the property sued for.

These demurrers were sustained, and, plaintiffs declining to plead further, final judgment was rendered in favor of the defendants, and the case has been brought to this court by appeal.

Messrs. William Carter, J. N. Burks, and Jerry B. Burks, for appellants:

The court erred in holding that Bridget Roth, the widow and devisee of Jacob Roth, deceased, had the right and authority, under the will of the said Jacob Roth, to dispose of the real estate in controversy, in this suit.

Murphy v. Carlin, 113 Mo. 112, 20 S. W. 786; *Noe v. Kern*, 93 Mo. 387, 6 S. W. 239; *McMillan v. Farrow*, 141 Mo. 55, 41 S. W. 890; 45 Cent. L. J. 167; *Howard v. Ames*, 3 Met. 308; *Oberlin College v. Fowler*, 10 Allen, 545; *Montague v. Dances*, 14 Allen, 369; *Dyer v. Shurtleff*, 112 Mass. 165, 17 Am. Rep. 77; *Dexter v. Shepard*, 117 Mass. 480; *Thompson v. Heywood*, 129 Mass. 401; *Briggs v. Briggs*, 135 Mass. 306; *Clark v. Simmons*, 150 Mass. 357, 23 N. E. 108.

Messrs. Peter H. Huck and W. M. Williams, for respondents:

Jacob Roth intended by his will to give to his wife all of his property, absolutely.

2 Underhill, Wills, § 689; *Halliday v. Stickler*, 78 Iowa, 388, 43 N. W. 228.

The absolute and unrestricted power of disposition given the first taker of an estate, unlimited, creates in such person a fee, and a limitation over to another is void as being repugnant to the first grant.

Rubey v. Barnett, 12 Mo. 3, 49 Am. Dec. 112; *Norcum v. D'Ench*, 17 Mo. 98; *Hazel v. Hagan*, 47 Mo. 277; *Clarke v. Leupp*, 88 N. Y. 228; *Roseboom v. Roseboom*, 81 N. Y. 356; *Small v. Field*, 102 Mo. 107, 14 S. W. 815; *Cook v. Couch*, 100 Mo. 29, 13 S. W. 80.

The third clause of the will is merely an expression of a desire as to the course the wife's property undisposed of by her in her lifetime should take at her death, and is not a limitation over of the property bequeathed to her, so as to cut down her title to a mere life estate.

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Campbell v. Beaumont, 91 N. Y. 464; *Howard v. Carusi*, 109 U. S. 725, 27 L. ed. 1089, 3 Sup. Ct. Rep. 575; *Hossey v. Hossey*, 37 N. J. Eq. 21.

Jacob Roth, by the words, "give, devise, and bequeath the whole of my estate, real, personal, and mixed, absolutely and forever," unquestionably intended to devise to his said wife his whole estate in said lands. These words are ample for that purpose in a will.

Yocum v. Siler, 160 Mo. 289, 61 S. W. 208; *Clarke v. Leupp*, 88 N. Y. 228.

Gantt, J., delivered the opinion of the court:

1. This record presents the ever recurring difficulty of construing the language of a last will. The rules of construction are so well defined and so frequently invoked that they need only to be mentioned. Indeed, in this state they are largely statutory. Thus, Rev. Stat. 1899, § 4650, requires, "all courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true intent and meaning of the testator in all matters brought before them." Obeying this behest, this court on many occasions has announced that "the cardinal rule in the interpretation of a will is that the intention of the testator, as gathered from the whole instrument, shall control, and, in arriving at such intention, the relation of the testator to the beneficiaries named in the will, and the circumstances surrounding him at the time of its execution, may be taken into consideration." *McMillan v. Farrow*, 141 Mo. 62, 41 S. W. 890, and cases cited. Another canon for the construction of the words of a will is that, when the words of a will at the outset clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate devised, absolutely, to the first donee, that estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent. It is well settled that in wills the words "heirs and assigns" are not necessary to devise a fee simple. With these principles for our guides, we must inquire what was the intention of Jacob Roth in making his last will. In the second item he "gives, devises, and bequeaths to his beloved wife, Bridget Roth, formerly Bridget Hook, the whole of his estate, real, personal, and mixed, absolutely and forever." As was said in *Yocum v. Siler*, 160 Mo. loc. cit. 289, 61 S. W. 212: "By the words 'bequeath absolutely' he unquestionably intended to devise to his said son [in this case his wife] his whole estate in said lands. These words are ample for that purpose in a will, and it is unnecessary to cite precedents to establish that it has been often so held." In *Yocum v. Siler*, 160 Mo. 289, 61 S. W. 212, the word "absolutely" was held to indicate the testator's purpose to give a fee simple, but in this will other words—"the whole of my estate, real, personal, and mixed"—are added, and it would be difficult indeed to find language which would more clearly indicate an intention to give his wife an abso-

lute fee simple in his lands and a perfect title to his personal estate. Had he stopped here, counsel for appellants frankly concede no doubt could be entertained that by his will he intended to, and did, give his wife the fee simple to the lands in suit. But their insistence is that by the third item or paragraph the intention of the testator is made apparent, notwithstanding the emphatic words of the second paragraph, to give his wife a life estate, with a remainder over to his blood relations. That paragraph, as already noted in the statement, is: "Third. It is my will, however, that after the decease of my said wife, if any of said property shall remain undisposed of by her, then such property—that is to say, such of the property herein bequeathed to her as may not have been disposed of by her at the time of her death—shall go and descend to, and be divided among, my blood relations, according to the rules of descents and distributions in the state of Missouri now in force."

Jacob Roth left no issue of his body or their descendants. Mrs. Roth died without issue. While plaintiffs allege they are the sole surviving blood relations, there is no allegation of what that particular relationship is, whether near or remote. It is plain that outside of his wife he had no particular person in his mind to whom he desired to give any portion of his property, or to whom he bore any special relation which would suggest him as a special object of his bounty. Reading the two paragraphs together, we think it is apparent that the one person for whom he was providing was his wife. Not only is the grant of his estate absolute in the second paragraph, but it is plain by the third paragraph he intended she should have an untrammelled power of alienation. There are no words of restraint upon her power of disposal. Nowhere in the four corners of this instrument are to be found any words limiting her right to sell or dispose of the property "for her necessary support" and maintenance. These words cannot by any fair inference be interpolated into the will. *Atty. Gen. v. Hall*, Fitzg. 314; *McClellan v. Larchar*, 45 N. J. Eq. loc. cit. 23, 16 Atl. 269; *Howard v. Carusi*, 109 U. S. 725-730, 27 L. ed. 1089-1091, 3 Sup. Ct. Rep. 575.

The language of one will is rarely exactly like another, and frequently a very slight change in the verbiage calls for a different construction of two wills much alike in other respects.

In *Halliday v. Stickler*, 78 Iowa, 388, 43 N. W. 228, the will contained the following devise: "I give, devise, and bequeath unto my beloved husband, George S. Beer, all the real and residue of both my real and personal estate of every name and nature whatsoever, and whatever of the same should be left at his decease I direct should be equally divided between the children of the said George S. Beer, and their heirs and assigns forever." The construction of this will came before the supreme court. It was contended that the husband took merely a

life estate, with remainder to his children, but the court said: "It is a devise of the real estate in general terms. It neither by words nor by any fair implication limits the devise to a life estate. On the contrary, and in addition to the general devise without words of limitation, by plain implication it authorizes the devisee to sell and convey the land. There is no devise over, unless some of said estate should be left at the death of the devisee. If a life estate was intended to be devised, the whole of the real estate would be left at the decease of George S. Beer."

2 Underhill on Wills, § 680, collates the authorities, and deduces the rule announced by this court in *banc* in *Cornwell v. Wulff*, 148 Mo. 542, 45 L. R. A. 53, 50 S. W. 439, that where by will or deed a fee simple is granted to the first taker, with the absolute power of disposal superadded, the first taker takes a fee simple absolute, and any attempt to limit an estate thereafter to another, either by remainder or executory devise, will be unavailing. After all the discussion in *Cornwell v. Wulff*, and *Walton v. Drumtra*, 152 Mo. 489, 54 S. W. 233, in which the construction placed by this court upon the deed in *Cornwell v. Wulff* was discredited, the law remained just as it had been announced by this court in that case and the courts generally throughout the land. The difference was in applying it to the given instrument. Judge Marshall, who wrote the views of the majority in condemning the judgment in *Cornwell v. Wulff*, says: "We all agree, and all the modern adjudications agree, that a conveyance which confers an absolute power of disposal creates a fee in the grantee. We also agree that a fee cannot be limited upon a fee." He further says that "we disagree only as to the proper manner or method of so limiting or qualifying the estate of the first taker."

The writer again most respectfully insists, however, that his learned brother misconceived the majority opinion in *Cornwell v. Wulff*, when he states that "the majority opinion required that intention [the intention to create a life estate merely] to be evidenced by the express term 'for life,' while the minority opinion held that the intention must be 'gathered from the four corners of the instrument,' and might be evidenced by any words that clearly conveyed it." The writer hereof disclaimed that *Cornwell v. Wulff*, 148 Mo. 542, 45 L. R. A. 53, 50 S. W. 439, announced the rule that the life estate must have been created by express words, and then and now concedes and agrees that the life estate need not be created by express words, but, if it is the clear intention from the whole instrument that the first taker is to have but a life estate, the added power of disposition will not convert it into an absolute ownership.

Bowing, as I should and do, to the views of the majority of my brethren, I take it that, if another deed be found in the same terms of the *Cornwell* deed, it should be ruled that it created a life estate merely in the first taker; but as every member of the

court conceded in the two opinions that, if land be granted by will or deed to the first taker without words which expressly or by fair implication indicate he is to have a life estate merely, and an absolute power of alienation is coupled with such grant, then no remainder can be limited thereafter, because "a remainder cannot be limited after a fee," nor could an executory devise thereafter be sustained, because such a limitation is inconsistent with the absolute estate and power of disposition expressly given or necessarily implied from the will, and, as each instrument is to be construed and measured by the law, when words are employed in an instrument, different from those used in the decided case just mentioned, it is and will continue to be in every case the duty of the courts to search out the intention of the testator in his will. If we find he only intended to create a life estate in the first taker, then his disposition of his property after the termination of the life estate by way of executory devise will and must be sustained. If, on the contrary, the testator devises a fee simple or generally to the first taker, with an absolute power of disposal in him, and there is neither by express words nor implication a mere life estate created in the first taker, all subsequent grants in the will must fail, because repugnant to the first grant, and because it conflicts with a settled rule of law. This will of Jacob Roth gives his wife, not only "the whole of his estate," "absolutely and forever," by words amply sufficient to create in her a fee simple, but in the third paragraph the absolute power of alienation is superadded by necessary implication. What, then, becomes of the further devise, "if any of said property shall remain undisposed of, . . . the property herein bequeathed to her as may not have been disposed of by her at the time of her death, shall go and descend to and be divided among my blood relations," etc? We are clearly of the opinion that this attempted disposition over was void and repugnant to the prior devise to his wife, and the blood relations took nothing thereby.

This was the view of the circuit court. We are, however, cited to the case of *McMillan v. Farrow*, 141 Mo. 55, 41 S. W. 890. In that case, however, it will be observed that Judge Burgess, speaking for the court, emphasizes the fact that the testator treats of the property as "his." In that case the testator devised the property to his wife, to hold and enjoy by her, with power and authority to sell, but if she died before he did, or if she survived him, whatever of "his" property remained undisposed of should go to Joseph McKinney and his heirs absolutely and in fee simple. Said the learned judge: "The testator speaks of the property in both the second and third clauses of the will remaining undisposed of by his wife as . . . his property . . . which clearly shows that he did not intend to give it to his wife absolutely, but that he only intended to give her a life estate therein, with power of disposal." Whereas Jacob Roth, in this will, after using the most em-

phatic language conveying "the whole of his estate, absolutely and forever," to his wife, speaks of it, not as "my" property, but "the property herein bequeathed to her." We think the intention of the two testators is plainly different. In the one, the testator indicates a desire for his wife to "hold and enjoy," and then plainly expresses his will that a special object of his bounty shall have the fee simple. In the other—the will before us—he plainly designated his wife as the special object of his bounty. To her he gives, absolutely, everything he has, with an absolute power of disposal, and seems to think that if, at her death, any of it remains undisposed of, he could direct its further devolution.—something which the rules of law do not permit. *McClellan v. Larchar*, 45 N. J. Eq. loc. cit. 20, 16 Atl. 289; *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751. But, again, the law is that, when the words of the will clearly indicate an intention to give the entire estate absolutely to the first donee, his estate will not be cut down to a less estate by subsequent or ambiguous words. *Locum v. Stier*, 160 Mo. 289, 61 S. W. 208. Thus, in *Cook v. Couch*, 100 Mo. 34, 13 S. W. 81, the testator gave his wife and five children all of his estate, share and share alike, and then preserved to her her dower also, and then added, "and [she shall] be privileged to will to whom she may see proper her portion of my real estate." The contention was that she took a life estate only, with power to dispose of the one sixth by will only. But this court, speaking through Judge Black, said there were no words expressly limiting the wife to a life estate in the one sixth, and the words saying that she should be privileged to will to whom she might see proper did not indicate an intention to devise an estate for life only. The learned judge then adds: "The most that can be said in behalf of the theory advanced by the plaintiff is that there is here a devise generally of the one sixth, with a superadded power to dispose of the same by will. The general rule is that a devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee. *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112; *Gregory v. Cowgill*, 19 Mo. 416; *Green v. Sutton*, 50 Mo. 186.

"A distinction must be made between those cases where there is a devise generally or indefinitely with a power of disposition, and those cases where there is a devise for life with a power of disposition. In the former, the devisee takes the property in fee. *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802."

In *Small v. Field*, 102 Mo. 127, 128, 14 S. W. 820, Judge Sherwood, speaking for the court, discussing Rev. Stat. 1879, § 4004, now Rev. Stat. 1899, § 4646, said: "Under this statute it is obvious that the absolute estate in fee granted to Mrs. Kate Green could not be impaired, cut down, or qualified, except by words as affirmatively strong as those which conveyed the estate to her." To the same effect is the recent case of *Roberts v. Crume* (Mo.) 73 S. W. 602. We

look in vain in the will of Jacob Roth for any words "as affirmatively strong" or even approximating those which he used in devising the fee simple of his estate to his wife. Our conclusion is that Mrs. Roth took a fee simple, with a superadded power of disposal, and that the plaintiffs, therefore, took no interest by the will of Jacob Roth, and hence have no standing in a court of equity to question her disposition of her estate. Her heirs alone can be heard to challenge the validity of her deeds to defendants on account of the alleged undue influence exerted upon her to procure their execution.

The judgment of the Circuit Court is affirmed.

All concur, except Fox, J., not sitting, he having presided on circuit.

Albert T. FETTER *et al.*, *Respts.*,
v.

FIDELITY & CASUALTY COMPANY of
New York, *Appt.*

(.....Mo.....)

1. **The fact that an accident ruptured a kidney** because of its cancerous condition does not prevent the accident from being the cause of the ensuing death of the injured person, "independent of all other causes," within the meaning of a policy of accident insurance held by him.
2. **A prima facie case for recovery on an accident insurance policy is shown** by proof that insured died of hemorrhage resulting from an accidental fall, without the necessity of proving the absence of any of the excepted causes in the policy.

(March 18, 1903.)

A PPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiffs in an action brought to recover the amount alleged to be due on accident insurance policies. *Affirmed.*

Statement by Valliant, J.:

Appeal from a judgment of the circuit court of Jackson county in favor of plaintiffs, founded on two accident insurance policies issued by defendant on the life of plaintiffs' father. The petition is in two counts. In the first it is averred that the defendant issued its policy February 21, 1892, whereby it insured the life of plaintiffs' father against bodily injuries sustained through external, violent, and accidental means, and agreed to pay plaintiffs \$5,000 if death should result to their father from such injuries, independent of all other causes, within ninety days from the date of the infliction of such injuries. It then goes on to state in detail the accident, which it alleges caused the death of their father within less

than thirty days from the date of its occurrence. The second count is in form substantially like the first, based on another policy, issued November 18, 1893, for \$6,000. The answer of defendant was a general denial and a special plea that the insured died a natural death, resulting from a diseased kidney. Reply, general denial.

The evidence on the part of the plaintiffs tended to show that W. J. Fetter, their father, whom we will hereinafter call the "insured," was past sixty-nine years of age. August 6, 1899, he was at his office, and, about 5 in the afternoon, preparatory to leaving, he and his son, who was with him, attempted to close a window, the upper sash of which had been let down. The sash did not move smoothly; therefore each of them took a window pole, which was designed for the purpose, and, inserting one end under the upper rim of the sash, endeavored to push it in place. But it seemed to be stuck, and required hard pushing to move it. In this effort the upper end of the stick held by the insured slipped off the rim, and the sudden release of its hold had the effect to throw the insured upon his right side against the edge of the table that was in place at the window, designed to hold maps and drawings to be used by one standing, and therefore tall enough to strike the insured high on the side. He immediately dropped the stick, turned pale, and groaned. In a few moments afterwards he went home. He was looking tired and pale when he arrived. He took a light repast, and went to bed. During the night he passed blood in his urine, and very early in the morning he sought his family physician, Dr. Porter, but did not see him, and returned home about 7:30 o'clock, pale and suffering. His physician came and found him suffering pain in the right kidney, and passing blood in his urine. August 13th he was taken to St. Joseph's hospital, where an exploratory examination was made by Dr. Binnie, assisted by Drs. Porter and Shy. Incision was made in the back, and Dr. Binnie introduced his finger into the pelvis of the kidney, but found nothing abnormal except the rupture and an enlargement. The patient rallied from the operation, and the wound healed from the inside, but the hemorrhage continued as before until his death, which occurred September 2, 1899, less than thirty days from the occurrence of the accident. He died from hemorrhage, — from loss of blood. The autopsy held September 4th revealed a normal left kidney. The right kidney revealed a rupture, and the lower end of that kidney was cancerous, harder than the normal part, and less vascular; that is, less full of arteries and veins that would bleed. The rupture found in the kidney was between the normal and the cancerous parts,

NOTE.—For other cases in this series as to what constitutes an accident within the meaning of an accident insurance policy, see *note* to Fidelity & C. Co. v. Johnson (Miss.) 30 L. R. A. 206; Modern Woodmen Acci. Assn. v. Shryock (Neb.) 39 L. R. A. 826; Kasten v. Interstate Casualty Co. (Wis.) 40 L. R. A. 61 L. R. A.

651; Western Commercial Travelers' Assn. v. Smith (C. C. App. 8th C.) 40 L. R. A. 653; Feder v. Iowa State Traveling Men's Assn. (Iowa) 43 L. R. A. 693; Smith v. Aetna L. Ins. Co. (Iowa) 56 L. R. A. 271; and Preferred Acci. Ins. Co. v. Robinson (Fla.) *ante*, 145.

or into the healthy tissue. The hemorrhages were from the rupture, and the hemorrhages caused the death. Before the accident the insured was an active, spare, hardworking man past sixty-nine years, engaged in the business of fire insurance. He was in good health, having had no hard spell of sickness within the memory of any member of his family. His family physician had several times examined and passed him for life insurance. Had examined his urine three months before the accident, and found it normal, with no evidence of diseased kidney. All the testimony was to the effect that the accident of falling against the table caused the rupture, the rupture caused the hemorrhage, and the hemorrhage caused the death. The majority of the expert witnesses were of the opinion that the cancerous condition of the kidney existed at the time of the accident, and that that condition was the predisposing cause of the rupture; that is, that that condition rendered rupture more liable to occur under the force of the blow than if the kidney had been sound. But some of the expert testimony was to the effect that the cancerous condition itself might have been produced by the blow. Dr. Hall, a scientific witness for defendant, who examined the kidney after it had been taken from the body, after death, was of the opinion that the cancer existed before the accident, and that the rupture occurred only in the diseased part of the kidney. He said:

The exciting cause of the hemorrhage was the injury, and the predisposing cause was the cancer.

Q. What do you mean by the "predisposing cause"?

A. That was the condition of the kidney which gave rise to the production of the fracture. The predisposing cause is the remote cause. . . . The cancerous condition weakened the kidney to such an extent that it responded to this injury by some accidental means.

He was asked as to the length of time required to develop a cancer. He answered: "That is a matter which must be stated relatively. I think this is, relatively, a rapid-growing cancer. Some cancers are matters of years,—most of them; but some are matter of months, and others matters of days."

The cause was submitted to the jury under the following instructions asked by the plaintiff:

"(1) The court instructs the jury that if they find from the evidence that W. J. Fetter died in Kansas City, Missouri, September 2, 1899, and that such death resulted from bodily injuries sustained through external, violent, and accidental means, and that the cause of said Fetter's death was the accidental rupture of his right kidney by an accidental strain, jar, or fall while endeavoring to raise a window in his office in the American Bank Building in Kansas City, Missouri, on the 6th day of August, 1899, that their verdict will be for the plaintiffs on both counts of the petition.

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"(2) The jury is instructed that if they believe from the evidence that the death of William J. Fetter was directly caused by the accidental rupture of his right kidney, then their verdict should be for plaintiffs on both counts of their petition,—on the first count in the sum of \$5,000, and on the second count in the sum of \$6,000, with interest on both said sums at 6 per cent per annum from February 21, 1900; notwithstanding that the jury further believes from the evidence that said kidney at the time of the rupture was diseased; provided, that the jury further find that said Fetter would not have died at the time, under the circumstances, and in the manner he did die, had it not been for the accidental rupture of his kidney.

"(3) The court instructs the jury that, the defendant in this case having pleaded an exception in the terms of the insurance policies sued on, and having alleged in their answer that the death of W. J. Fetter was caused by disease, and not by accident, the burden of proving that said Fetter's death was caused by disease is upon the defendant, and, unless they believe from the preponderance of the evidence that said death was caused by disease, they will find for the plaintiffs.

"(4) The jury are instructed that they are the judges of the question of fact as to what was the cause of Mr. Fetter's death. If they find from the evidence that the cause of said death was accidental rupture of the right kidney on or about August 6, 1899, under the circumstances as detailed in evidence, they will find for the plaintiffs, even though they believe from the evidence that said right kidney, when so ruptured, was diseased."

The defendant asked the following, all of which were refused except No. 2, which the court gave after modifying it by writing the word "direct" before the word "cause:"

"(1) The court instructs the jury that, under the pleadings and the evidence in this cause, you will return a verdict for the defendant.

"(2) The court instructs the jury that, before they can find the issues for the plaintiffs, they must find that the alleged accident was the sole and only cause of the death of the insured.

"(3) Upon the question of whether the act of the deceased was an accident or not, you are instructed that if he was suffering or affected at that time with a disease of the kidneys, and the raising of the window would not have injuriously affected him in ordinary health and condition, but would be dangerous to him and result in injury because of the diseased condition of the kidney, then the injury was not due to accidental means independent of all other causes.

"(4) The court instructs the jury that if you find the deceased, W. J. Fetter, sustained an accident, but that at the time it occurred he was suffering from a pre-existing disease of the kidney, and if the accident could not have caused death if he had

not been affected with disease of the kidney, but that he died because the accident aggravated the effect of the disease or the disease aggravated the effect of the accident, the death of deceased in such case would not be the result of the accident alone, but would be caused partly by the accident, and in such case the plaintiffs cannot recover upon the accident policies sued on in this case.

"(5) The court instructs the jury that, if you find from the evidence that the kidney of the insured was diseased, or affected by some disease, or otherwise impaired, at the time he attempted to raise the window, and that the blood vessel in the kidney was ruptured while he was attempting to raise it, but further find that the rupture would not have been occasioned by the raising of the window if this kidney had not been diseased or impaired, then you are instructed that the insured did not die of an injury from the accidental means independent of all other causes; and if you so find your verdict must be for the defendant.

"(6) The court instructs the jury that the plaintiffs cannot recover unless the jury find from the evidence that the insured died from external, violent, and accidental means independent of all other causes, and that there is no evidence showing, or tending to show, that any accidental means resulting in an injury was either violent or external.

"(7) The court instructs the jury that the insurance policies in question do not undertake or bind the defendant to pay the policies because or on account of death resulting from an accident, but are limited to and bind the defendant to pay only in case death results from accidental means independent of all other causes. If you find from the evidence that the means employed by the deceased to raise the window were such means as he intended, and that he did not push or shove upon the pole with greater force or strength than he intended, then the plaintiffs cannot recover, even though the result of the means employed may have produced the injury.

"(8) The court instructs the jury that the policies in question do not make the defendant liable by reason of an accident alone, but only make them liable by reason of an injury received from accidental means independent of all other causes. If you believe from the evidence that the means employed by W. J. Fetter to raise the window, and his act in raising it, was just what he intended to do,—that he did it in the manner that he intended, and voluntarily did it,—then you are instructed that the means employed by W. J. Fetter was not accidental, although you may further find that the result of the means employed was not contemplated or intended by him."

"(10) The court instructs the jury that this action is founded upon accident insurance policies, and that the death of the party insured does not make the company liable because of his death, but that the insurance policies are directly and only applicable to death resulting from an accident in 61 L. R. A.

dependent of all other causes. And in order for the plaintiffs to recover in this case upon the policies, they must establish and show by a preponderance of the evidence that the insured's death was directly caused by some accidental means independent of all other causes. In passing upon this question you will bear in mind and be guided by the fact that, if any other cause contributed to the death of deceased than the alleged accident which he received, then plaintiffs cannot recover. In this connection you are instructed that the testimony in the case shows that at the time of the death of the insured he was affected with a diseased condition of the kidney. Therefore, if you find that such diseased condition of the kidney existed at the time the assured attempted to raise the window, and the raising of the window caused the rupture of the kidney because and on account of the already diseased condition of the kidney, and that such diseased condition of the kidney was of such character as that the pushing upon the window might necessarily cause the rupture of the kidney because of its diseased condition, and that the pushing upon the window would not of itself have produced the rupture but for and on account of the diseased condition of the kidney, then the plaintiffs cannot recover in this action."

Exceptions were duly saved. The verdict and judgment were for the plaintiffs on both counts, and defendant appealed.

Messrs. Harkless, O'Grady, & Crysler, for appellant:

To entitle the plaintiffs to recover it must be shown that death resulted from accidental means, independent of all other causes.

National Masonic Acci. Asso. v. Shryock, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; *Travelers' Ins. Co. v. Melick*, 27 L. R. A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L. R. A. 753, 30 N. E. 1013; *Hubbard v. Travelers' Ins. Co.* 98 Fed. 932; *Hubbard v. Mutual Acci. Asso.* 98 Fed. 930.

Death in this case did not result from accidental means.

Feder v. Iowa State Traveling Men's Asso. 107 Iowa, 538, 43 L. R. A. 693, 78 N. W. 252.

The burden of proof was upon the plaintiffs, and not upon the defendant.

Laessig v. Travelers' Protective Asso. 169 Mo. 272, 69 S. W. 469; *Aylward v. Briggs*, 145 Mo. 604, 47 S. W. 510; *National Masonic Acci. Asso. v. Shryock*, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774.

Messrs. Ashley, Gilbert, & Dunn, for respondents:

Neither party is bound to prove a negative.

McCarthy v. Travelers' Ins. Co. 8 Biss. 368, Fed. Cas. No. 8,682.

"Independently of all other causes" is originally a negative.

Sutherland v. Standard Life & Acci. Ins. Co. 87 Iowa, 505, 54 N. W. 453.

Defendant having directly put in issue the fact that the assured did not die of bodily injuries sustained by any accidental means, "independently of all other causes," and the plaintiffs having joined issue by reply of the general denial, the pleadings are exactly in the same shape as though plaintiffs had originally alleged the injuries to have been sustained through accidental means, and to have caused death "independently of all other causes."

Allen v. Chouteau, 102 Mo. 318, 14 S. W. 869; *Garth v. Caldwell*, 72 Mo. 630; *Hughes v. Carson*, 90 Mo. 403, 2 S. W. 441.

"Independently of all other causes" means independently of all other direct (proximate) causes.

Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L. R. A. 753, 30 N. E. 1013.

This general clause was, in effect, a condition or exception, and the burden of proof was upon the defendant to show such causes of death other than accident, as he saw fit to allege, plaintiff having alleged a performance of all the conditions of the policy.

Freeman v. Travelers' Ins. Co. 144 Mass. 578, 12 N. E. 372; *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 354, 26 L. R. A. 406, 38 N. E. 973; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 653, 61 N. W. 485; *Badenfeld v. Massachusetts Mut. Acci. Asso.* 154 Mass. 77, 13 L. R. A. 263, 27 N. E. 769.

Even though the cancerous condition of the kidney might have rendered the kidney more liable to rupture from a blow, unless the accidental fact of the slipping of the window stick and the fall resulted directly or indirectly, or happened partly, because he had cancer of the kidney, it is unavailable to the defendant as defense.

Atna L. Ins. Co. v. Hicks, 23 Tex. Civ. App. 74, 56 S. W. 87; *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L. R. A. 753, 30 N. E. 1013.

Cancer of the kidney was not within the multitudinous exceptions written into the policy by the company.

State v. Krueger, 134 Mo. 262, 35 S. W. 604; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *St. Louis v. Laughlin*, 49 Mo. 559; *Mair v. Railway Pass. Assur. Co.* 37 L. T. N. S. 356; *Lovelace v. Travelers' Protective Asso.* 126 Mo. 104, 30 L. R. A. 209, 28 S. W. 877; *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 53 S. W. 49; *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

The hemorrhages from the rupture in the kidney through the bladder were sufficiently external and violent.

United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

The verdict and judgment of the trial court thereon should be affirmed.

Hester v. Fidelity & C. Co. 69 Mo. App. 186; *Cunningham v. Union Casualty & Security Co.* 82 Mo. App. 614; *McFarland v. United States Mut. Acci. Asso.* 124 Mo. 204, 61 L. R. A.

27 S. W. 436; *Mcadoirs v. Pacific Mut. L. Ins. Co.* 129 Mo. 76, 31 S. W. 578; *Hoffman v. Manufacturers' Acci. Indemnity Co.* 56 Mo. App. 301; *Summers v. Fidelity Mut. Aid Asso.* 84 Mo. App. 605; *Lovelace v. Travelers' Protective Asso.* 126 Mo. 104, 30 L. R. A. 209, 28 S. W. 877; *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; *State v. Krueger*, 134 Mo. 262, 35 S. W. 604; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *St. Louis v. Laughlin*, 49 Mo. 559; *Mair v. Railway Pass. Assur. Co.* 37 L. T. N. S. 356; *Isitt v. Railway Pass. Assur. Co.* L. R. 22 Q. B. Div. 504; *Lawrence v. Accidental Ins. Co.* L. R. 7 Q. B. Div. 216.

Valliant, J., delivered the opinion of the court:

1. If, after weighing all the evidence in the case, the jury had reached the conclusion that the cancerous condition of the kidney was the result of the blow caused by the falling of the insured, striking his side heavily against the edge of the table, and had based their verdict on that conclusion, it would have had substantial evidence to sustain it. There were seven surgeons who testified in the case, who were all men of intelligence, learning, and high character. They gave their testimony in a manner to show that they were expressing only their honest opinions. They agreed on some, but disagreed on other, points. The majority of them were of the opinion that the cancer was there before the accident occurred, but that it might not have been. Dr. Hall, a witness for defendant, expressed a more positive opinion than any other surgeon that the cancer existed before the accident: He said, "There is no question, in my opinion, that it did exist at that time." Yet, he also said: "I think this is, relatively, a rapid-growing cancer. Some cancers are matters of years,—most of them; some are matters of months; and others are matters of days." One of the learned witnesses—Dr. Horgan—said that a blow of the kind in question is a common cause of cancer. Add to this the fact that Mr. Fetter was an apparently healthy, active, energetic business man, who had never had a serious spell of sickness within the memory of any member of his family; that a few days after the accident he was examined by a number of surgeons, who made an incision into his back to explore the kidneys, and who, with all the aid that science could afford, discovered nothing wrong except the rupture of the right kidney, and an enlargement of it,—under those facts, and in the light of the scientific evidence, who can say with certainty that the blow which ruptured the kidney did not also cause the cancerous growth?

The genius of our law does not claim for it infallibility. It recognizes that there is an element of uncertainty that enters into every forensic contest, which human wisdom cannot always make certain, and its aim is to come as close to the right as the means at hand will permit. Under our system of jurisprudence the jury is the tribunal to

which questions of this kind are submitted for determination, and with all their human liability to err we have never yet discovered any better tribunal for the trial of questions of fact, even where highly scientific propositions are involved. Science itself appeals to common sense for its recognition. On the question of whether or not the blow caused the cancer, if the jury had found either way, the verdict would have had honest, intelligent, scientific testimony to support it.

2. There is no question but that the fall of the insured against the table, striking his side heavily against its edge, was accidental; that it produced the rupture of the kidney which caused the hemorrhage which caused his death. All the witnesses concur in that. They also concur in the opinion that, conceding the previous existence of the cancer, the man would not have died as and when he did if the accident had not occurred; that, whilst death from the cancer might have resulted, it would probably have been deferred several years. But the contention of the defendant is that the accident would not have resulted in the rupture if the cancer had not been there. As defendant's witness Dr. Hall said, "The exciting cause of the hemorrhage was the injury, and the predisposing cause was the cancer." On this testimony the defendant says that the death was not the result of the accident "independent of all other causes." If we should give to those qualifying words of the policy the meaning that is now claimed by defendant they were intended to have, there would be scarcely any limit to their nullifying influence. Dr. Hall said in explanation of what has just been quoted of his testimony, "The predisposing cause is the remote cause." If, therefore, there could be discovered in a man's body, after his death, any condition before undiscovered and unsuspected, that, under scientific tests, would render him more amenable to accidents, or less capable of resisting their influence, the policy would not cover the case. The fact that a man is sixty-nine years old, yet with an activity of body ordinarily found only in one much younger, might have something to do both with the fact of an accident and its result, and thus his age and unusual activity could be said to be a predisposing cause,—remote, perhaps, as the learned witness designated the cancer in this case,—still, in such case, in that sense, the accident could not be said to have been the cause of the death "independent of all other causes." The causes referred to in the policy are the proximate or direct, not the remote, causes. This was evidently the view of the trial court when it modified the second instruction asked by defendant, inserting the word "direct" before the word "cause," thereby directing the jury that they could not find for the plaintiff unless they found that "the accident was the sole and only direct cause of the death of the insured;" and that view of the law was correct. *Freeman v. Mercantile Mut. Acci. Assn.* 156 Mass. 351, 17 L. R. A. 753, 30 N. E. 1013. In that case

the court said: "Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and in dealing with such cases the maxim, *Causa proxima, non remota, spectatur*, is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so as well when death comes through the medium of a disease directly induced by the injury as when the injury immediately interrupts the vital processes." The undisputed evidence and conceded facts make out a prima facie case for the plaintiffs, and the defense that there was a remote predisposing cause of the death was given as full and fair consideration as the defendant was entitled to, and there is not sufficient in the evidence bearing on it to justify any impeachment of the verdict.

3. The theory of the instructions given at the request of the plaintiff is that, if the death of the insured resulted from the accidental rupture of his kidney, the plaintiffs were entitled to recover. These were supplemented by the modified instruction for defendant that the plaintiffs could not recover unless the "accident was the sole and only direct cause of the death." Those instructions, taken together, put the case on the correct theory, and they include whatever there legitimately was in the defendant's theory of any other cause. There was really so little in the remote—predisposing—cause theory that the court would have been justified in ignoring it altogether. It is complained that the third instruction for the plaintiffs was erroneous in placing the burden on the defendant to show that the insured died of cancer. When the plaintiffs introduced evidence tending to show that the insured died of hemorrhage resulting from the accidental fall, they made out a prima facie case. *Laessig v. Travelers' Protective Assn.* 169 Mo. 272, 69 S. W. 469. It was not necessary then for them to take up the defendant's side of the case, and prove that the death did not result from any of the excepted causes named in the policies. The defendant, in its answer, had averred that the man died of cancer. The burden was on the defendant to prove it. From what has already been said, it is unnecessary to say

that the court did not err in refusing the defendant's first instruction, which was in the nature of a demurrer to the evidence. Defendant's sixth instruction is also, in effect, a peremptory direction to find for defendant. Instructions 3, 5, 7, 8, and 10 refer the cause of the rupture to the strain in raising the window, and leave out of view entirely the accident of the pole slipping off the rim of the window sash, and causing the insured to fall against the edge of the table. Defendant's instruction 4 directs the jury that the plaintiffs cannot recover "if the accident could not have caused death if he had not been affected with disease." There was no evidence to sustain any such hypothesis. We find no error in the record.

The judgment is affirmed.

All concur.

STATE of Missouri *ex rel.* Edward C. CROW, Attorney General,
v.

ARMOUR PACKING COMPANY *et al.*

(.....Mo.....)

1. **Statements made by the managers of "coolers" maintained for supplying local butchers** by corporations engaged in preparing meat for the trade, and by solicitors in negotiating sales to the trade, as to reasons for prices and the method of billing goods, are admissible in evidence upon the question whether or not their principals have entered into an unlawful combination in restraint of trade.
2. **A combination to fix prices in restraint of trade may be shown by acts** on the part of several competing dealers in the same line of trade, such as selling at a fixed price from which rebates are given in goods or weights, giving notice of coming advances in price, which always follow as announced, securing concessions from competitors of the right to sell shop-worn goods, gathering evidence of sales under price, and abandoning such conduct as soon as legal proceedings are instituted to punish them.
3. **Proceedings against jobbers for the punishment of a combination in restraint of trade cannot be defeated** by showing employment of many persons, payment of large amounts in wages, improvement in the business of furnishing the raw material, regulation of prices by the cost of raw material, and that the retailers had a combination among themselves which was more effective in fixing the prices to consumers than that of the jobbers because the combination among the latter could not be made effective.
4. **The court may impose a fine in lieu of the forfeiture of the charters of corporations** found guilty of entering into

a combination in restraint of trade, if the unlawful combination has been abandoned, although the statute provides for the forfeiture of the rights of corporations found guilty of such conduct.

(March 20, 1903.)

APPPLICATION for a writ of quo warranto to oust defendant corporations from their franchises to do business in the state. *Fine imposed.*

Statement by **Marshall, J.:**

This is a proceeding by quo warranto, instituted by the attorney general *ex officio*, to oust the defendant corporations from their franchise to do business in this state because of alleged violations by them of their powers and privileges. The information charges that between August 22, 1899, and May 9, 1902, they entered into an agreement, confederation, combination, pool, and understanding among themselves and with each other and Nelson, Morris & Co. and Schwartzschild & Sulzberger, and other corporations and persons, to regulate, fix, and control the price to be paid by retail butchers and others for all dressed pork, beef, and cured meats and lard, slaughtered, manufactured, and prepared and offered for sale or to be sold in the state of Missouri; and to maintain and control said prices for said products in this state when so regulated and fixed; and to prevent competition in said business in preparing, marketing, and selling said products in this state between themselves and others engaged in like business; and that respondents and those others above named have maintained the said prices of dressed beef and pork, and fresh meat, cured meat and lard so prepared, sold, and offered for sale by them in this state by and through their officers, managers, agents, salesmen, servants, and employees acting for and in behalf of said corporations, and that by the acts and conduct of said corporations through their officers, salesmen, managers, agents, servants, and employees competition in the sale of dressed beef, dressed pork, fresh beef, and cured meats of all kinds and lard in the markets of Missouri has been unlawfully prevented and destroyed, to the great detriment of the public. The information charges that respondents and those who have combined with them own, control, and supply to the general public 90 per cent of the dressed pork, beef, and meats, and all smoked and cured pork, beef, and meats and lard, and all fresh beef and pork and meats slaughtered, manufactured, and cured and prepared and offered for sale or sold for general consumption in the state of Missouri, and that the object and purpose of said combination and agreement is to fix, regulate,

NOTE.—For other cases in this series as to combination of dealers to prevent competition and control prices, see *United States v. Jellico Mountain Coke & Coal Co.* (C. C. M. D. Tenn.) 12 L. R. A. 753, and *note*; *State v. Phipps* (Kan.) 18 L. R. A. 657; *Queen Ins. Co. v. State* (Tex.) 22 L. R. A. 483; *People v. Sheldon* (N. Y.) 23 L. R. A. 221; *United States v. Trans-* 61 L. R. A.

Missouri Freight Asso. (C. C. App. 8th C.) 24 L. R. A. 73; *United States v. E. C. Knight Co.* (C. C. App. 3d C.) 24 L. R. A. 428; *People v. Milk Exchange* (N. Y.) 27 L. R. A. 437; *United States v. Addyston Pipe & Steel Co.* (C. C. App. 9th C.) 46 L. R. A. 122; and *Hawarden v. Youghloheny & L. Coal Co.* (Wis.) 55 L. R. A. 828.

and maintain the price to be paid by the consuming public for said products above mentioned, and to control said price when so fixed, maintained, and regulated, and to destroy competition among themselves and others engaged in like business. It is charged that the officers, managers, agents, servants, and employees of the respondents, legally and fully authorized by each of said several respondents to act for them and in their behalf in matters relating to the sale and price to be charged for the products above mentioned, have since the 21st day of August, 1899, met, and continuously from time to time since said day continued to meet, when they have deemed it necessary, and unlawfully agreed and combined to fix and maintain from week to week and day to day an agreed price on the different grades, classes, and kinds of dressed beef, fresh beef, dressed pork, hams, bacon, cured meats, and lard, which should be sold or offered for sale to the retail butchers and others and the consuming public in Missouri; that at said meetings the officers, managers, employees, and agents of respondents would and did agree upon and fix the price at which the respondent corporations, through their officers, agents, and employees, would sell in Missouri from week to week and day to day the products above mentioned to the consuming public; that said meetings were held by the said officers, agents, and representatives of the respondents for the purpose of fixing and maintaining the agreed price to be charged in St. Louis, Kansas City, St. Joseph, and elsewhere in Missouri for the products manufactured, prepared, and sold by the respondents; that at said meeting so held from time to time as aforesaid, and for the purpose of controlling and monopolizing the market and preventing competition in the sale of dressed meat, cured meat, pork, and lard, and in order that a common uniform price should be charged the retail butchers and the consuming public and all others in the state of Missouri by the agents of all the respondents for the same or similar grades of dressed beef, pork, cured meats, and lard, said officers, managers, and agents would at said meetings agree upon the prices at which all the different classes and kinds of the products above mentioned should be sold in the state of Missouri.

The information then charges that the said prices which should be so charged in Missouri for the said different commodities, which had been agreed upon as aforesaid at the said meetings, all the officers, managers, agents, and servants of respondents charged and intrusted with the sale to butchers and others of said products throughout Missouri were notified of, and the prices agreed upon for the period of time during which it had been agreed said prices should be charged, and that the officers, managers, agents, and employees of respondents intrusted and charged with the sale to retail butchers, meat dealers, and all others of said products in Missouri were directed and required to sell said products for said period theretofore agreed upon at the prices fixed, and not be-

low the said prices agreed upon at said meeting so held as aforesaid. The information then alleges that, after the prices to be charged had been fixed and agreed upon as aforesaid, the said officers, managers, agents, and employees of respondents did not sell and have not sold any of the kinds, classes, and grades of the products above mentioned in this state to retail butchers, meat dealers, and the consuming public except at the prices fixed and agreed upon. It is then charged that the agreement and combination so made in the manner as aforesaid has prevented and does prevent competition in Missouri among respondents and others engaged in the same line or lines of business in this state, and that said acts of respondents have deprived and do deprive the public of free, full, and wholesome competition in the sale of the commodities above mentioned, to the great damage and detriment of the public.

Informant then charges that the general nature and object of the said combination, pool, agreement, and confederation so made as aforesaid by the said respondent corporations by the means and in the manner aforesaid is: First, to fix, regulate, maintain, and control by the respondents the price and prices to be paid for all classes, kinds, brands, and grades of dressed beef, dressed pork, hams, bacon, and all kinds of cured meats and lard, sold to the retail butchers and dealers in all kinds of fresh and cured meat and the consuming public in the cities of St. Joseph, Kansas City, St. Louis, and throughout the state of Missouri; second, to maintain the said price or prices, when so fixed as aforesaid, to be paid for all classes, kinds, and brands of dressed beef, dressed pork, hams, bacon, and all other cured meats and lard by the retail butchers, dealers in meat, and the consuming public in the cities of St. Joseph, Kansas City, St. Louis, and throughout the state of Missouri; and, third, that it is one of the objects of said combination, agreement, pool, and confederation so made as aforesaid by the respondent corporations by the means and in the manner aforesaid to prevent, prohibit, and avoid competition among themselves and others in the sale in Missouri of the said commodities dealt in and handled by the said respondents. The information then charges that the respondents, by the means and manner aforesaid, have obtained control of, and monopolized to the exclusion of all others, the business of selling all classes and kinds and grades and brands of dressed beef, dressed pork, hams and bacon, and cured meats and lard, to the retail butchers, dealers in meat, and the consuming public in the state of Missouri, to the great detriment of the public. It is then charged that by reason of the monopoly and control and exclusion of competition in the sale of said commodities aforesaid in the manner and means aforesaid the respondents and their agents, officers, and managers, have been enabled and now are selling to the butchers and dealers in meat and the consuming public in Missouri certain grades of dressed beef, pork, hams, bacon, cured meats, and lard of an unwholesome and inferior

quality, to the great detriment of the public. It is then charged that the purpose and intention of respondents has been and now is to wilfully and unlawfully combine and confederate as aforesaid with each other to monopolize and control absolutely and prevent competition in the business of dressed beef and meats as aforesaid in the state of Missouri, and that said respondents are now wilfully and unlawfully maintaining said illegal agreement, and unlawfully and illegally fixing and controlling prices in the manner aforesaid for said commodities, and which said price for the aforesaid commodities so fixed by the respondent and others acting with them as aforesaid is the minimum price to be charged by respondents throughout the state of Missouri for the different classes, kinds, grades, and brands of dressed meat and pork, hams, bacon, and cured meats and lard, and that said prices so fixed as aforesaid are the minimum prices at which agents, employees, and officers of respondents are allowed to sell said products throughout Missouri. It is then charged that by reason of the premises and facts aforesaid, since the 21st of August, 1899, and up to the present time, respondent corporations have grossly offended against the laws of this state, and wilfully and flagrantly and grossly abused and misused their corporate authority and franchises and privileges, and have wilfully and unlawfully assumed and wilfully usurped authority and privileges not granted said corporations by the laws of Missouri by entering into and becoming a member of and a party to said trust, combination, confederation, and pool, as aforesaid, to monopolize and control the business of selling dressed beef, dressed pork, ham, bacon, and all cured meats and lard in the state of Missouri, and by means of said combination aforesaid to prevent competition in said business, and to regulate, fix, and maintain the price or prices to be charged retail butchers, dealers in meat, and the consuming public for the aforesaid products, and that in pursuance of the aforesaid agreement so made respondents are now unlawfully and wilfully monopolizing and regulating, fixing, maintaining, and controlling the prices to be paid by retail butchers, dealers in meat, and the consuming public for the products above mentioned, and that the action of the respondent corporations as hereinabove set out is a wilful and malicious perversion of the franchises granted to said corporations by the state of Missouri, and an illegal, wilful usurpation of privileges not granted to them, and is a great and permanent injury to the public. The prayer of the petition is that "respondent corporations, each and all of them, severally be excluded from all corporate rights and franchises under the laws of the state, and that their rights, authority, license, and certificate to do business under the laws of Missouri be declared forfeited, and that each of them and every one of them be ousted from their several franchises, corporate rights, and privileges."

The Krug Packing Company answered
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separately, denying generally the allegations of the information. The other respondents answered jointly, setting up many specific defenses. On motion of the attorney general the court struck out all of the defenses except the sixth paragraph of the second defense pleaded, which first alleged the corporate organization of each of the above-named Armour, Hammond, and Cudahy and Swift packing companies as corporations, and their right to do business in Missouri, and then respondents denied that they ever made or entered into an agreement, confederation, combination, pool, or understanding by and among either of them or any other person or corporation to regulate, fix, and control the price to be paid by retail butchers, or anyone else, for any kind of pork, beef, cured meats, or lard, slaughtered or manufactured, prepared or offered for sale, or to be sold in the state of Missouri and elsewhere, or to maintain or control the prices thereof in this state, or to prevent competition in business between respondents and others engaged in like business; nor did respondents ever take any part in maintaining any such agreement, combination, pool, or understanding; that none of the officers, managers, agents, servants, or employees of this respondent at any time, with the consent of the respondent or otherwise, agreed and combined to fix or maintain an agreed price of the products handled by respondents which should by respondents be sold or offered for sale to the retail butchers or others or to the consuming public in Missouri, and that respondents never did agree upon or fix the prices at which they would sell in Missouri such products. Respondents then denied generally each and every allegation in the information contained except as in this paragraph 6 of the second defense admitted. Respondents then denied that they ever agreed, entered into, or became a member of or a party to any pool, trust, agreement, or understanding with any other person or persons or association of persons to regulate and fix the price of any article or commodity whatsoever, or the price to be paid therefor. Respondents then deny that they were ever parties to any contract, agreement, or combination designed or made with a view to lessen, or which tended to lessen, full and free competition in the importation, manufacture, or sale of any article, product, or commodity in this state. Respondents then also denied that they had ever sold to anyone any kind of dressed beef, dressed pork, ham, bacon, cured meats, and lard which is or was unwholesome, and of an inferior quality, and which was a detriment to the public.

It will be seen that this paragraph is in substance a general denial, and raised a general issue upon the pleadings. All of the respondents, except the Krug Packing Company, which is a Missouri corporation, are corporations organized under the laws of sister states, and have complied with the laws of this state with respect to foreign corporations, and have been licensed to do business in this state. Armour & Co. has never done

any business in this state, and never was a member of any pool, or guilty of any of the acts charged. The Krug Packing Company is not shown ever to have been guilty of the acts charged. This proceeding is therefore quashed as to them, and in speaking of the respondents hereinafter reference is had only to the Armour Packing Company, the Hammond Packing Company, the Cudahy Packing Company, and Swift & Co. Of these the Hammond Packing Company and Swift & Co. have extensive packing plants at St. Joseph, Missouri. The Armour Packing Company and the Cudahy Packing Company have extensive plants in Kansas City, Kansas. Swift & Co., the Cudahy Company, the Armour Packing Company, have "coolers" in St. Joseph and St. Louis, and the Hammond Packing Company has a "cooler" in St. Joseph. The Armour Packing Company, The Cudahy Packing Company, and Swift & Co. have no "coolers" in Kansas City, Missouri, but they sell their meats at their plants in Kansas City, Kansas, to the butchers and their customers in Kansas City, Missouri and deliver them to said butchers and customers in Kansas City, Missouri. Of the other corporations and persons alleged to have been with the respondents in the combination, Schwartzschild & Sulzberger Company had its plant in Kansas City, Kansas, and had "coolers" in Kansas City, Missouri, and St. Joseph; and Nelson, Morris & Co. had their plant in East St. Louis, Illinois, and had "coolers" in St. Louis, Kansas City, and St. Joseph.

The case was referred to Hon. I. H. Kinley, a member of the Kansas City bar, as special commissioner to take the testimony, and make and report a finding of facts, and with leave to the parties to file exceptions thereto. The report of the special commissioner covers 25 printed pages, and is too voluminous to be embodied herein. In brief, he finds:

(1) That the respondents, together with Nelson, Morris & Co., between August 21, 1899, and May 9, 1902, entered into "agreements, confederations, combinations, and understandings between themselves, to fix, regulate, and control the prices of dressed beef and fresh pork slaughtered, manufactured, prepared, and offered for sale or to be sold by respondents to the retail butchers and others at St. Joseph, Missouri, and that respondents, with Nelson, Morris & Co., agreed among themselves and with each other to maintain and control the prices of such dressed beef and fresh pork, and that, in pursuance of said agreements to fix, maintain, and regulate the prices for which said dressed beef and fresh pork should be sold, said respondents above named, during said time between August 21, 1899, and May 9, 1902, have sold to the butchers at St. Joseph, Missouri, said dressed beef and fresh pork at the prices so fixed, regulated, and maintained, except where such respondents gave rebates in money or in pounds of meat to their customers."

(2) The commissioner makes a similar finding of fact as to dressed beef in St. 61 L. R. A.

Louis, except that he finds that the Hammond Packing Company did do business in that city, and was not in the combination, but that the St. Louis Dressed Beef Company was in the combination in that city with the respondents.

(3) The commissioner finds that the respondents and others, in St. Louis, "about 1899 or 1900, formed a voluntary association for the purpose of meeting once a week at some hotel or place designated, and discussing and fixing the list prices to be charged the butchers for fresh pork, and at these meetings these representatives agreed among themselves and with each other to maintain these prices as fixed under a penalty of paying a fine of \$5 for each sale under such fixed price. They employed a secretary at \$10 per week, and paid the same by assessments on the members of the organization. These fines were expended for incidental expenses of the meetings and cigars. This organization, these meetings and agreements, were testified to by several who were parties thereto and participated in the agreements and fixed prices for which each should sell fresh pork to the butchers in St. Louis, Missouri, and that in pursuance of said combination, agreement, and conspiracy said respondents maintained the prices so fixed in selling such fresh pork to the butchers at St. Louis, Missouri, except where the prices were cut as aforesaid; and those testifying stated they did not keep such agreements, and did not intend to when they were made, and the most of the witnesses testified that the prices agreed on were reasonable."

(4) The commissioner finds that respondents at St. Joseph, St. Louis, and Kansas City sell to the trade from 65 to 80 per cent of all the dressed beef and from 50 to 60 per cent of all the dressed pork that is handled in those cities, but that such sales amount to "comparatively a very small portion of their business in selling fresh beef, fresh pork, and provisions throughout this and foreign countries."

(5) The commissioner finds that as soon as the attorney general began the initiatory steps in this case all of the respondents abandoned all of the said combinations.

(6) The commissioner finds that at St. Joseph and St. Louis, after meat had been in the coolers a certain length of time, the owners were allowed to sell it at a price less than the price fixed, and this is what is termed "concession meat."

(7) The commissioner excluded evidence showing that, if a butcher did not pay his bills to the respondent with whom he dealt by Wednesday of each week, he was put on the C. O. D. list of all the respondents and persons in the combine, and that the members of the combine had a meeting every Wednesday night to hear such reports and make such order.

(8) Over objection of the attorney general, the commissioner permitted the respondents to show how the cattle business in Kansas City had increased from \$4,210,605 in 1890 to \$1,655,966,699 in 1901, but afterwards excluded all except what related to

the years 1899, 1900, and 1901. The commissioner also allowed the respondents to show the number of animals the respondents killed, the number of persons they employ, and the amount they pay for salary and expenses. He refused to allow the respondents to show by various cattle raisers that the cattle-raising business has become more profitable since the respondents have been engaged in business, and that it would be injured if the respondents were ousted from doing business in this state.

Both sides have filed voluminous exceptions to the findings of fact by the commissioner. The case has been argued orally at length, and exhaustive briefs have been filed. The evidence has been printed in full, covering two volumes, aggregating 949 pages, while the brief of the informant covers 106 printed pages, and the two briefs of the respondents cover 200 pages.

Mr. Edward C. Crow, Attorney General, for informant:

The Missouri anti-trust acts are constitutional.

State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 45, 45 L. R. A. 363, 52 S. W. 595; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670; *Chapin v. Brown Bros.* 83 Iowa, 156, 12 L. R. A. 428, 48 N. W. 1074; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 381, 29 N. E. 888; *Milwaukee Masons' & Builders' Asso. v. Niezcrowski*, 95 Wis. 129, 37 L. R. A. 127, 70 N. W. 166; *Volcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 31 Pac. 581; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598, 19 S. W. 274; *India Bagging Co. v. Kock*, 14 La. Ann. 168; *Western Boatmen's Benev. Asso. v. Kribben*, 48 Mo. 41.

Acts of the managers and salesmen and agents of respondents bind the corporations.

State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 38, 45 L. R. A. 363, 52 S. W. 595; *Northrup v. Mississippi Valley Ins. Co.* 47 Mo. 442, 4 Am. Rep. 337; *Boogher v. Life Asso. of America*, 75 Mo. 324, 42 Am. Rep. 413; *Buckley v. Knapp*, 48 Mo. 152; *State v. Boogher*, 3 Mo. App. 442; *Brennan v. Tracy*, 2 Mo. App. 540; *Perkins v. Missouri, K. & T. R. Co.* 55 Mo. 214; *Sherman v. Commercial Printing Co.* 20 Mo. App. 38; *Favorite v. Cottrill*, 62 Mo. App. 119; *Cooley, Torts*, 2d ed. pp. 119, 120; *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474; *State ex rel. Crow v. Aetna Ins. Co.* 150 Mo. 113, 51 S. W. 413; *Elliott, Priv. Corp.* 247.

Acts of agents of a corporation within the scope of their employment are the acts of the corporation, and are evidence against it.

Northrup v. Mississippi Valley Ins. Co. 61 L. R. A.

47 Mo. 442, 4 Am. Rep. 337; *Pitts v. D. M. Steele Mercantile Co.* 75 Mo. App. 232; 3 Clark & M. Priv. Corp. pp. 2216-2218; *Kirk-stall Brewery Co. v. Furness R. Co.* L. R. 9 Q. B. 408; *Potts v. Wabash, St. L. & P. R. Co.* 17 Mo. App. 401; *Dubuque & S. O. R. Co. v. Pierson*, 70 Fed. 303; *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163; *Hauley v. Gray Brothers Artificial Stone Pav. Co.* 106 Cal. 337, 39 Pac. 609; *Webb v. Smith*, 6 Colo. 365; *Norwich & W. R. Co. v. Cahill*, 18 Conn. 484; *Imboden v. Etowah & B. B. Min. & Hydraulic Hose Co.* 70 Ga. 86; *Fulton Bldg. & L. Asso. v. Greenlea*, 103 Ga. 376, 29 S. E. 932; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L. R. A. 696, 25 N. E. 799; *Wabash R. Co. v. Kelley*, 153 Ind. 119, 52 N. E. 152, 54 N. E. 752; *Black v. Des Moines Mfg. & Supply Co.* (Iowa) 77 N. W. 504; *Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co.* 59 Kan. 111, 52 Pac. 71; *Buffum v. York Mfg. Co.* 175 Mass. 471, 56 N. E. 599; *Oakland County Sav. Bank v. State Bank*, 113 Mich. 284, 71 N. W. 453; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 68; *Morris & E. R. Co. v. Green*, 15 N. J. Eq. 469; *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158, 26 Atl. 27, 537; *Spann v. Erie Boatmen's Transp. Co.* 157 N. Y. 694, 51 N. E. 1094; *Steinbach v. Prudential Ins. Co.* 62 App. Div. 133, 70 N. Y. Supp. 809; *O. S. Paulson Mercantile Co. v. Seaver*, 8 N. D. 215, 77 N. W. 1001; *Sturges v. Bank of Circleville*, 11 Ohio St. 153; *O'Toole v. Post Printing & Pub. Co.* 179 Pa. 271, 36 Atl. 288; *Beckham v. Southern R. Co.* 50 S. C. 25, 27 S. E. 611; *Ward v. Tennessee Coal, I. & R. Co.* (Tenn. Ch. App.) 57 S. W. 193; *Houston, E. & W. T. R. Co. v. Campbell*, 91 Tex. 551, 43 L. R. A. 225, 45 S. W. 2; *Hall v. Union Cent. L. Ins. Co.* 23 Wash. 610, 51 L. R. A. 288, 63 Pac. 505; *Coyle v. Baltimore & O. R. Co.* 11 W. Va. 94; *McGowan v. Supreme Court, I. O. of F.* 104 Wis. 173, 80 N. W. 603; 1 Greenl. Ev. 16th ed. § 184c; *Spies v. People*, 122 Ill. 213, 3 Am. Rep. 321, 12 N. E. 865, 17 N. E. 898.

The proof of the express agreement as to the fresh pork is competent evidence against each of the respondents, tending to prove the conspiracy between respondents to fix, regulate, and control the price to be paid for dressed beef, because it proves an unlawful agreement and relationship to exist between respondents with reference to carrying on a portion of the business that they all engaged in, to wit, the pork business.

Tarbox v. State, 38 Ohio St. 581; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *Gardner v. Preston*, 2 Day, 205, 2 Am. Dec. 91; *Luckey v. Roberts*, 25 Conn. 480; *King v. Stone*, 6 T. R. 527; *Rex v. Hammond*, 2 Esp. N. 719; *McDonald v. People*, 25 Ill. App. 350; *Ford v. State*, 34 Ark. 649; *McDonald v. People*, 126 Ill. 150, 18 N. E. 817; 6 Am. & Eng. Enc. Law, pp. 864, 865.

The state is not required to prove that the agreement was made in express terms to fix and maintain the prices of dressed beef.

State v. Walker, 98 Mo. 104, 9 S. W. 646, 11 S. W. 1133.

It is not necessary, in order that the fact of a conspiracy may be established, that it should be proved by evidence of an express agreement or compact between the alleged conspirators, or by direct evidence of any agreement or compact. A conspiracy may be proved inferentially, or by circumstantial evidence.

United States v. Rindskopf, 6 Biss. 259, Fed. Cas. No. 16,165; *United States v. Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223; *Drake v. Stewart*, 22 C. C. A. 104, 40 U. S. App. 173, 76 Fed. 140; *Gardner v. Preston*, 2 Day, 205, 2 Am. Dec. 91; *Spies v. People*, 122 Ill. 213, 12 N. E. 865, 17 N. E. 898; *Aroher v. State*, 106 Ind. 426, 7 N. E. 225; *Taylor County v. Standley*, 79 Iowa, 666, 44 N. W. 911; *Bloomer v. State*, 48 Md. 521; *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *Benford v. Sanner*, 40 Pa. 9, 80 Am. Dec. 545; *State v. Sterling*, 34 Iowa, 443.

A mutual implied understanding is sufficient, so far as the combination or confederacy is concerned, to constitute the offense.

United States v. Sacia, 2 Fed. 754; *United States v. Cassidy*, 67 Fed. 698; *United States v. Lancaster*, 10 L. R. A. 333, 44 Fed. 896; *Gibson v. State*, 89 Ala. 121, 8 So. 98; *Spies v. People*, 122 Ill. 170, 12 N. E. 865, 17 N. E. 898; 6 Am. & Eng. Enc. Law, p. 840; *Reg. v. Fellowes*, 19 U. C. Q. B. 48; *United States v. Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223.

Where corporations receive the benefit of the acts of the agents and the fruits of the business transacted by them, the corporations are bound by the agents' acts.

Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936; *Elliott, Priv. Corp.* § 247; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 37, 45 L. R. A. 363, 52 S. W. 595; *Nickell v. Phoenix Ins. Co.* 144 Mo. 420, 46 S. W. 435.

If conspiracy to fix, maintain, regulate, and control the prices to be paid for dressed pork, beef, and cured meats between respondents and others has been proved, then the acts and declarations of one of the respondents or its agents in the conduct of the business of respondent is evidence against all of the respondents.

State v. Walker, 98 Mo. 104, 9 S. W. 646, 11 S. W. 1133; *Sundry Goods, Wares, & Merchandises v. United States*, 2 Pet. 359, 7 L. ed 451; *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *United States v. Lancaster*, 10 L. R. A. 333, 44 Fed. 896; *United States v. Cassidy*, 67 Fed. 698; *Lincoln v. Claflin*, 7 Wall. 132, 19 L. ed. 108; *Drake v. Stewart*, 22 C. C. A. 104, 40 U. S. App. 173, 76 Fed. 140; *State v. Duffy*, 124 Mo. 1, 27 S. W. 358; *State v. Minton*, 116 Mo. 605, 22 S. W. 808; *Spies v. People*, 122 Ill. 213, 12 N. E. 865, 17 N. E. 898; 6 Am. & Eng. Enc. Law, 2d ed. pp. 866, 870, 871; *Com. v. Campbell*, 7 Allen, 541, 83 Am. Dec. 705; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172. 61 L. R. A.

Messrs. Karnes, New, & Krauthoff and Frank Hagerman, for respondents:

The declarations of an agent are admissible as evidence against his principal, only when made while transacting the business of the principal and as a part of the transaction which is the subject of the inquiry in the suit in which they are offered.

Adams v. Hannibal & St. J. R. Co. 74 Mo. 553, 41 Am. Rep. 333; 1 Greenl. Ev. 14th ed. § 114.

The agency must be proved before the acts or declarations of the agent will affect the principal.

Francis v. Edwards, 77 N. C. 271; *Galbreath v. Cole*, 61 Ala. 139; *Central Branch Union P. R. Co. v. Butman*, 22 Kan. 639; *Corbin v. Adams*, 6 Cush. 93; *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Covington & L. R. Co. v. Ingles*, 15 B. Mon. 637; *Tuttle v. Brown*, 4 Gray, 457, 64 Am. Dec. 80.

The declarations of an agent are not competent to charge his principal, unless a part of the *res gestæ*; that is, unless they relate to the identical contract in controversy.

1 Am. & Eng. Enc. Law, 2d ed. p. 695; *Dorne v. Southwark Mfg. Co.* 11 Cush. 205; *Barber v. Bennett*, 62 Vt. 50, 19 Atl. 978.

The acts of agents, performed by the authority of the corporation, are the acts of the corporation. The unauthorized acts of agents will not, in a proceeding to enforce a forfeiture of its franchises, be deemed the acts of the corporation.

9 Am. & Eng. Enc. Law, 2d ed. p. 590.

So far as any sale was concerned, the *res gestæ* was as to that sale, and not as to some state of things or existence of some fact collateral to the sale.

1 Greenl. Ev. § 114; *Milwaukee Harvester Co. v. Tymich*, 68 Ark. 225, 58 S. W. 252; *Winchester & P. Mfg. Co. v. Carey*, 116 U. S. 161, 29 L. ed. 591, 6 Sup. Ct. Rep. 369; *Southern P. Co. v. Arnett*, 50 C. C. A. 17, 111 Fed. 849; *Gimbel v. Salomon*, 54 Iowa, 389, 6 N. W. 582; *Corbin v. Adams*, 6 Cush. 93; *Batchelder v. Emery*, 20 N. H. 165.

Agreements which have for their object the realization of a fair price for the product manufactured and sold are not against public policy, even though in some respects they operate in restraint of trade.

1 Eddy, Combinations, § 224; *Cohen v. Berlin & J. Envelope Co.* 38 App. 499, 56 N. Y. Supp. 588; *Ontario Salt Co. v. Merchants' Salt Co.* 18 Grant Ch. (U. C.) 540.

Refusing to sell except for cash to delinquent debtors is not any evidence of any unlawful combination.

Breuster v. C. Miller's Sons Co. 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301; *Schulten v. Bavarian Brewing Co.* 96 Ky. 224, 28 S. W. 504; *Vandeweghe v. American Brewing Co.* (Tex. Civ. App.) 61 S. W. 526; *John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* 54 App. Div. 223, 66 N. Y. Supp. 615; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

Even if a judgment of ouster should go, it should be limited to ousting respondents from the particular illegal act charged, *i. e.*, from fixing or maintaining prices to local butchers on the sale of fresh meats from the coolers at St. Joseph and St. Louis.

State ex rel. Crovo v. Lincoln Trust Co. 144 Mo. 582, 46 S. W. 593; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 483, 53 L. R. A. 413, 53 N. E. 1089; 2 Eddy, Combinations, § 1189; *State ex rel. Kohler v. Cincinnati, N. O. & T. P. R. Co.* 47 Ohio St. 130, 7 L. R. A. 319, 23 N. E. 928; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; *Yore v. San Francisco City & County Super. Ct.* 108 Cal. 431, 41 Pac. 477; *State v. Norwalk & D. Turnp. Co.* 10 Conn. 167; *State ex rel. Atty. Gen. v. Topeka*, 30 Kan. 653, 2 Pac. 587; *State ex rel. Little v. Board of Regents*, 55 Kan. 389, 29 L. R. A. 378, 40 Pac. 656; *People v. Rensselaer & S. R. Co.* 15 Wend. 113, 30 Am. Dec. 33; *Com. v. Delaware & H. Canal Co.* 43 Pa. 301; *State ex rel. Circuit Attorney v. Bernoudy*, 36 Mo. 279; *Weston v. Lane*, 40 Kan. 479, 20 Pac. 280; *State ex rel. Crossland v. Omaha & C. B. R. & Bridge Co.* 91 Iowa, 517, 60 N. W. 121.

The court should regard the public interest and public welfare.

Brown v. Carolina C. R. Co. 83 N. C. 128; 1 High, Inj. 3d ed. § 742; 16 Am. & Eng. Enc. Law, 2d ed. p. 364; *Stoddard v. Vanlaningham*, 14 Kan. 18; *State ex rel. Clapp v. Minnesota Thresher Mfg. Co.* 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020; *Torrey v. Camden & A. R. Co.* 18 N. J. Eq. 293; *Society for Establishing Useful Mfrs. v. Butler*, 12 N. J. Eq. 499; *Huckentine's Appeal*, 70 Pa. 102, 10 Am. Rep. 669; *Hyatt v. Myers*, 71 N. C. 271; *Atty. Gen. ex rel. Eason v. Perkins*, 17 N. C. (2 Dev. Eq.) 38; *Atty. Gen. ex rel. Bradsher v. Lea*, 38 N. C. (3 Ired. Eq.) 302; *State ex rel. Crossland v. Omaha & C. B. R. & Bridge Co.* 91 Iowa, 517, 60 N. W. 121; *Re Franklin Teleg. Co.* 119 Mass. 447.

Marshall, J., delivered the opinion of the court:

The statute of this state (Rev. Stat. 1899, § 8965) relating to "pools, trusts, and conspiracies" makes it unlawful for any persons, associations, partnerships, or corporations to become a member of or a party to "any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated, or fixed," or to enter into any such pool to fix or limit the amount or quantity of any such articles. Section 8966 prohibits any combinations that are designed or tend "to lessen full and free competition in the importa-

tion, manufacture, or sale of any article, product, or commodity in this state." And § 8971 punishes the violation of the law by a forfeiture of the corporate rights and franchises if it be a home corporation, or a forfeiture of its right to do business in this state if it be a foreign corporation. Other penalties and forfeitures are imposed by § 8968, but are not involved in nor sought to be enforced in this proceeding.

The commissioner reported that over the objections of the respondents he had admitted "the statements and admissions of the managers of these coolers and solicitors of respondents, showing that such combinations and agreements to fix and regulate prices as aforesaid had been made and entered into by respondents. Without such testimony it is doubtful if the existence of such combination could be found, but, if such statements and admissions be admissible,—as I have ruled them to be,—then" he found that the respondents were guilty. To appreciate the force of what is thus said it is necessary to understand how the respondents did business in this state. Great care has been taken to show that the business done by the respondents in this state is but an "infinitesimal" portion of the total business it does all over the world. The business done in this state is not done from the slaughtering or packing plants of the respondents, nor is it conducted or personally managed by any of the higher officers or agents of the respondents, but it is all done through "coolers," and the agents of the respondents who manage the "coolers" and transact the business. The commissioner finds the facts in this regard, and the conceded facts show the finding is correct, to be as follows: "A 'cooler,' as shown by the testimony, consists of two or more rooms, at least one of which is refrigerated, the temperature being kept down from about 34 to 40 degrees Fahrenheit. Fresh meat is taken from the packing house, and placed in this refrigerating room for sale to the butchers in the city where the cooler is located. As a rule, the packers only sell to the butchers who sell to the public from their shops. At each cooler is a 'cooler manager' in charge thereof, one or more city solicitors, who solicit trade of the butchers, and a driver, who, from a wagon driven by him, delivers the meat to the butcher who has purchased it. As a rule, the butcher goes to the 'cooler,' inspects the carcass he wishes to buy, and, if it suits him, he purchases it, and it is delivered to him at his shop, and he pays therefor at the cooler." In other words, the purchasers deal exclusively with either the solicitors, who urge them to buy, or the manager of the cooler. The drivers, of course, only deliver the goods. There is also a bookkeeper or cashier and an auditor at each cooler, who are subordinate to the manager, but in referring to the statements and admissions of the agents of the respondents these subordinate agents are not intended, but the managers of the coolers and the solicitors or salesmen are alone referred to.

The statements and admissions referred to

were made by the solicitors when engaged in the business of soliciting orders from the retail butchers, and related to the price at which sales could be made, and the reasons for such prices, and to schemes and subterfuges for billing the goods at a price stated or as of certain quantities, and afterwards giving a rebate of the price or for sending more meat than the bills called for; or, as it is termed by the witnesses, of allowing a rebate in cash or in pounds of meat, or they were made by the managers of the coolers when engaged in making sales or when allowing such rebates. They were, therefore statements made by these persons who were employed by the respondents and who transacted all of the respondents' business of selling in this state, were made while so engaged, and related to the business being transacted. They were, therefore, statements of agents touching the business of the principal then being transacted by such agents, and such agents were the only representatives of the respondents that the buying public ever saw or dealt with. They quoted the prices to the public. They made and carried out the arrangements for rebates. They delivered the goods and collected the bills. They were, therefore, statements made by authorized representatives of the respondents while in the transaction of their business and touching the business. They were, therefore, admissible in evidence, and were just as binding upon the respondents as if those statements had been made by the highest officer of the company, or had been solemnly adopted by the directors or stockholders of the company and entered on the minutes of their meeting. *Northrup v. Mississippi Valley Ins. Co.* 47 Mo. 442, 4 Am. Rep. 337; *Western Boatmen's Benev. Assn. v. Kribben*, 48 Mo. loc. cit. 41; *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 41 Am. Rep. 333; *Boogher v. Life Assn. of America*, 75 Mo. loc. cit. 324, 42 Am. Rep. 413; *State ex rel. Crow v. Aetna Ins. Co.* 150 Mo. loc. cit. 133, 134, 51 S. W. 413; *Nickell v. Phœnia Ins. Co.* 144 Mo. 420, 46 S. W. 435; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. loc. cit. 38, 45 L. R. A. 363, 52 S. W. 595.

The testimony introduced by the state was abundant to show that the respondents were members of a combination or pool to fix and maintain prices. The state called as witnesses nine butchers who did business with the respondents in St. Joseph, whose testimony showed that they all got rebates in money or pounds of meat from respondents, and that in every instance they were given by the solicitors or the cooler managers, who said they could not sell the meat for less than a certain price because all of the respondents had an agreement as to prices which was fixed every Wednesday by the head man of the packing plants, and the prices given by them to the cooler managers on Thursday and by the cooler managers and solicitors were given to the trade; and that, if anyone cut the price, he would be fined, so they circumvented their fellow conspirators by giving rebates as herein described. 61 L. R. A.

That such a combination existed at the time charged in this case is further shown by facts and circumstances outside of any admissions and statements of the agents of the respondents. The witnesses testified that they had tested the various respondents by going to the several coolers of the different respondents on the same day, and trying to buy cheaper from one than was offered them by another, and in every instance they found the prices to be exactly the same at all of the coolers. It further appeared that on various occasions a manager or solicitor ascertained that a purchaser had gotten a rebate from one of the other companies, and he would immediately secure from the customer the papers showing the rebate, and take them away with him, and afterwards the agent of the company that had granted the rebate complained that the purchaser had gotten him into trouble by allowing the fact to become known. In fact, it appears that in every instance when a rebate was granted secrecy was strictly enjoined upon the customer. It further appeared that on various occasions the cooler managers or solicitors would tell the butchers they had better lay in a supply of meat before a certain day, as the prices would go up on that day, and that in every instance the prices did go up uniformly at the time specified at all of the coolers of all the respondents. It further appeared that at all of the coolers "concession meat," as it is called, was sold. By "concession meat" is meant meat that has remained so long on hand in the cooler that it had become discolored or moldy, or not exactly what would be termed as first-class, but, as some of the witnesses called it, unfit for sale, but not exactly unfit for use after it had been trimmed up. When any cooler had such meat on hand, the manager of another or of other coolers would be called in, and they would examine it, and if they believed it to be of such a character, they would "concede" to the manager of the cooler having such meat the right or privilege to sell it for a price less than the agreed price. The manager who had obtained such concession would then sell it, or try to sell it, to the trade at such price as he could get for it. It further appeared that no butcher could buy meat from any packer that did not do business in St. Joseph, because packers located elsewhere refused to sell to them, stating as a reason that St. Joseph was the respondents' territory, and such outside packers were afraid to invade their territory. It further appeared that when the attorney general took the initiatory steps in this case the respondents immediately dissolved, discontinued, and stopped the pool and combination arrangements.

The state called eleven witnesses in St. Louis, butchers, city meat inspectors, and former managers of the respondents' coolers, who testified to the same facts, circumstances, and conditions in St. Louis as to dressed beef in St. Louis. As to dressed pork the state called five witnesses, who were themselves members of such a pool, trust, or combination, who testified that the

respondents (except the Hammond Packing Company) were also members of the pool; that the representatives of the pool, trust, or combination met every week at either the Southern or Lindell hotel; that the prices were fixed by an arbitrator, named McCall, who was paid a salary of \$10 a week, raised by assessments on all of the members, and if anyone cut the prices, he was fined \$5; that the combination ran for two or three years, and until the institution of this suit, when it was abandoned. As to the existence of a combination as to dressed pork, therefore, the facts and circumstances show it as plainly as they do in regard to dressed beef, and, in addition, five of the conspirators testified directly to it.

It is quite too plain for doubt that persons or companies who are engaged in the same line of business in the same place do not bill goods at one price and give rebates in money or goods or weights, and do not give notice of a uniform advance of rates at a certain date, always followed by such a rise, and do not maintain a uniform selling price, and do not call in their competitors and get them to "concede" to them a right to sell shop-worn or old goods at a price less than such uniform price, and do not gather up papers or bills of their competitors showing that they have been selling below a certain price, and do not abandon, dissolve, and discontinue their understandings or combinations as soon as the legality thereof is called in question by the state's officers, unless there has been an unlawful pool, trust, or combination to fix and maintain prices. Such acts and circumstances and practices speak as loudly, as directly, and as certainly, and tell as strong and conclusive a tale of wrongdoing in those regards, as any witness could possibly testify to it or any resolution formally adopted by the directors or stockholders could prove it. Independent, therefore, of any admissions or statements of the managers of the coolers or of the solicitors, which, however, were clearly admissible, the state has made out a case against the respondents under the facts and circumstances of the case. The commissioner, therefore, reached the right conclusion, and properly followed the rules of law as to the admissions and statements of the managers of the coolers and solicitors, as laid down in the cases hereinbefore cited; but he was in error in saying that, outside of such admissions and statements, it is doubtful if the charges against the respondents could be sustained. As against all such direct testimony, admissions, and statements the respondents offer no proofs, call no witnesses, and remain absolutely mute. They do not even do, as was done in *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595, call the chief officers of the conspirators, and show that they never knew of nor authorized any such arrangements or combinations by their agents. They do not show or pretend that they have not reaped the benefits of such arrangements or combinations for all the years they existed. They simply let the

state's showing stand uncontradicted, and content themselves with claiming that the admissions and statements were not made at the time the agents were engaged in transacting the business they were given power to transact, but were made before or after the said time, which an analysis of the evidence shows is not the fact; and with further showing how their business has increased in the last ten years, how many persons they employ, how much wages they pay, how the cattle raising business has increased since they began business, and how it would be injured if they are ousted of their right to do business in this state, how they regulate their prices by the price of cattle, how much loss the resident companies would suffer by reason of not being allowed to operate their plants, how the butchers in St. Joseph are as bad as they are, and worse, because, while they sell concession beef to the butchers at reduced prices, and give butchers rebates to get their trade from each other or to retain their trade, the butchers do not sell concession meat any cheaper to the public, nor do they give the public the benefit of any rebates; and that the butchers belong to a union, which fixes the price of meat for the consumers, and keeps newcomers out of the trade, and prohibits or tries to prohibit the packers from selling directly to the trade; and that, as to the dressed pork combine in St. Louis, it never was lived up to, and never was intended to be lived up to, and the members were false to their trust agreements so often that they could not make the combination effective. None of these matters constitute any defense or bar to this action. The commissioner admitted the testimony bearing on most of these matters for the purpose of enabling the court to be fully advised as to all the conditions when it came to fixing the punishment to be imposed.

"Competition is the life of trade." Pools, trusts, and conspiracies to fix or maintain the prices of the necessities of life strike at the foundations of government; instill a destructive poison into the life of the body politic; wither the energies of competitors; blight individual investments in legitimate business; drive small and honest dealers out of business for themselves, and make them mere "hewers of wood and drawers of water" for the trust; raise the cost of living and lower the price of wages; take from the average American freeman the ability to supply his family with necessary, adequate, and wholesome food; force the boys away from school, and into the various branches of trade and labor, and the girls into workshops and other avenues of business, and make them breadwinners while they are yet almost infants, because the head of the house cannot earn enough to feed and clothe his family. The people are helpless to protect themselves. The powers that be must protect them, or, as surely as history records the story of republican government in Rome, so surely will the foundations of our government be shaken, and its perpetuity threatened. Missouri (*State ex rel. Crow v. Fire-*

men's Fund Ins. Co. 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595); New York (*People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785); Pennsylvania (*Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159); Ohio (*Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666); Kentucky (*Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670); Iowa (*Chapin v. Brown Bros.* 83 Iowa, 156, 12 L. R. A. 428, 48 N. W. 1074); Illinois (*Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171, and *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361, 29 N. E. 888); Wisconsin (*Milwaukee Masons & Builders' Asso. v. Niezewowski*, 95 Wis. 129, 37 L. R. A. 127, 70 N. W. 166); California (*Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 31 Pac. 581); Texas (*Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598, 19 S. W. 274); Louisiana (*India Bagging Asso. v. Kook*, 14 La. Ann. 164); and the Supreme Court of the United States (*United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540),—have held statutes which prohibited such combinations or trusts to be constitutional, and, further, that all such combinations or agreements are against public policy, and void at common law and as a matter of American common law, irrespective of whether there is any statute on the subject or not. The rule is well stated in the syllabus to *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785: "A combination between independent dealers to prevent competition between themselves in the sale of an article of prime necessity [the combination was to fix and maintain the price of coal] is, in the contemplation of law, an act inimical to trade or commerce, without regard to what may be done under and in pursuance of it; and, although the object of such a combination was merely the due protection of the parties against ruinous rivalry, and no attempt was made to charge undue or excessive prices, where it appears that the parties acted under the agreement, an indictment for conspiracy is sustainable." The court further aptly says: "But the question here does not, we think, turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public or to the community in Lockport. The question is, Was the agreement, in view of what might have been done under it, and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law affixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. It is to be noticed that the organization of the 'exchange' was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regu-

lations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified in case of persistent default by the member that 'he is not entitled to the privileges of membership in the exchange.' No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange. The cases of *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, and *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282, are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and the court in those cases held that the agreements were void on the ground that they were agreements to prevent competition, and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5 Denio, the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the injury which might result from agreements to raise prices or prevent competition. See also *People v. Fisher*, 14 Wend. 10, 28 Am. Dec. 501; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190. The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed, and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very diffi-

cult in any case to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state, and that the jury were properly instructed that, if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal, and justified the conviction of the defendants."

In *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33, 24 N. E. 834, it was held, as stated in syllabus, that, "as corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their functions, maims and cripples their separate activity, and takes away free and independent action, affects unfavorably the public interests." Accordingly, where a number of persons, including the defendant in that case, entered into an agreement the purposes of which were declared to be "(1) to promote economy of administration, and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit; (2) to give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar; (3) to furnish protection against unlawful combinations of labor; (4) to protect against inducements to lower the standard of refined sugars; (5) generally to promote the interests of the parties hereto in all lawful and suitable ways;" and each of the parties transferred all its shares of stock to a board, and the board managed the whole business,—it was held to be against public policy, in restraint of trade, and void. It is not essential that the combination or trust shall constitute a complete monopoly, for, as was said by Mr. Chief Justice Fuller in *United States v. E. C. Knight Co.* 156 U. S. loc. cit. 16, 39 L. ed. 330, 15 Sup. Ct. Rep. 255: "Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result shall be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." As was well said by Best, Ch. J., in *Homer v. Ashford*, 3 Bing. 328: "The law will not permit anyone to restrain a person from doing what the public welfare and his own interests require he should do." If it be true that a combination or trust among the respondents has increased the cattle business in this state, and has encouraged the stock-raising business, and its prohibition hereafter will injure or destroy such business, or if such trust arrangements have given employment to so many people and put in circulation so many millions of dollars of money in this state, or if it be that the home corporations would lose their plants entirely if their franchises were taken away from them, such considerations would not amount to a defense or excuse for the offense charged. They are matters that 61 L. R. A.

should have been thought of before the offense was committed. So long as the law puts the stamp of condemnation on all arrangements, agreements, pools, trusts, and conspiracies to fix and maintain the prices of articles of prime necessity, the courts have no option but to enforce the law. The wisdom and experience of all ages and all people has demonstrated the necessity for such laws, and for the rigid enforcement of them. And, even after so many years of unflinching enforcement of such laws, the terrors and consequences thereof have not been sufficient to deter people from violating them. The conclusion is irresistible that the defendants are guilty of being members of a trust, pool, or conspiracy to fix and maintain the prices of dressed beef and dressed pork in this state at the times charged in the petition, except as before stated, Armour & Co. and the Henry Krug Packing Company, as to whom the writ must be quashed.

2. This leaves only the question of punishment. The punishment to be imposed rests in the sound judicial discretion of the court. It need not necessarily be a general judgment of ouster. It may be an ouster of the right to do the particular act complained of (*State ex rel. Crow v. Lincoln Trust Co.* 144 Mo. 562, 46 S. W. 593; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 483, 53 L. R. A. 413, 53 N. E. 1089; *State ex rel. Kohler v. Cincinnati, N. O. & T. P. R. Co.* 47 Ohio St. 130, 7 L. R. A. 319, 23 N. E. 928; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; *Yore v. San Francisco City & County Super. Ct.* 108 Cal. 431, 41 Pac. 477; *State v. Norwalk & D. Turnp. Co.* 10 Conn. 167; *State ex rel. Atty. Gen. v. Topeka*, 30 Kan. 653, 2 Pac. 587; *People v. Rensselaer & S. R. Co.* 15 Wend. 113, 30 Am. Dec. 33; *Com. v. Delaware & H. Canal Co.* 43 Pa. 301); or it may be a suspensive judgment of ouster with a fine accompaniment (*State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595); or it may be a simple fine, if it appears that the trust, pool, or conspiracy complained of and proved has been abandoned. In short, the character of the judgment rests in the discretion of the court. 5 Thomp. Corp. § 6812; *Weston v. Lane*, 40 Kan. 479, 20 Pac. 260; *State ex rel. Crossland v. Omaha & C. B. R. & Bridge Co.* 91 Iowa, 517, 60 N. W. 121; *State ex rel. Circuit Attorney v. Bernoudy*, 36 Mo. loc. cit. 281.

Under all the circumstances, a judgment of absolute ouster is not necessary, but the ends of justice will be satisfied by the imposition of a fine and the payment of all the costs in the case. It is accordingly ordered that the respondents, the Armour Packing Company, the Hammond Packing Company, the Cudahy Packing Company, and Swift & Company, each pay to the clerk of this court, within thirty days from this date, the sum of \$5,000 as a fine, and that they also pay the costs in this case. And it is further ordered that if the respondents, or any of them, fail to pay said fine and costs

within said time, then they or those so failing be ousted of all rights, privileges, and franchises of every nature and kind conferred upon them by the laws of this state, and be forever prohibited from doing business in this state.

All concur.

Robert L. SAMS, *Appt.*,
v.

ST. LOUIS & MERAMEC RIVER RAILROAD COMPANY, *Respt.*

(.....Mo.....)

1. A car starter does not represent the principal in ordering the motorman of a street car to move the car forward so as to clear the switch at the terminus of the line, where the car is being moved from one track to the other, preparatory to making the return trip, so as to render the principal liable for an injury thereby caused to the conductor; but he is a fellow servant of the conductor.
2. That a street car company is organized under the general railroad law, and has claimed to exercise the right of eminent domain, does not bring it within the terms of a statute making railroad companies "owning and operating a railroad" liable for injuries sustained by one servant "injured in the work of operating such railroad," by reason of the negligence of a fellow servant, where the company is in fact operating only a street railroad.
3. A street railroad is not within the provisions of a statute making corporations owning or operating railroads liable for injuries to one servant by the negligence of another while engaged in the work of operating such railroad.

(*Gantt, Brace, and Burgess, JJ., dissent.*)

(March 20, 1903.)

APPPEAL by plaintiff from a judgment of the Circuit Court for the City of St. Louis in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by **Valliant, J.:**

Suit for damages for personal injuries. The petition states that the defendant is a railroad corporation owning and operating a railroad from a point named in the city of St. Louis to a point named in St. Louis county, and is engaged in carrying passengers and freight by means of cars propelled by steam and electricity; that on each car the defendant has two employees,—a motorman, whose station is on the front platform, where he manipulates the machinery through which the electric power is applied,

NOTE.—As to the question whether a street railway is a "railroad" within the meaning of a statute making railroad companies liable for injury to a servant by a fellow servant, see also, in this series, Savannah, T. & I. of H. R. Co. v. Williams (Ga.) *ante*, 249.
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and a conductor, who has certain other duties to perform; that there was also at the time and place of the accident a third employee of the defendant, whom the plaintiff calls a "car despatcher," whose station was at the eastern terminus of the road, who had authority to direct the movements of the car, and to command the motorman and conductor in reference thereto; that upon the occasion in question the plaintiff was the conductor on one of these cars, one Horn was the motorman, and Hogan the car despatcher; that Horn was without skill or training; that on January 27, 1898, at the eastern terminus of the road, at Sixth and Locust streets, in St. Louis, while the plaintiff, in the due discharge of his duties as conductor, was on the ground, in front of the car, in the act of shifting the trolley to reverse the direction, the car, through the negligence and lack of skill of the motorman and the negligence of the car despatcher, was suddenly projected against the plaintiff, crushing him against another car which was standing on the track, and inflicting on him great bodily injuries. Specifications of the conduct of the motorman and car despatcher constituting the alleged negligence are set out in the petition, as likewise are the particulars of the injuries suffered by the plaintiff. The answer was a general denial, contributory negligence of the plaintiff, and a special plea that defendant was a street railroad corporation, organized for the purpose and engaged in the business only of conducting a street railroad, and the plaintiff, the motorman, and the car despatcher were fellow servants employed in operating the car, and therefore defendant was not liable to plaintiff for the negligence of his fellow servants. The reply was a general denial.

On the trial plaintiff introduced in evidence the charter of the defendant, by which it appeared that defendant was incorporated as an ordinary railroad company under article 2, chap. 42, Rev. Stat. 1889 (now art. 2, chap. 12, Rev. Stat. 1899); also evidence showing that it had claimed and exercised the right of eminent domain to condemn private property for a part of its right of way outside of the city; that its road in the city was in the city streets, and of the same character as ordinary street railroads, whilst in the country it was partly of that character and partly of the character of the ordinary steam railroads; that the cars of defendant were moved by electricity under the ordinary trolley system, and for the carrying of passengers only, except that defendant had one car, propelled in like manner as its passenger cars, which was used to carry the United States mails, and one half of it was arranged to carry freight or express packages, and was so used; that from its eastern terminus at Sixth street, west to Forty-First street, the road was used jointly for the same purpose by defendant and a street railway company called in the evidence the Suburban. The car on which the plaintiff was conductor was an ordinary street car, and was being

used as such, like the cars of the Suburban Company operating over the same road, only the defendant's car was red, and the Suburban's yellow. There was evidence tending to show that Hogan, the car starter, had authority to direct the conductor and motorman when to start, and that his authority to regulate the time space between cars applied, not only to the starting at the eastern terminus, but extended all along the line, and that in that matter the conductors and motorman were ordered to obey him; that if his orders were disobeyed he would report the offender, who was therefor liable to be suspended. There was no evidence to support the charge that the motorman was inexperienced or deficient in skill. The evidence as to the accident tended to show as follows: The road was a double track, ending at Sixth street on Locust. The mode of operating was: The cars would come east on the south track. The machinery would be reversed without turning the cars, and they would be passed over a switch to the north track, on which they would return west. This car came in a little late, and Hogan, the car starter, spoke angrily to the motorman, asking him where he had been. The car stopped, and the conductor stepped off to reverse the trolley; passing on the south side, holding the cord. Hogan was standing on the north side, and, seeing that the rear trucks of the car had not cleared the switch, motioned or called to the motorman to move up. The motorman, as if in obedience to that direction, set the apparatus to receive the electric current, but the car did not move, owing to the fact (which neither the motorman nor Hogan seemed to have noticed) that at that moment the conductor was in the act of reversing the trolley, and therefore the connection of the machinery with the wire overhead was broken. The motorman, still seeming not to see what the conductor was doing, took off the controller, leaving the apparatus open to receive the current, and started to the other end of the car, where he was to stand when going west. His duty, under the circumstances, was to have closed the machine against the admission of the current until the conductor had readjusted the trolley; but this he neglected to do, and on the instant the trolley touched the wire the car shot forward and crushed the plaintiff against one of the Suburban cars which was standing on the track, and inflicted on him great injuries.

At the close of the plaintiff's evidence the court, at the request of the defendant, gave an instruction to the effect that the plaintiff was not entitled to recover. Thereupon he took a nonsuit, with leave, and, his motion to set the same aside having been overruled, brings this appeal.

Messrs. C. A. Schnake and O. J. Mudd, for appellant:

The defendant was and is liable to plaintiff for Horn's negligence.

Act of Legislature approved February 9, 1897, Sess. Acts 1897, p. 96.
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Hogan was a vice principal, and defendant is liable to plaintiff for his negligence.

Session Acts 1897, p. 96, § 2, Fellow-Servant Act; *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359, 4 S. W. 129.

The fellow-servant act applies to street railroads.

St. Louis Bolt & Iron Co. v. Donahoe, 3 Mo. App. 559; *Koken Iron Works v. Robertson Ave. R. Co.* 141 Mo. 228, 44 S. W. 269.

If the fellow-servant act is not applicable to "street" railroads, respondent is not a "street" railroad, but is a "railroad corporation owning and operating a railroad in this state."

Mo. Rev. Stat. 1900, §§ 1163, 1880, 2666; *Booth, Street Railroads*, § 1, p. 2; *Ruckert v. Grand Ave. R. Co.* 163 Mo. 260, 63 S. W. 814; *Williams v. City Electric Street R. Co.* 41 Fed. 556; 2 Beach, Priv. Corp. § 403, pp. 664, 665; *St. Louis & M. River R. Co. v. Kirkwood*, 159 Mo. 239, 53 L. R. A. 300, 60 S. W. 110; *St. Louis Bolt & Iron Co. v. Donahoe*, 3 Mo. App. 559; *Manhattan Trust Co. v. Sioux City Cable R. Co.* 68 Fed. 82; *Powell v. Sherwood*, 162 Mo. 606, 63 S. W. 485; *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L. R. A. 208, 63 N. W. 1099; *Thompson-Houston Electric Co. v. Simon*, 20 Or. 60, 10 L. R. A. 251, 25 Pac. 147.

The existence, genus, species, individuality, privileges, powers, duties, and liabilities of this respondent, all depend upon the legislative act which gave it birth, and not upon its own voluntary action or nonaction.

Pennsylvania R. Co. v. Canal Comrs. 21 Pa. 9; *Millvale v. Evergreen R. Co.* 131 Pa. 1, 7 L. R. A. 369, 18 Atl. 993.

Respondent may not incorporate under a law, take caste or color from the law, avail itself of its benefits, but relieve itself of its burdens.

St. Louis & M. River R. Co. v. Kirkwood, 159 Mo. 254, 53 L. R. A. 300, 60 S. W. 110.

Messrs. McKeighan & Watts and Robert A. Holland, Jr., for respondent:

The act of the legislature of Missouri of February 9, 1897, commonly known as the fellow-servant act, does not apply to street railroads.

Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L. R. A. 208, 63 N. W. 1099; *Front Street Cable R. Co. v. Johnson*, 2 Wash. 112, 11 L. R. A. 693, 25 Pac. 1084; *Louisville & P. R. Co. v. Louisville City R. Co.* 2 Duv. 175; *Manhattan Trust Co. v. Sioux City Cable R. Co.* 68 Fed. 82; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; *Sears v. Marshalltown Street R. Co.* 65 Iowa, 742, 23 N. W. 150; *Massachusetts Loan & T. Co. v. Hamilton*, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588; *Booth, Street Railroads*, 2; *Thompson-Houston Electric Co. v. Simon*, 20 Or. 60, 10 L. R. A. 251, 25 Pac. 147; *Nichols v. Ann Arbor & Y. Street R. Co.* 87 Mich. 361, 16 L. R. A. 371, 49 N. W. 538.

Hogan was not a vice principal, certainly not with respect to the duties that he per-

formed as a "starter" at Sixth and Locust streets.

Grattis v. Kansas City, P. & G. R. Co. 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108; *Murray v. St. Louis Cable & W. R. Co.* 98 Mo. 573, 5 L. R. A. 735, 12 S. W. 252; *Garland v. Missouri, K. & T. R. Co.* 85 Mo. App. 579.

There was no causal connection between the direction given by Hogan and the injuries received by plaintiff.

Goodrich v. Kansas City, C. & S. R. Co. 152 Mo. 222, 53 S. W. 917; *Graney v. St. Louis, I. M. & S. R. Co.* 157 Mo. 666, 50 L. R. A. 153, 57 S. W. 276.

Valliant, J., delivered the opinion of the court:

1. There is nothing in the case to justify a conclusion that the car starter was a vice principal of the defendant. He had certain duties to perform, and in that his word was the word of the master to his fellow servants; and if they refused to obey him in that particular they were, on being reported to the manager, liable to be suspended. But each of the other servants had his peculiar duty to perform, and in which his word was that of the master. The conductor, by word or signal to the motorman, orders him to start or stop the car; and if he should refuse to obey, and the fact was reported to the manager, doubtless he would be disciplined. And there may be events in the operation of the car when the motorman may be in duty bound to give orders to the conductor, which he is to obey. But it would never be contended that the conductor and motorman were not fellow servants. And so is a car starter, who has no more authority than this man had, the fellow servant of the conductor and motorman. Although the motorman, in seeming obedience to the order of the car starter, did a negligent act, yet the car starter did not order him to do what he did. The order was to move the car forward so as to clear the switch. That was a proper thing to do, and could have been done in a proper manner. The argument is made that the order should not have been given at the instant the conductor was in the act of readjusting the trolley. Assuming, as we should, that the car starter saw what the conductor was doing when he gave the order, still the order did not mean that the motorman should move the car with the trolley off, which would have been impossible, but that he should do it in a proper way. The negligence was in the act of the motorman attempting to execute the orders without looking to see what the conductor was doing, and in removing the controller and starting to the other end of the car without closing the apparatus against the current which he was bound to know would pass into the machinery as soon as the trolley should touch the wire. We do not perceive any negligence in the act of the car starter, but undoubtedly the act of the motorman was negligence; and, if the defendant is liable to the plaintiff for the negligence of his fellow

servant, the trial court erred in giving the instruction which forced the nonsuit. This brings us to the main question in the case.

2. The general assembly passed an act which was approved February 9, 1897 (Acts 1897, p. 96) the 1st section of which (being now § 2873, Rev. Stat. 1899) is: "That every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury." The question is, Does that statute apply to the defendant, which claims to be a corporation owning or operating a street railroad, and to its servants engaged in the work of operating such street railroad?

(a) Appellant's first point is that the defendant is not a street railroad corporation, but that it is a railroad corporation, in the fullest sense of the word, possessing all the corporate powers of such. The defendant's charter, in evidence, shows that to be the fact. To this point appellant's main argument is addressed. It is urged that not only has the defendant such corporate powers granted by its charter, but that it has asserted them in court, and has been permitted to exercise the right of eminent domain; that in a suit which reached this court it was heard to say that it was a railroad corporation of general powers and duties, and, as such, that it could not be restricted, nor could it by contract restrict itself, to the carrying of passengers only. *St. Louis & M. River R. Co. v. Kirkwood*, 159 Mo. 239, 53 L. R. A. 300, 60 S. W. 110. And the argument is pressed that defendant cannot be heard to claim the rights, yet deny the liabilities, of a general railroad corporation. Referring to the case just cited (*St. Louis & M. River R. Co. v. Kirkwood*), in which this defendant asserted its powers as a general railroad corporation, and resisted the effort of the city of Kirkwood to restrict it to the dimensions of a street railroad company, we find that this court did not sustain the company in its assertion; but, on the contrary, the court, per Gantt, J., said: "We think the facts in evidence constituted plaintiff, so far as the city of Kirkwood is concerned, a street railway, with the right to transport passengers only." That essential differences exist between railroads and street railroads is recognized by the learned counsel for appellant in their briefs. They review the cases and texts cited in the briefs for respondent, and cite many in their own briefs, showing the recognized differences, and mark the points that distinguish the one kind from the other; but they answer all that those law writers say on that subject by saying that this is not a street railroad company, but it is a railroad company, in its broadest sense of the term, because its charter so declares, because it was incorporated under article 2 of chapter 42.

Rev. Stat. 1889 (Rev. Stat. 1899, art. 2, chap. 12), and not under article 8 of the same chapter, under which street railroad companies at the date were usually incorporated; and they say, referring to a corporation organized under article 8: "When a corporation so organized, and actually confining itself to the technical street railway business, is sought to be held amenable to the fellow servant act, it will be time enough for this court to decide that question." The argument of the learned counsel for appellant proves this proposition, *viz.*: The defendant, having by its charter acquired and assumed all the rights and privileges appertaining to a general railroad corporation as such, is bound to assume, also, all the duties and burdens imposed by law on a general railroad corporation as such. If, therefore, our fellow-servant statute imposes on every railroad corporation having the charter powers given in article 2, chap. 12, Rev. Stat. 1899, liability for injury to any one of its servants through the negligence of his fellow servant, and if the statute, so construed, is constitutional, then this defendant is liable in this case. And so it would be, if that were the law, regardless of the particular business the corporation was engaged in at the time, or of the kind of work the injured servant and his fellow servant were doing. If the corporation, on its own account, was erecting a depot building, and a carpenter engaged in the work was injured through the negligence of another carpenter in the same work, both being employees of the company, the company, on that theory, would be liable. In such case it would not avail the company, when sued, to say: "We were not at that time engaged in an operation peculiar to a general railroad corporation. We were building a house, conducting the work in manner like any other house builder would do, and our employees were not subject to any greater or different risk than other carpenters in like work." For to all that, on appellant's theory, the conclusive answer would be: "Your charter determines your character, and fixes your relation to the fellow-servant statute." But that cannot be the law. Our fellow-servant act itself draws a distinction which appellant's argument overlooks. It does not impose the liability on railroad corporations because they are railroad corporations, nor does it apply to them without reference to the business in which they are in fact engaged, nor to their employees in every capacity. The language of the statute is: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason," etc. Thus we see that by the very words of the statute the liability is not imposed on railroad corporations *quia* railroad corporations, but on concerns that own and operate railroads in this state; and the liability is not for damages sustained by any servant of the company, but only by a servant en-

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gaged in the work of operating such road. From this it is clear that the lawmakers had in mind the kind of work in which the men whom they aimed to protect were engaged. The peculiar character of the work of operating a railroad was, to the minds of the lawmakers, the reason for making a peculiar class of the men engaged in that work, and affording them relief not afforded to other hired servants, and imposing on their employers a liability not imposed on other masters. It is the peculiar character of the work that justifies the statute in the eyes of the Constitution, and it is upon that ground alone that its validity has been upheld. It is the condition, and not the theory, that justifies the law. This law applies to a master who, as a matter of fact, owns or operates a railroad, and to a servant who, as a matter of fact, is engaged in its work of operating that railroad. It applies to no other master, to no other servant.

The business in which the corporation was engaged may have been such as its charter did not authorize. Still, when the attempt is made to bring the act within the scope of this statute, the question is not What was the company authorized to do? but, What in fact was it doing? and, In what work was the injured servant engaged? The charter gives no answer to those questions. It is conclusive evidence of what the company had a right to do, but it is no evidence of what in fact it was doing. Whether, under its charter, defendant could lawfully engage in the street-railroad business, is a question between the state and the defendant. It is not in this case. If, therefore, a corporation and its servants, who, as a matter of fact, are engaged only in operating a street railroad, are not covered by the fellow-servant statute, then the fact that the charter of the corporation authorizes it to own and operate a trunk-line steam railroad will not bring them within the statute, nor estop the corporation from showing the fact. The facts of this case afford an illustration of this principle. The evidence shows that from Sixth to Forty-First street, a distance perhaps of 3 miles, through a densely populated portion of the city, this defendant operated its cars over the same tracks over which the Suburban Company operated its cars, and the cars of both companies were operated in the same manner. The only means by which the cars of one company could be distinguished from those of the other was that the defendant's cars were red, while those of the Suburban Company were yellow. It was against a yellow car that this car of defendant's was crushed, inflicting the injuries on the plaintiff. It could just as well have been the yellow car that was crushed against the other, and the conductor of the yellow car injured by the negligence of that motorman. And suppose that had been the case; could we say that the Suburban Company was not liable, because its charter called for a street railway, while the defendant, in like circumstances, was liable, because its charter

called for a regular steam railroad? Where there are two concerns engaged in precisely the same business, and both conducting it in precisely the same manner, a statute which would undertake to impose a liability on the one, and not on the other, could not be sustained in the face of either our state or our Federal Constitution. The defendant's charter is not decisive of this case.

(b) The question remaining to be considered is, Does the fellow-servant statute apply to concerns operating street railroads, and to their servants engaged in that work? In pursuing this inquiry, we must keep in mind the fact that we are dealing with an act of class legislation that marks off certain employers of men, and imposes on them a liability for injuries to their servants under certain circumstances which is not imposed on other masters; and we must remember that there is a reason that justifies that class discrimination, and that a case, to fall within the operation of the statute, must come within its reason.

It is conceded that the term "railroad," when used in a statute, does not always include in its meaning a street railroad. The learned counsel for appellant, in their brief, say: "For some purposes the law recognizes several species of railroads and railroad companies, and recognizes a distinction between a railroad and a street railroad. Statutes using the general term 'railroad' may or may not apply to a street railroad." That is undoubtedly the law, and therefore, when the word "railroad" is used in a statute, if we want to know if it is intended to embrace in its meaning a street railroad, we must look at the connection in which it is used.

In support of the contention that street railroads are included in the scope of the fellow-servant statute, we are referred to *St. Louis Bolt & Iron Co. v. Donahoe*, 3 Mo. App. 559, and *Koken Iron Works v. Robertson Ave. R. Co.* 141 Mo. 228, 44 S. W. 269. Those two cases decide that the statute giving contractors and material men a mechanic's lien on the property of railroad companies for their labor and materials entering into the construction of the roads applies to street railroad companies. Although the mechanic's lien law is to some extent class legislation, yet the lines circumscribing the class or classes embraced within it are by no means as closely drawn as in the statute now in question. There was no reason seen in those cases for a legislative policy that would give a mechanic or material man who should contribute to the building of a steam railroad a lien for the value of his work or materials, and not give a like remedy to men who should build or furnish materials to build a street railroad. In the first of those cases the court, per Bakewell, said: "It is also a fact that acts of the legislature may be passed, and that sections of certain laws are to be found, in which railroads are spoken of, and when it is quite clear, nevertheless, that street railroads are not meant." But, after recognizing that such distinctions existed,

the court, with reference to the mechanic's lien statute then in hand, said: "We can see no reason for giving the remedy provided in this act in the case of one railroad which would not equally apply to every other railroad." That is to say, that the reason upon which that statute was founded was in every way as applicable to one kind of railroad as to another. In the second of those two cases (*Koken Iron Works v. Robertson Ave. R. Co.*), which was also a mechanic's lien case, this court referred to the first case with approval, and per Barclay, J., said: "When we bring into view the various statutes affording liens for materials or labor furnished for the improvement of land, and consider the broad objects sought by such legislation, it seems clear that street railroads were not intended to be exempt from liability to respond to such lien claims in a proper case." The first of those cases was decided a good many years ago, when the only street railroads in the city were horse railroads, and it was a horse railroad that the court was discussing. The court saw no difference between a horse railroad and a steam railroad, so far as the mechanic's lien law was concerned, and we see none; but, if that case is authority for construing the fellow-servant statute to include street railroads, it would be equivalent to saying that the reason upon which the fellow-servant statute is founded applies as well to horse railroads as to steam railroads.

Appellant's cause in this court has not lacked for ability and industry of counsel. They have favored us with three separate briefs, showing zealous research and learning, yet they have given us on this point reference to only those two cases. They refer, also, to § 1163, Rev. Stat. 1899: "The term 'railroad corporation' contained in this chapter shall be deemed and taken to mean all corporations, companies, or individuals, now owning or operating, or which may hereafter own or operate, any railroad in this state." But that section of the statute does not reach this question. It is conceded that the defendant is a railroad corporation, and that it is operating a railroad, but the contention is that the kind of railroad it is operating is not the kind referred to in the fellow-servant statute. The section just quoted throws no light on that subject. We have a statute (Rev. Stat. 1899, § 1953) making it a felony to place an obstruction upon, or to tear up, a railroad track with intent to obstruct the passage of a car or cars thereon, and under that statute men have been convicted, with the affirmance of this court, for attempting to blow up with dynamite a passenger car on a street railroad. *State v. Brennan*, 164 Mo. 487, 65 S. W. 325; *State v. Northway*, 164 Mo. 513, 65 S. W. 331. It is also made a misdemeanor (§ 1956) to throw a stone or other missile into or at a train or car or locomotive, and our St. Louis court of appeals has held that the offense was committed by throwing a stone at a car on a street railroad. *State v. Lang*, 14 Mo. App.

247. Although those are penal statutes, and therefore to be strictly construed, yet, with the strictest construction, it is impossible to see any sound reason why they should not apply to persons maliciously threatening the lives and safety of passengers in a street car, as well as in a car on a steam railroad. The danger against which those statutes were aimed were not that which might result from mismanagement within, but from felonious assault without. The danger to the life of the passenger from such source in the street car is exactly of the same nature as that to the life of the passenger on the car of the steam railroad. The difference, if any, is only in degree, and such difference is not obvious. But neither the mechanic's lien law nor the penal statutes just quoted rest for their constitutionality on such narrow grounds as does the fellow-servant act,—grounds that were earnestly contested until the question was finally decided. The foregoing are the only Missouri decisions to which our attention has been drawn that can be said to bear on the question at all, and they are clearly distinguishable from the case at bar.

Before persons or corporations can be marked out for class legislation, there must be in them, or in their business or property, some peculiar characteristic that, in the judgment of the lawmakers, justifies the distinction. *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350. An act of class legislation, to stand in the face of the Constitution, must include all who belong to the class,—not all who bear similarity in some characteristic to those included, but all who cannot be distinguished from them in that particular characteristic which justifies the act. And it must include none who do not belong to the class, for, if the legislature must resort to the peculiarity of the business in which corporations operating steam railroads are engaged to find justification for the act in the eyes of the Constitution, it must limit the act to those in whose business, is the same peculiarity found. When the validity of such an act is in question the courts will look into the nature of the class to see if it possesses peculiar features which might reasonably call for legislative action, but beyond that they will not interfere with the policy of the legislature. In the statute we are now considering the legislature has marked out railroad corporations owning or operating railroads, and their employees engaged in the operation of their railroads, and has made a law applicable to them as a class. We must look into the nature of the business thus distinguished, and ascertain what there is in it that justifies the act, and what object the legislature had in view in making the law. Then if we find that the street-railroad business is of the same nature, and the men engaged in that business are within the class intended by the legislature, we must decide this case in appellant's favor.

In 1874 Kansas enacted a fellow-servant law applicable to railroad corporations alone, and very similar to our act of 1897. 61 L. R. A.

The constitutionality of the act was contested upon the ground that it was class legislation, but the Supreme Court of the United States, in *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, in deciding the question, said: "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination." There was no question in that case as to the application of the statute to any other than a corporation operating a steam railroad. What is there said of the peculiar hazard of the business to justify the statute refers to steam railroads.

In 1887, Minnesota enacted a fellow-servant statute, of which ours is almost a literal copy. The supreme court of that state in June, 1895, had for decision the very question now before us, in *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L. R. A. 208, 63 N. W. 1099. As the decision of that court construing its statute was rendered nearly two years before our statute, in almost the same words, was enacted, we may presume that our legislature was aware of the interpretation that court put upon it. That court, in two able opinions in the case, held the statute did not include street railroads. The court, per Buck, J., said: "It is a matter of common knowledge that street cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. Street cars are generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the roadbeds are constructed upon level or graded streets, without deep cuts, and generally lighted. Nor do street railways carry freight. The greatest railroad hazard and danger of personal injury to railroad employees arises from operating freight trains.

Especially is the danger in coupling freight cars entirely absent." And in the same opinion it is said: "If we were to hold that the term 'railroad,' in the law of 1887 [Laws 1887, chap. 13, p. 69], applied to street railways, because the word is broad enough to cover all roads constructed of iron or steel rails for wheels of cars to run upon, we see no reason why it should not be so construed whenever found in the other legislation of this state." Then the court goes on to mention some of the requirements of other statutes in that state referring to railroads, which it is manifest were not designed to apply to street railroads. And the same is true of our statutes in general relating to railroads. In a separate concurring opinion by Mitchell, J.,

in that case, it is said: "The difference in conditions affecting the risks to which employees are exposed is sufficiently substantial to authorize the legislature to make the law applicable to ordinary commercial railroads alone, and furnishes, in my judgment, ample reason for concluding that they so intended, and that they used the word 'railroad' in its ordinary, popular sense, and in the sense in which they themselves had generally used it in other statutes." We have felt justified in quoting at length from the opinions in that case because they were dealing with precisely the same question that is now before us, and construing a statute of their own which we afterwards copied. That is the only case to which we have been referred where the question as to whether street railroads were included in a fellow-servant act like ours was decided; but there are many cases, referred to in the briefs of counsel, arising under other statutes, in which the distinction between railroads and street railroads is drawn, and the general doctrine runs through them all that the term "railroad" does not include "street railroad," unless so expressed, or necessarily understood from the context; that, as a rule, the term means steam railroad only, and it is the exception when it means street railroad.

In Arkansas they have a statute authorizing a city to grant the right of way through its streets "to any railroad company," but the statute requires the railroad company to pay the property owners the damages they may sustain thereby. In *Williams v. City Electric Street R. Co.* 41 Fed. 556, it was decided that the provision of the statute requiring damages to the property to be paid did not apply to the owners of a street railroad. The court, per Caldwell, J., said: "The difference between street railroads and railroads for general traffic is well understood."

In Iowa a statute made a judgment against "any railway corporation" for injury to persons or property a lien superior to that of a mortgage. But it was held (*Manhattan Trust Co. v. Sioux City Cable R. Co.* 68 Fed. 82) that it did not apply to a street railroad company. Mr. Justice Shiras delivered the opinion of the court, in which he said: "It cannot be questioned, on the one hand, that a company engaged in operating street cars upon lines of rails laid down along the streets of a town or city, for the transportation of passengers, is, in one sense, a railway corporation, nor, upon the other hand, that there is a marked difference and recognized distinction between street railway lines and those engaged in the general passenger and freight traffic of the country."

In Oregon a statute gave the right to condemn land to "all railway corporations," but it was held that that did not include street railway companies. *Thompson-Houston Electric Co. v. Simon*, 20 Or. 60, 10 L. R. A. 251. 25 Pac. 147.

Iowa adopted a fellow-servant law applicable only to railroad companies in 1862, 61 L. R. A.

and the Iowa court has recognized the narrow constitutional ground on which the statute stands, and has been careful to keep it on that ground. In *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52, the court said: "The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited, it is constitutional. When extended further, it becomes unconstitutional." The peculiar hazardous business of operating railroad trains, distinguished from other kinds of business, as the ground upon which the statute is founded, is emphasized in other cases in the same court. *Schroeder v. Chicago, R. I. & P. R. Co.* 41 Iowa, 344; *Stroble v. Chicago, M. & St. P. R. Co.* 70 Iowa, 555, 59 Am. Rep. 456, 31 N. W. 63; *Butler v. Chicago, B. & Q. R. Co.* 87 Iowa, 206, 54 N. W. 208; *Larson v. Illinois C. R. Co.* 91 Iowa, 81, 58 N. W. 1076; *Akeson v. Chicago, B. & Q. R. Co.* 106 Iowa, 54, 75 N. W. 676. Although the question of the applicability of the fellow-servant statute to street railroads does not seem to have come before the Iowa court, yet what is said in those cases as to the purpose of the statute leaves us to infer that it would place men engaged in operating street cars outside of the pale of that statute.

It is not the mere fact that men engaged in operating railroads are subjected to hazard that has called forth the legislative action, for men to whom no such protection is afforded are engaged in other kinds of business that are hazardous to as great or greater degree,—as, for example, some kinds of mining, tunneling, etc.; but it is the peculiar nature of the hazard incident to the railroad business that makes the foundation of this statute. Reference to this peculiarity runs through all the cases sustaining the validity of the fellow-servant statutes. In *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, Mr. Justice Brewer said: "The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, the use of safety couplers, and a multitude of other things, easily suggest themselves." In *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974, the court said: "The frequency and magnitude of the dangers to which those employed in operating railroads are exposed; the difficulty, sometimes impossibility, of escaping from them, with any amount of care, when they come; the fact that a great number of men are employed, co-operating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that he may be said to voluntarily assume the risk arising from the want of skill or care by any one of the number,—are sufficient reasons for applying a rule of liability on the part of the employer to the employee so employed, different from that ordinarily applied between master and servant. But

no just reason can be suggested why such difference should be founded, not on the character of the employment, nor of the dangers to which those employed are exposed, but on the character only of the employer." In *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156, the court was considering what employees were within the scope of the fellow-servant statute, and said: "Therefore, after mature consideration, our conclusion is that if any limitation is to be placed by the courts upon the application of this statute (and, on constitutional grounds, there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those employees who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers."

Men engaged in the operation of street railroads are exposed to hazards, but not to the peculiar hazards which distinguish men engaged in operating steam railroads, and which has made them a class for special legislation. In 1897, when this law was enacted, there were still some street railroads in this state operated by horse power. If the law applies to street railroads at all, it applies to street railroads of all kinds; and, if it applies to them now, it applied to them when it was first enacted, and, if so, then there was no difference in its application to the driver of a horse car and a brakeman on a freight train. There are employments attended with even greater hazard than the operating of a railroad, but men engaged in those employments are not included in this class, because the hazard is not of the same character. And there are men in the employ of railroad corporations who are not within the class because they are not engaged in operating the railroad. Thus, the lines around the class are drawn, and men who do not fill the description are not within those lines.

Running through all our statutes on the subject there is an obvious distinction shown between railroads and street railroads. No one can read article 2 of chapter 12, Rev. Stat. 1899, and gather the idea that it has any reference to street railroads. Then follows article 3, which relates to street railroads only. The very fact of the frequent use of the term "railroad" in our statutes in such connection as to indicate that the legislature understood that it would be taken, as a matter of course, to mean a steam railroad, shows that the usual use of the word is with that meaning, and when some other meaning is intended some additional word is used. Thus, § 1180, Rev. Stat. 1899: "It shall be the duty of every street railway company or corporation operating a street railway across the tracks of a railroad company to bring its cars to a full stop at least 10 and not more than 20 feet before reaching the tracks of the railroad company, and it shall be the duty of the conductor or some other employee of the street railway company, to go forward to the tracks of such railroad company for the

purpose of ascertaining whether a train is approaching such crossing." In that connection the word "railroad" is brought into sharp contact with the words "street railway," and the legislature took it for granted that anyone reading the section would understand that "railroad" meant steam railroad, and therefore did not add any word of qualification or explanation. In the Session Acts of 1897, p. 96, is this fellow-servant law, in which the term "every railroad corporation" is used, and immediately following on the same page is another act, in these words: "The railroads of this state are required to carry peddling cars of watermelons or cantaloupes, strawberries, blackberries, and other perishable fruits," etc. The words "railroads," in the latter act, is used as unqualifiedly as the word "railroad" in the former, yet the lawmakers took it for granted that everyone would know what the word "railroad" meant. Then on the next page of the same book there is an act having in view the construction of a street railway, and the term "street railway" is used. The title to article 2, chap. 12, is "Railroad companies." That to article 3 is "Street railroads." Then comes article 4: "Railroad classification. Charges — Commissioners." The 1st section of article 4 is: "All railroads in the state of Missouri are hereby divided into three classes, to be known as Class A, Class B, and Class C." Then follow definitions of the classes, and regulations as to charges for passengers and freight, duties of railroad commissioners, etc. Although the words of that statute are "all railroad corporations in the state of Missouri," yet, manifestly, it does not include street railroads. Article 7 of the same chapter, which points out the procedure to be followed in condemning private property for public use, refers in general terms to "any road, railroad, telephone, telegraph, or other corporation created under the laws of this state." There not only is the term "railroad corporation" used in unlimited form, but it is followed by the still more general and comprehensive term, "other corporation created under the laws of this state," yet no street railroad chartered under article 3 of that chapter has ever been accorded the right of eminent domain. The only right of way such corporation can obtain is by grant from the city over its streets, or by grant from private owners. § 1187, Rev. Stat. 1899. There are many other sections of our statutes referred to in the briefs of the learned counsel in which the term "railroad" or "railroad corporation" is used without qualifying words, yet manifestly referring only to steam railroads, but we will not now discuss them, because this opinion is already too long. In almost every instance where street railroads are intended in our statutes, street railroads are named. In every instance where steam railroads are intended, the word "railroads" only is used. The fellow-servant law of 1897 does not designate street railroads by name, nor by any words necessarily indicating an intention to include them, and, as

such companies are neither within the letter nor reason of the law, it does not apply to them. This is the view the learned trial judge took of the law, and he was correct. *The judgment is affirmed.*

Robinson, Ch. J., and Marshall and Fox, JJ., concur.

Gantt, J., dissenting:

This is an action for damages growing out of personal injuries alleged to have been suffered by the plaintiff through the negligence of defendant, a railroad company organized under the laws of this state, and operating a railroad from the corner of Sixth and Locust streets, in the city of St. Louis, to Meramec Highlands, a point on the Meramec river, in St. Louis county, in this state. The petition alleges that plaintiff was a conductor and employee of defendant on said railroad on the 27th day of January, 1898, and on said day one Jesse B. Horn was also an employee of said railroad company as motorman of car No. 348, of which plaintiff was conductor; that said car was propelled by electricity; that in operating said car it was the custom, when a car reached the eastern terminus of said road, at Sixth and Locust streets, in St. Louis, to change the operating machinery so as to return said car westwardly over the tracks on which it had come; that the motorman would bring his car to a standstill, and turn off the electric current from the machinery; the conductor then would release the rope which held the trolley pole to the wire, alight from his car, pull down the trolley pole from the overhead wire, and by means of a rope which was attached to one end of the trolley pole, move the trolley pole around to the opposite end of the car, and again, by releasing the rope, raise the trolley pole to the overhead wire, and while the conductor was so engaged the motorman was required to keep the power or electric current turned off, so that the car would remain stationary, but that at the time and on the day mentioned in the petition, while plaintiff, as conductor, was carrying the trolley pole around to the opposite or east end of said car, Horn, the motorman, negligently failed to withhold the electric current from the machinery, but did, without the knowledge of plaintiff, and while plaintiff was reversing the trolley pole, so arrange the machinery as to admit of the entrance of the electric current from the overhead wire into the machinery of the car, and while the said car was thus arranged the plaintiff, unaware of this negligent act of Horn, raised the trolley pole to the overhead wire, thus connecting the car with the overhead wire, and immediately the electric current, by reason of the negligent act of Horn as aforesaid, entered the machinery of the car, and caused it to suddenly bound forward with great force and violence against and upon plaintiff, whereby plaintiff was knocked and forced upon and against the platform of another of defendant's cars, then and there standing upon the 61 L. R. A.

track in front of said car; that his right hand was crushed and mashed so that he has lost the use of it permanently; that his right leg was crushed and disabled forever,—from all of which injuries he is permanently disabled, to his damage in the sum of \$23,000. The answer contains, first, a general denial; second, a plea of contributory negligence; and, third, the following special defense: "Said defendant, further answering said petition, states that it was on the occasion in question, is now, and has been for a long time, a street railroad corporation only, organized and existing under the laws of the state of Missouri for the purpose only of operating, and it was, has been, and is only operating, a street railroad by electricity for the carriage of passengers, and said railroad company was neither organized nor incorporated for operating a railroad by steam, nor has it ever operated a railroad by steam, nor was it on the occasion in question, nor did it then, nor has it at any time since operated any other than a street railroad for the carriage of passengers on its said line, beginning at or near Sixth and Locust streets, in said city of St. Louis, and running in a westerly direction over various streets in said city to the western boundary of said city; that on the occasion in question the agents and employees of defendant named in plaintiff's petition, and charged with negligence in the performance of their duties, to wit, James B. Horn, motorman, and _____ Hogan, were the fellow servants of the plaintiff in and about the operation of the car of which the said plaintiff was conductor, and which was one of the cars that the said defendant used in the operation of its said street railroad on its line of street railroad aforesaid, and said defendant further says that the said plaintiff, by virtue of his employment as fellow servant of said Horn and Hogan, assumed the risk on his part of any negligence on the part of said agents or employees of defendant, or either of them, as fellow servants of him, the said plaintiff, and that if, on the occasion in question, the plaintiff was injured in consequence of any negligence of either said Horn or said Hogan, the said plaintiff, by virtue of his said employment, and by virtue of the said Horn and Hogan being his fellow servants in the operation of said car at the place where he was injured, and on the occasion in question, assumed the risk of said negligence, by virtue of the nature and character of his, the said plaintiff's, employment by said defendant, and said defendant is not liable to said plaintiff for any injury caused on the occasion in question by any negligence, if any, which the said Horn or the said Hogan was guilty of, causing the injuries complained of by said plaintiff in his petition." Plaintiff replied, denying all the new matter set up in the answer. There was substantial evidence tending to prove the allegations of the petition as to the manner in which the injury to plaintiff occurred. Plaintiff also offered and read in evidence the articles of incorporation of defendant,

showing it was organized under the general railroad law of this state, known as article 2, chap. 42, Mo. Rev. Stat. 1889, and evidence showing its proceedings as such to condemn lands for a right of way in St. Louis county; also evidence of the extent and nature of his injuries. At the close of plaintiff's case the defendant prayed and the court gave an instruction that under the pleadings and evidence the verdict must be for defendant, and thereupon plaintiff took a nonsuit, with leave to move to set the same aside, and afterwards, and within four days, moved the court to set aside said nonsuit, and, among other things, assigned as error the giving of said instruction, which motion the court overruled, and thereupon plaintiff perfected his appeal in due form to this court.

1. This record requires a construction by this court of the scope and effect to be given to an act of the legislature of this state approved February 9, 1897 (Acts 1897, p. 96), and commonly known as the "fellow-servant act." It is entitled "An Act to Define the Liabilities of Railroad Corporations in Relation to Damages Sustained by Their Employees, and to Define Who Are Fellow Servants and Who Are Not Fellow Servants, and to Prohibit Contracts Limiting Liability under This Act." The 1st section is as follows: "That every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury."

By sustaining the demurrer to plaintiff's evidence, the trial court obviously held that defendant was operating a street railroad, and that the above-quoted statute had no application to street railroads; in short, that the words "every railroad corporation owning or operating a railroad in this state" do not mean "every railroad," but those only which own or operate steam railroads, and the word "railroad" must be restricted to those only who operate their cars in trains, and by steam as the motive power. That the words of the act, "every railroad corporation" are broad enough in themselves to include street and electric railroads as well as steam railroads, will not be denied; that they are plain, unambiguous, and comprehensive enough to include all railroads, cannot be doubted. *Prima facie*, the act applies to street as well as any and all other railroads. *Bloaham v. Consumers' Electric Light & Street R. Co.* 36 Fla. 519, 29 L. R. A. 507, 18 So. 444. The rule of construction is that where a law is clearly expressed it is the duty of the court to adhere to the literal expression, unless such construction would lead to a palpable absurdity. Thus, in *Smith v. State*, 66 Md. 215, 7 Atl. 49, a married woman was sued jointly with her husband, and she pleaded specially her disability of coverture, to 61 L. R. A.

which plaintiff demurred. This brought the act of 1872 of that state before the court for construction, which provided that "any married woman may be sued jointly with her husband on any bond," etc. Laws 1872, p. 442, chap. 270. The contention was that the act did not apply to official bonds, but said the court: "Whatever latitude may at one time have been assumed by courts in the construction of statutes, the more recent cases have established the rule that, when the language of a legislative enactment is clear and unambiguous, a meaning different from that which the words plainly imply cannot be judicially sanctioned." Citing *Green v. Wood*, 7 Q. B. 185; *Woodbury v. Berry*, 18 Ohio St. 462; *United States v. Ragsdale*, 1 Hempst. 497, Fed. Cas. No. 16,113; *Bosley v. Mattingly*, 14 B. Mon. 89. "When the legislature says she may be sued on any bond executed jointly with her husband, can the judicial department of the government undertake to say that the law-makers meant that she shall not be sued on some bonds executed jointly with her husband? Such a determination could only be reached by a species of judicial legislation not sanctioned by any authority, and extremely dangerous if once established as a precedent." In *Woodbury v. Berry*, 18 Ohio St. 458, the supreme court came to the conclusion that certain words had by accident or oversight been omitted from an act, but notwithstanding this they say: "*Ita lea scripta est*. The language, as it stands, is clear, explicit, and unequivocal. . . . It is our legitimate function to interpret legislation, but not to supply its omissions." Citing *Sedgw. Stat. & Const. Law*, 231. In *Bradbury v. Wagenhorst*, 54 Pa. 180, the statute required a copy of the instrument sued on to be filed with the clerk before judgment should be entered. It was contended that there was no necessity for a copy of claims, since the mechanic's lien law required a bill of particulars to be filed in order to make a lien, but the court answered: "Whatever may have been the legislative thought, no ambiguity exists in what they have said; and, when the words of a statute are plainly expressive of an intent, the interpretation must be in accordance therewith." So, in *Bennett v. Worthington*, 24 Ark. 487, it was urged that the statute of limitations ought not to run during the time the courts were closed on account of the war between the states; but the supreme court held that, as no such exception was included in the statute, the court could not enforce the equity in behalf of plaintiff, saying: "The correct rule, as we apprehend, or to be extracted from the authorities, is that, where the will of the legislature is clearly expressed, the courts should adhere to the literal expression of the enactment, without regard to consequences, and that every construction derived from a consideration of its reason and spirit should be discarded."

At the time this law was enacted there was a general provision in our statutes defining the term "railroad corporations" as

follows (§ 1163, Rev. Stat. 1899): "The term 'railroad corporation,' contained in this chapter, shall be deemed and taken to mean all corporations, companies, or individuals now owning or operating, or which may hereafter own or operate, any railroad in this state." But it is plausibly and ably contended that in the various laws of this state governing railroad corporations the word "railroad" has a well-defined and clearly understood meaning, and is never confounded with "street railroad," and various sections of the general railroad law are cited to show that they have no reference to street railroads. That there are many provisions of the various acts in regard to railroads which do not apply to street railroads may be, and is, conceded; but the statement of counsel is entirely too broad, when they assume that those laws do not apply at all to street railroads, as an examination of the decisions of this court will clearly demonstrate. In *Koken Iron Works v. Robertson Ave. R. Co.* 141 Mo. 228, 44 S. W. 269, it was contended by the defendant, a street railway company, that §§ 6743, 6744, 6747, 6754, 6756, Rev. Stat. 1889, giving a lien for work and material upon the roadbed, depots, rolling stock, station houses, etc., did not in terms, and were never intended by the legislature to, embrace street railways; but this court held adversely to its contention, saying: "Undoubtedly, much of the language of that law is applicable to railroads operated by steam. Those were the roads to which the act was chiefly designed to apply. But the general terms of the law are also susceptible of application to street railroads, and we find nothing in any part of the enactment to indicate that such application is not intended. . . . Laws of this nature should receive a fair and rational interpretation, and full effect be given to the remedial purpose that constitutes their spirit." The St. Louis court of appeals had previously given those sections the same interpretation in *St. Louis Bolt & Iron Co. v. Donahoe*, 3 Mo. App. 559, in which Judge Bakewell, speaking for the court, says: "It is a fact that acts of the legislature may be passed, and that sections of certain laws are to be found in which railroads are spoken of, and where it is quite clear, nevertheless, that street railroads are not meant. But we do not see how these facts affects the question here. A street railroad or horse railroad is none the less a railroad because the Baltimore & Ohio Railroad is also a railroad; and, where the legislature cites the term without limitation, it will be taken to use it in its broadest sense, unless it appears from the face of the enactment that it meant to restrict the word to one class of railroads or the other." But again, § 1953, Rev. Stat. 1899, makes it a crime to obstruct any railroad, and this court, in the cases of *State v. Brennan*, 164 Mo. 487, 65 S. W. 325, and *State v. Northway*, 164 Mo. 513, 65 S. W. 331, held that the term "railroad" was broad enough to include cable and electric street railroads. The same conclusion was reached by the su-

preme court of California upon an altogether similar criminal statute. *People v. Stites*, 75 Cal. 570, 17 Pac. 693. And the identical point was again affirmed in *Price v. State*, 74 Ga. 378, and *Com. v. McCaully*, 2 Pa. Dist. R. 63; *Milvale v. Evergreen R. Co.* 131 Pa. 1, 7 L. R. A. 369, 18 Atl. 993. In *Gyger v. Philadelphia City Pass. R. Co.* 136 Pa. 104, *sub nom. Montgomery v. Philadelphia City Pass. R. Co.* 9 L. R. A. 369, 20 Atl. 399, the supreme court of Pennsylvania laid down a very satisfactory rule, to wit, that "railway" and "railroad" are synonymous, and in all ordinary circumstances are to be treated as without distinction, and when either of them is used in a statute, and the context requires that a particular kind of a road is intended, that kind will be held to be the subject of the statutory provision; but if the context contains no such indication, and either of the words is used in describing the subject-matter, the statute will be held applicable to every species of road embraced within the general sense of the word used. In *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 210, it was held that the word "railroad" applied to street railways. Indeed, as pointed out by Judge Bakewell in *St. Louis Bolt & Iron Co. v. Donahoe*, the first street railroads constructed in the city of St. Louis were constructed under the then existing general railroad corporation laws of this state, and it was not until 1866 that the general act concerning corporations was passed, authorizing the formation of manufacturing and business companies for the purpose of constructing horse railroads. In Illinois an act passed in 1855 (Laws 1855, p. 304) whilst horse railroads were in existence in Illinois, giving certain powers to "railroads," was held to include horse as well as steam railroads. *Chicago v. Evans*, 24 Ill. 52. These cases sufficiently indicate that it is not accurate to state that the word "railroad" always refers to steam railroads, and that when street railways are to be included they are specifically named as such. On the contrary, the great weight of authority is that, if the context contains no such indication, a statute containing the word "railroad" will be held to include every species of railroad which is embraced within the general sense of that word.

Looking now more closely to the act, we find it is a short, remedial act, of four sections only, and not a word in it to indicate that it was the intention of the legislature to restrict it to steam railroads operating long trains. Being remedial, the universal rule is that it should receive a liberal construction, to cure the evil which it was intended to remedy. "The old law, the mischief, and the remedy must be kept in mind." Prior to the enactment of this statute the course of decision was that a master, in this state, was not liable to his servant for injuries occasioned by the negligence of his fellow servant. For many years counsel endeavored to get this court to change this rule, but the answer was that this was a legislative function; that it was the duty of the

court to declare, not to make, the law. It is within the knowledge of all of us that this ruling occasioned the passage of this law. But counsel urge that the reason of the law would exclude its application to street railways, because they say in the operation of the car two persons only were employed—a conductor and a motorman—and the reason for changing the law was that steam railroads had a large number of employees operating freight and passenger cars in trains, and there resulted a consequent want of opportunity on the part of the employees to observe and watch their co-employees in the same service, and thus discover their negligence, and an opportunity to quit the service if these negligent coemployees were not discharged. Doubtless this was one of the reasons, but it cannot be that it was the only one, because, if it was, if an employee, as a fireman, closely associated in the same cab with an engineer, was injured by the negligence of the latter, it could be urged with the same plausibility that, being so closely associated, they did not fall within the reason which prompted the passage of the act, to wit, that they had no opportunity to watch the conduct of each other. There is no such exception written in the law. Under its terms an employee injured by the negligence of another servant of the same company would not be turned out of court because his employment brought him so closely in contact with him that he could observe his conduct. If a fireman or engineer, then, can recover for injuries occasioned by the other, whose duties call them together on the same cab, how can it be maintained that a motorman or conductor, operating at different ends of the same car, is not equally entitled to be protected from the negligence of the other? Moreover, since the application of electricity, and the operation of cars by cables, it is not true that only one car can be operated, but frequently it occurs that two and three cars are connected in the same train. Neither can it be said that the high rate of speed of steam cars makes it necessary to apply a different rule, as the modern electric car easily makes from 18 to 25 miles an hour. It is true that the supreme court of Minnesota, a tribunal whose opinions and judgments entitled it to our highest respect, attached great importance to these considerations in *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L. R. A. 208, 63 N. W. 1099. It is proper to remark, moreover, that the Minnesota court based its opinion upon an additional reason. On page 438 of the report, 29 L. R. A. 210, page 1100, 63 N. W., it is said: "It is claimed by appellant's counsel, and not denied by the counsel for the respondent, and such we believe to be the fact, that on February 24, 1887, when the general law of that year was passed, there were no cable or electric street railways in existence in this state. If so, what was the legislative intent in using the word 'railroad' in the law of 1887, to be deduced from the whole and every part of the statute, taken together, upon the subject of rail-

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roads? 'When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the object and remedy in view.' Potter's Dwarrr. Stat. 194, note 13. What was the mischief felt which resulted in the passage of this law? Was it a danger known or one unknown? . . . We must assume that it was dealing with and acting upon existing facts within its knowledge. Of course, if the language used was entirely free from ambiguity, and broad enough to include unknown things which might spring into existence in the future, they would be deemed to come within and be subject to the evident meaning of the terms used." Much weight is given by both the learned judges who filed opinions in that case to the fact that in the previous legislation in that state the word "railroad" had not been applied to street railways. It must be apparent that the first reason given, to wit, that at the time the Minnesota fellow-servant act was passed, to wit, in 1887, there was no such thing as a cable or electric car in Minnesota, could have no force in interpreting our act of 1897, which was enacted years after our cities and towns in Missouri were gridironed with both systems of street railroads, and therefore our legislature could not be charged with legislating in ignorance of the character of such roads. Neither has our legislature or courts made the distinction between "railroads" and "street railroads" that the learned justices discovered in Minnesota, as we have already shown; and, while the history of railroad legislation in that state may have justified the conclusion reached by that court, the facts upon which that adjudication was bottomed do not and did not exist in Missouri when the act of 1897 under consideration was passed.

The statute before us has been construed by the St. Louis court of appeals in the case of *Stocks v. St. Louis Transit Co.* (at the October term, 1902, of said court), not reported, and held to apply to street railways; citing with approval *Rafferty v. Central Traction Co.* 147 Pa. 579, 23 Atl. 884; *Clinton v. Clinton & L. Horse R. Co.* 37 Iowa, 61. Bland, J., in *Stocks v. St. Louis Transit Co.* referring to the contention that by using the word "railroad" this act must be construed with reference to our general-railroad act, pertinently remarks: "The act of 1897 is not a railroad act, and is not *in pari materia* with any of the general laws of the state concerning railroads, and for this reason cannot be interpreted by them. It is a fellow-servant act intended for the benefit of the employees of railroad corporations, and designed to place them on the same footing as to the right to recover damages caused by the negligence of their co-employees. The act confers on a class of employees of railroad corporations a right of action which they did not have before, and we can see no sound reason for confining the benefits of the act to but one class of railroad employees."

But it is earnestly insisted that in con-

struing this act we must bear in mind that this is class legislation, and, to sustain the constitutionality of the act, we must be convinced, in applying it to street railways, that they fall within the reason of the statute; otherwise the act is unconstitutional. This is a grave contention, because, if sound, it must result in our holding, not only that the language of this act does not include street railways, but that it would not be in the power of the legislature, even by using the words "street railways," to make them amenable to its provisions. To sustain their position the learned counsel have recourse to the opinion of the Supreme Court of the United States, sustaining the constitutionality of the fellow-servant act of Kansas, in *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, in which it is said in justification of that law against the charge of unnatural and unreasonable classification that "the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination." The fellow-servant act, applicable to railroads only, has been upheld by the same court, for a similar reason, in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and in the various states adopting a like statute. *La-Vallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156; *Powell v. Sherwood*, 162 Mo. 605, 63 S. W. 485; *Cambren v. Omaha & St. L. R. Co.* 165 Mo. 543, 65 S. W. 745; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176. Because the courts, in sustaining these acts, have pointed to the peculiar hazards to which railroad employees are exposed, to defend the statutes against the charge of unjust discrimination, it is assumed that a fellow-servant act applicable to street railways would be unconstitutional, because the employees of such corporations are not subjected to all the hazards that beset employees of steam railroads. It is admitted that employees in the operation of street railroads—especially those engaged in operating cars on which electricity is the motive power—are exposed to great hazards; but it is said they are not the peculiar hazards which attend the operation of steam railroads, and therefore they do not, and, if the argument is sound, cannot, come within the same class as employees of steam railroads. We cannot subscribe to this contention. In our opinion, it was entirely competent for the legislature to have enacted a general fellow-servant law, which would have applied to all masters and servants; and it was also within its power to enact this law governing the liability of

railroads to their employees, and to include therein, as we hold they did do, the employees of all railroads,—street and electric railroads as well as steam railroads.

It is not to be questioned that, in the exercise of its general remedial and police powers, the legislature may enact laws for the health and safety of our citizens, and, when a given subject is within its power, the extent to which it is to be exercised is within the discretion of the legislature. It is within the common knowledge of us all that at the time this act was passed nearly all the street railways in this state were being operated by electricity, and those that were not were rapidly being converted into electric roads; that this motive power was exceedingly hazardous and dangerous. It is not insisted that it would not be wise and humane legislation to throw around the employees operating these cars the same protection that is given an operative on a steam railroad, but only that the general words do not include them, and, if they did, they are not in the same class. To this we answer that, when it is conceded that their avocation subjects them to perils from the negligence of their fellow servants, it is not for this or any other court to say to the legislature, "You shall not enlarge the class so as to include the employees of all railroads, but shall restrict it to steam railroads alone." In a word, we hold that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for doubt. *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *State v. Layton*, 160 Mo. 499, 61 S. W. 171. As was said by the supreme court of Ohio in *State v. Nelson*, 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 24: "The appliances and construction of cars, and, in fact, all kinds of machinery, are continually changing; and it is within the exclusive authority of the general assembly, in the exercise of its police power, to determine by general laws what, if any, regulations are required for the protection of the health, safety, and comfort of the operatives." Because the Supreme Court of the United States and this court and all other courts now hold the fellow servant acts applicable to railroads is not unconstitutional classification. Because the business is hazardous, it by no means follows that this class should not include all railroads. On the contrary, the classification would seem less objectionable when it includes in it all who are subjected by their employment to similar hazards, albeit not exactly the same. We hold that a construction of the act before us which makes it applicable to the employees of street railways would not render it unconstitutional.

In view of the remedial character of this act, the absence of anything in any portion of the act indicating a purpose to restrict it to steam railroads, and the decisions in this state which have applied certain general provisions of our railroad laws alike to street railways, and steam railroads, and

because the plain, unambiguous words of the act are broad enough to include street railways, we hold that the act means what it says, and that street railroads are liable in the same manner as steam railroads to their employees for the negligence of their coemployees or fellow servants.

2. But were this not so, in our opinion, the defendant in this case would still be liable, for the reason that it is a railroad corporation organized under the general railroad laws of this state, with all the powers and subject to all the liabilities of any other railroad corporation. The evidence shows, beyond question, that it was incorporated under and by virtue of article 2, chap. 42, Mo. Rev. Stat. 1889, for the purpose of constructing, maintaining, and operating a standard gauge railroad for public use in the carriage of persons and property, and "to be constructed from a point in the city of St. Louis in a general southwesterly direction through or near the towns of Maplewood, Old Orchard, Tuxedo Park, Webster Groves, and Kirkwood to a point on or near the Meramec river within the limits of St. Louis county." It further appears that by virtue of its charter it exercised the right of eminent domain in condemning a right of way under and by virtue of the powers conferred upon steam railroads in this state. There was also evidence that it carried express and the United States mails between St. Louis and Kirkwood. It is true that the motive power employed by defendant is electricity, but all the cases agree that the motive power is not a determining feature in distinguishing a street railway from a general railroad which carries both freight and passengers. So that we have a case in which the corporation has elected to take its charter under the general railroad law of the state, and has voluntarily placed itself in the class of roads to which it concedes the act of 1897 properly and necessarily applies. But defendant argues that because it only carries passengers over that part of its road which lies along and in the streets of St. Louis, and by express permission in the streets of Kirkwood, it should to that extent be regarded only as a street railroad, but we do not think its contention is tenable. It is still a railroad, notwithstanding the city of St. Louis and other municipalities would not permit it to run its freight trains over their streets. These cities are empowered by the Constitution and general laws to exclude it from their streets; and, if it has entered into conventions with them whereby it denies itself in those localities the right to carry freight on condition that it may operate cars on their streets for passengers only, it has not thereby changed the charter, which alone authorizes it to exist as a corporation, and thus relieved itself of its obligation to state laws. It remains a railroad corporation operating a railroad in this state, and falls within both the language and spirit of the act of 1897. Can it be that, if this accident and injury had occurred to plaintiff on defendant's line out in St. Louis county, defendant would be 61 L. R. A.

heard to say, under its charter, that it was not a railroad, within the meaning of the act of 1897? Assuredly not. But it would in that case still be the same railroad that runs into and delivers its passengers in the city of St. Louis. It is one corporation, and operating one railroad, and it is not subject to a different liability in the city from what it is in the country. In our opinion, it is clearly within the provisions of the act of 1897, and the circuit court erred in holding otherwise. It is said, however, the liability is not imposed "on railroad corporations because railroad corporations, but on concerns that own and operate railroads," and that therefore the charter of this defendant does not determine its liability. But how can that affect the defendant's liability, when it is confessedly both a "railroad corporation," to which this act, in terms, applies, and at the same time owns and is operating a railroad, by every test known to the law? We fully agree that the servant who can avail himself of the protection of this statute must be one engaged in the work of operating such road. In *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* 170 Mo. 473, 60 L. R. A. 249, 71 S. W. 208, we held that this right was not limited to those who are engaged in running trains, but extends to those employees, also, whose work is directly essential to enable trains to run; and in so doing we were fully supported by the decisions of the supreme court of Kansas in *Chicago, K. & W. R. Co. v. Pontius*, 52 Kan. 264, 34 Pac. 739, and of the Supreme Court of the United States affirming that view. *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Stubbs v. Omaha, K. C. & E. R. Co.* 85 Mo. App. 192. It may be well to note that the Supreme Court of the United States, in enumerating the grounds upon which it sustained the Kansas law, noted that it applied "to all railroad corporations, without distinction," and so does the act of 1897. So that we have not a case where some corporation other than a railroad or some person is operating a railroad, but we have a case within the exact language of the act, to wit, "a railroad corporation owning and operating a railroad in this state," and the servant who is suing was a servant engaged in operating such railroad, and was hurt by another servant engaged in operating the said railroad, and the question is, shall the act of the legislature, made for identically such a case, be enforced, or shall we turn the plaintiff out of court simply because the car which said employees were operating was not operated by steam, and was not one of a long train, or that said railroad company was permitted to run only passenger cars in the streets of St. Louis and Kirkwood by the ordinances of said cities, the right having been conferred on said municipalities by our Constitution and General Statutes to allow said company to run its trains within the corporate limits, or to deny it that right? In the case supposed of the suburban car crushed against the car on which plaintiff was em-

ployed, we have no doubt whatever that the conductor of the Suburban car could recover against the defendant for the negligent act of its servant; and we also agree, as already said, that the Suburban or any other street railway company, under the unrestricted terms of this act, is a railroad, and liable to one of its servants who is injured in the operation of its road by another servant of

said company. In our opinion, the judgment should be reversed, and the cause remanded for a new trial in accordance with the views we have expressed.

Brace and Burgess, JJ., concur in my views.

Rehearing denied.

NEBRASKA SUPREME COURT.

A. E. RICKLEY, *Plff. in Err.*,
v.
STATE of Nebraska *et al.*

(.....Neb.....)

***Section 322 of the Code of Criminal Procedure**, in so far as it authorizes the question of the good faith of the prosecuting witness in instituting the prosecution to be tried and determined at the same time that the defendant is tried, and the taxation of costs against him in case it is found that in filing the information he acted maliciously or without probable cause, is unconstitutional and void.

(October 9, 1902.)

*Headnote by DUFFIN, C.

NOTE.—*Constitutionality of statute authorizing costs of prosecution to be imposed upon prosecuting witness.*

The objections to a statutory or Code provision imposing costs on the prosecuting witness, and authorizing his imprisonment until they are paid, are that such statutes violate constitutional provisions, in that the prosecuting witness is deprived of liberty or property without due process of law; that it is an imprisonment for debt; that the prosecuting witness has not had his day in court; that it deprives him of a trial by jury; that it does not give him any opportunity to produce witnesses or make a defense; that he is not permitted to testify in his own behalf; that it is cruel and excessive punishment; and that it denies him the equal protection of the law in contravention of the 14th Amendment to the United States Constitution. Some of these constitutional objections have been sustained in a few cases, as in *RICKLEY v. STATE*, and *State ex rel. McGraw v. Ensign*, 11 Neb. 529, 10 N. W. 449, holding that it contravenes the provision that no person shall be deprived of life, liberty, or property without due process of law. In a large number of cases the constitutionality of this provision has not been questioned, and it was taken for granted that the statute was valid. On the other hand, where it has been questioned, it seems that the present weight of authority is in favor of its constitutionality, holding that such provision is due process of law (*Lowe v. Kansas*, 163 U. S. 81, 41 L. ed 78, 16 Sup. Ct. Rep. 1031; *Re Ebenhack*, 17 Kan. 618; *State, McCaslin, v. Smith*, 65 Wis. 93, 26 N. W. 258); and gives him his "day in court" (*Re Ebenhack*, 17 Kan. 618); and is not an imprisonment for debt (*Green v. State*, 112 Ga. 52, 37 S. E. 93; *Re Ebenhack*, 17 Kan. 618; *State v. Wallin*, 89 N. C. 578; *State v. Cannady*, 78 N. C. 539); and does not

ERROR to the District Court for Sheridan County to review a judgment taxing the costs of prosecution against one upon whose information proceedings had been instituted against George Lovekin for the alleged commission of a larceny, of which he was acquitted. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. W. W. Wood, for plaintiff in error:

Section 322 of the Criminal Code is repugnant to § 3, art. 1, of the state Constitution. Under its provisions no process is issued against the complainant; no notice is given him of the time of trial; no bill of particulars or pleading is filed against him. He has no voice in the selection of a jury, and is deprived of the right of appeal.

deprive him of a trial by jury (*State ex rel. McCaslin v. Smith*, 65 Wis. 93, 26 N. W. 258); and is not cruel and unusual punishment (*State v. Cannady*, 78 N. C. 539).

The grounds for these rulings are that the prosecutor has voluntarily brought himself into court by instituting proceedings; that the imposition of the costs upon him are in the nature of a penalty for an abuse of the process of court; that it is a quasi contempt of court for any person to start a prosecution maliciously and without probable cause. Some of the cases dispose of the question on the ground that the prosecutor is granted the right of appeal in order to try the question of probable cause, and therefore he is not deprived of any constitutional rights. While it seems that the cases are in conflict, so that it cannot be positively declared what will be the result in future cases, it must be supposed that, where such statute has not been questioned from the beginning of the history of the state up to the present time, such long acquiescence will have great weight in sustaining the validity of such provisions, and that it will be hard to overthrow such a statute. Yet sometimes great hardship may be caused without any remedy, as usually the case of the prosecuting witness is in the hands of the prosecuting attorney, and the witness has no control of the manner of presenting the evidence, and may be prohibited from producing on the trial evidence to establish the fact that he had ample probable cause, and was actuated by the very best of motives. The only state in which it seems to have been held that such provision is unconstitutional is Nebraska, and the states wherein such statute has been held valid are Kansas, Wisconsin, Georgia, and North Carolina.

In *RICKLEY v. STATE* it was held that Neb. Code Crim. Proc. § 322, authorizing the question of the good faith of the prosecuting witness in instituting the prosecution to be tried

State ex rel. McGraw v. Ensign, 11 Neb. 531, 10 N. W. 449; *O'Chander v. Hansen*, 48 Neb. 485, 67 N. W. 604.

Mr. C. Patterson, for defendant in error:

The issues were tried without objection.

Carson v. Broady, 56 Neb. 648, 77 N. W. 81; *Dye v. Russell*, 24 Neb. 829, 40 N. W. 417.

The jury was acceptable to plaintiff and his attorneys before the trial, and, no objection having been made, all objections were waived.

Wasson v. Palmer, 13 Neb. 377, 14 N. W. 171; *Scott v. Waldeck*, 12 Neb. 5, 10 N. W. 413; *Jones v. Driscoll*, 46 Neb. 575, 65 N. W. 194.

Mr. C. E. Woods also for defendant in error.

Duffie, C., filed the following opinion:

March 8, 1897, the plaintiff in error filed

and determined at the same time that the defendant is tried, and the taxation of the costs against him in case it is found that in filing the information he acted maliciously or without probable cause, was unconstitutional and void. It was held that this provision contravened Neb. Const. art. 1, § 3, declaring that no person shall be deprived of life, liberty, or property without due process of law, in that it denied the complaining witness his day in court and a fair hearing. The court said that Neb. Comp. Stat. 1901, § 604, making it the duty of the prosecuting attorney to prosecute all complaints on behalf of the state before any magistrate, gave the county attorney full control of the case, and that the interests of the complaining witness were wholly at the mercy of the county attorney, and that there were many apparent difficulties in trying at the same time and before the same jury the question of the guilt of the defendant and the good faith of the complaining witness in commencing the prosecution. The court further said: "The advice of an attorney, after a full statement of the facts, would be competent evidence for the complainant upon the question of his good faith in commencing the prosecution, but would be highly objectionable if offered on that of the guilt or innocence of the defendant."

And in *State ex rel. McGraw v. Ensign*, 11 Neb. 529, 10 N. W. 449, it was held that the right to imprison a complainant for costs without a complaint specifying the offense and an opportunity to make a defense might well be questioned, under Neb. Const. art. 1, § 3, providing that no person shall be deprived of life, liberty, or property without due process of law, and § 11, providing that in all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, and demand the nature and cause of accusation, to meet the witnesses face to face, to have process to compel the attendance of witnesses, and a speedy public trial by an impartial jury. The court said: "A complaint under oath, charging a party with the commission of some offense against the law, must be filed before a party can be subjected to imprisonment in the county jail, yet the legislature has assumed to provide that upon the mere finding of a jury or justice that the complaint was malicious or without probable cause, the justice shall render judgment against the complainant for costs, and commit him to jail until he pay the same, unless he give security for their payment. We have no hesitation in saying that in this the 61 L. R. A.

a complaint with the county judge of Sheridan county, Nebraska, charging one Lovekin with stealing certain pieces of machinery, of the value of \$15. A warrant was issued on this complaint, the defendant arrested, and a trial had on March 18th. The jury, after deliberating seventeen hours, was unable to agree upon a verdict, and was discharged. The case was again tried on March 20th to a jury of four only, the state and the defendant agreeing thereto. This jury returned the following verdict: "We, the jury in the case, being duly impaneled and sworn, do find and say that the defendant is not guilty, and we further find that this case was brought without probable cause." Judgment was entered on this verdict discharging the defendant, and taxing the costs of the prosecution to the complainant. The complainant thereupon took error to the district court, where the judgment of

legislature exceeded its power. The mere failure to prove the charge made in a complaint is not conclusive evidence of want of probable cause or of malice. A party may be convinced of the existence of a tipping or gambling shop at a certain place, or of other means by which the morals of the community are corrupted or debased, and yet upon the trial, from the peculiar or secret nature of the business, may be unable to prove the charge. Does such a case upon the trial assume the form of a contest between the accused and the accuser as to which shall be imprisoned? We think not. And in no case can a complainant be subjected to imprisonment for a failure to pay costs. When the offense charged is a misdemeanor, the justice, before issuing the warrant, may require the complainant to acknowledge himself liable for the costs, and, if he deem himself irresponsible, may require security. If the justice fails to do this, the claim is merely a civil liability, and the Constitution provides that there shall be no imprisonment in a civil action except in cases of fraud. It follows that the judgment must be reversed and the petitioner must be discharged."

For a case in this state holding that the question of the constitutionality of the statute had not been properly raised, see *O'Chander v. Hansen*, 48 Neb. 485, 67 N. W. 604.

On the other hand, where the question has been raised in other states, similar provisions have been held valid.

In Kansas a proceeding by which judgment for the costs of the prosecution was rendered against a person upon whose oath a criminal information for libel was filed, and who was found by the jury to have instituted the prosecution without probable cause and with malice, was held to be due process of law. It was further held that Kan. Gen. Stat. 1889, chap. 82, § 320, providing that, "whenever it shall appear to the court or jury trying the case, that the prosecution has been instituted without probable cause and from malicious motives, the name of the prosecutor shall be ascertained and stated in the finding; and such prosecutor shall be adjudged to pay the costs, and may be committed to the county jail until the same are paid, or secured to be paid," did not deny him the equal protection of the law, as it was applicable to all persons under like circumstances, and did not subject the individual to an arbitrary exercise of power. *Lowe v. Kansas*, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031.

This was an appeal from the same case,—

the county judge was affirmed, and from that judgment the complainant has prosecuted error to this court.

The testimony taken on the trial of the cause has not been preserved, and we cannot say, therefore, whether the finding of the jury that the cause was brought without probable cause is supported by the evidence. There is in the record a paper entitled a "bill of exceptions," signed by the county judge, and indorsed, filed as of March 22, 1897; but the exceptions preserved in this bill go only to the action of the court in sustaining an objection made by the state to testimony offered by the defendant in another. Even these we cannot consider, for the reason that, while it appears that the bill was signed by the county judge and marked "Filed," the judge has erased his signature from the paper, and indorsed thereon a memorandum to the effect that

the bill does not correctly set out the proceeding had upon the trial, and, because the plaintiff in error refuses to make the proper corrections therein, he refuses to certify the same. The memorandum is not dated, but, as the county judge would have no right to change a record, the presumption obtains that it was indorsed on the bill before the same was filed and made part of the record in the case. If the bill correctly sets out the proceedings had, the plaintiff in error had his remedy to compel by proper proceedings its allowance by the judge; but he cannot ask us, nor are we permitted, to go behind the matters certified by the trial court to ascertain what actually took place on the trial. In this condition of the case, we can only examine the transcript, and ascertain if the judgment is one that could legally be entered against the plaintiff in error. In *O'Chander v. Hansen*, 48 Neb.

Re Lowe, 46 Kan. 255, 26 Pac. 749, Rehearing Denied, in 47 Kan. 769, 28 Pac. 1089, *infra*,—from which Lowe sued out a writ of error contending that he had been deprived of his liberty and property without due process of law, contrary to the 14th Amendment to the United States Constitution. In that case Lowe contended that Kan. Comp. Laws 1879, § 275, p. 366, providing that in all prosecutions for libel the jury have the right to determine, at their discretion, the law and the fact, was unconstitutional; but it was held to be valid, the court saying: "Counsel attack this provision of the statute, and say it is unconstitutional and void, but they forget that within their memory the practice in criminal cases in almost all, if not all, of the states, was for the jury to pass upon the law and the facts." It was also claimed that § 326 of the Criminal Code, authorizing the jury to find the name of the prosecutor, and that the prosecution was instituted without probable cause and from malicious motives, was unconstitutional and void. The court said: "The constitutionality of the other statute [§ 326, *supra*] has been upheld by this court in the case of *Re Ebenhack*, 17 Kan. 618, decided many years ago."

This does not appear to have been the same statute that was passed upon in *Re Ebenhack*, but was a similar one, Gen. Stat. 881, § 18, providing that when, upon a trial before a justice for a misdemeanor, it shall be found that the prosecution was instituted maliciously or without probable cause, the prosecuting witness may be adjudged to pay the costs, and may be committed. In the *Lowe* case § 326 of the Criminal Code was reviewed, and that section provided that the jury might find the name of the prosecutor, and that the prosecution was instituted without probable cause and from malicious motives.

In *Re Ebenhack*, 17 Kan. 618, Kan. Gen. Stat. (1868) § 18, p. 881, providing that when, upon a trial before a justice of the peace for a misdemeanor, it shall be found that the prosecution was instituted maliciously or without probable cause, the prosecuting witness shall be adjudged to pay the costs, and, unless a bond is given therefor, shall be committed to the county jail until the same are paid, was held to be valid and constitutional. In this case it was objected that such an imprisonment would not be upon "due process of law," and that it could not be said that the prosecuting witness had had his "day in court." The court said: "The proceeding is summary; but it is clear that it is due process of law, and that

the offender has had his day in court. Indeed, it may well be considered that he who maliciously, or without probable cause, invokes the process of a court to oppress and wrong an innocent party by placing him under arrest and upon trial for violation of law is guilty of a contempt of court." It was further contended that the statute conflicted with Bill of Rights, § 16, providing that "no person shall be imprisoned for debt except in cases of fraud;" but it was held that these costs were imposed upon the prosecuting witness as a penalty, and did not constitute strictly and simply a debt in the technical sense of the word. The court further said: "The legislature has, in effect, declared that an unwarranted appeal, in this class of cases, to the criminal law, is itself a violation of law, and subjects the offender to punishment; and the penalty imposed is the costs of the unwarranted proceedings."

The above case held that the costs imposed on the prosecutor did not constitute a debt, and that an unwarranted appeal in this class of cases to the criminal law was itself a violation of law and subjected the offender to punishment. In *RICKLEY V. STATE*, referring to this, the court said: "The court followed this case in *Re Lowe*, 47 Kan. 769, 28 Pac. 1089, but it is evident from the opinion that the supposed binding force of early decisions had much to do with securing the assent of the court as then constituted. It is apparent that the argument above used in support of the validity of the statute is forced, and to our minds it is unsatisfactory."

Under Ga. Penal Code, § 1082, providing that the prosecutor's name shall be indorsed on every indictment, and he shall be compelled to pay all costs and jail fees upon the acquittal or discharge of the person accused, it was held that the judge had the power to issue an order or rule nisi calling upon the prosecuting witness to show cause why he should not pay the costs, and, in case of failure to give a legal answer, the judge had the right to attach him for contempt until the costs were paid. It was contended by counsel that this method of enforcing such an obligation against a party in court was unconstitutional, being tantamount to an imprisonment for debt. *Green v. State*, 112 Ga. 52, 37 S. E. 93. In this case the court said: "It will be noted, however, in the present case, in the first place, that the respondent, in answer to the rule nisi served, did not avail himself of the defense that he had no means with which to pay the costs, even if such an answer would have been a legal reply set-

485, 67 N. W. 604, it was held that an appeal would not lie in favor of a complaining witness against whom a judgment for costs had been entered. It was intimated, however, that a writ of error would lie under § 580 of the Code of Civil Procedure; and the defendant in error does not question, further than to say that, while an appeal will lie only in those cases provided by statute, a writ of error may be taken by anyone injuriously affected by a judgment, where the injury is the direct and immediate result thereof, and who stands in such relation to the case that he is competent to release the error. *Black v. Kirgan*, 15 N. J. L. 45, 28 Am. Dec. 394.

Our Code of Criminal Procedure provides that, upon the trial of minor offenses before a magistrate, if the defendant is acquitted, and the magistrate or jury trying the case shall state in the finding that the complaint was malicious and without probable cause, the magistrate shall enter judgment against

ting up a valid defense to the rule. But the payment of the costs in such a case we do not think could be regarded as a debt for which the Constitution declares there shall be no imprisonment, but rather a penalty for the manifest violation of the rights and liberty of others. We can conceive of a case where this rule of law would operate with great hardship upon a person in good faith undertaking a criminal prosecution of another. That seems to have been a hardship on the defendant in the case above cited in *Jacobs v. State*, 20 Ga. 839, but, if there be any evil in the law as it now stands, the remedy is not with the courts, but with the lawmaking power of the state."

And in *State v. Wallin*, 89 N. C. 578, it was said that when costs are adjudged against the prosecuting witness, "when the prosecution terminates in a *nolle prosequi*, acquittal, or arrest of judgment, or against the accused when it terminates in a verdict of guilty, either party may be put in the sheriff's custody until the costs are paid or he discharged according to law. Code, § 738; *State v. Manuel*, 20 N. C. 144 (4 Dev. & B. 20); *State v. Cannady*, 78 N. C. 539. These charges do not constitute a debt within the meaning of the clause in the Constitution for which imprisonment is forbidden (art. 1, § 16), but are in the nature of a penal indiction, punitive in character and purpose, as is a fine imposed upon one found guilty of crime."

In *State ex rel. McCaslin v. Smith*, 65 Wis. 93, 26 N. W. 258, where costs were imposed on the complainant by the municipal court, under Wis. Rev. Stat. 4791, authorizing such a judgment on determining that the complaint was wilful and malicious and without probable cause, it was contended that the judgment entered against complainant was without due process of law, or without giving him a trial by jury or any opportunity to produce witnesses or make a defense. But it was held that a complaining witness, who instigated a criminal prosecution maliciously and without probable cause, in a sense made himself a party to it. The court said: "The statute gave the defendant in error the right of appeal from the judgment where he could have had a trial upon the merits in the appellate court. The law in this respect has been changed since the case of *State v. Rusch*, 44 Wis. 582, was decided. As it now stands, it obviates an objection which 61 L. R. A.

the complainant for all costs that shall have accrued in the proceedings had upon such complaint, and shall commit such complainant to jail until such costs be paid, unless he give bond, etc. The latter part of this section was declared unconstitutional in *State ex rel. McGraw v. Ensign*, 11 Neb. 529, 10 N. W. 449; the reasons given being that the costs in such a case were a mere civil liability, for which a party could not be imprisoned. It is now insisted that the statute, in so far as it authorizes the entry of a judgment for costs against the complaining witness in a criminal case, is in contravention of § 3, art. 1, of the state Constitution, which declares: "No person shall be deprived of life, liberty, or property without due process of law." There is great force in the suggestion that the property of the citizen cannot be taken or made liable in an action to which he is not a party to the record, and in which his rights are not directly put in issue; but whether this stat-

has sometimes been taken to a provision authorizing the examining magistrate to impose the costs of prosecution upon the complaining witness, and making the determination of the magistrate in the matter final. See *State ex rel. McGraw v. Ensign*, 11 Neb. 529, 10 N. W. 449; *State v. Roney*, 37 Iowa, 30. We do not think the section in question is obnoxious to any constitutional objection." In this case it was contended that the statute was unconstitutional, as the Constitution, art. 7, § 2, vested judicial power in the supreme court, circuit court, courts of probate, and justices of the peace, and this statute attempted to confer judicial power upon court commissioners and justices of courts of record in vacation; and that, if the statute conferred power to enter judgment upon justices of the peace alone, it would be partial and unequal legislation, discriminating against the right of different suitors in courts of justice. It was further contended that this statute contravened U. S. Const. 5th Amendment, and Wis. Const. art. 1, §§ 5, 9, and ordinance 1787, art. 2, in that under this statute a citizen would be deprived of his property and his liberty without a trial by jury, without being a party to the action, without being permitted to testify in his own behalf, without the right to produce such evidence as he might deem proper, and judgment would be entered against him without due process of law.

And where a prosecutor in a peace warrant was ordered to pay costs because the prosecution was frivolous or malicious, and an order was made that, on failure to do so, he should be imprisoned, the court held: "(1) That neither a fine nor costs inflicted as a punishment is a debt within the meaning of the Constitution in relation to this matter; (2) that the legislature had the power to prescribe, as it has done, that the prosecutor may be made to pay costs, where the defendant is acquitted and the prosecution is frivolous or malicious; (3) that there is nothing cruel or unusual in requiring a prosecutor, who has not been indicted and convicted by a jury, to pay costs, nor is it contrary to the Constitution, because it has long been the practice to do so, and because substantially he stands convicted by his false clamor and the acquittal of the defendant." *State v. Cannady*, 78 N. C. 539.

In *State v. Dunn*, 95 N. C. 697, it was urged that the opinion in *State v. Cannady*, 78 N. C.

ute denies to a prosecuting witness his constitutional rights is a question not so easily determined as might seem at first glance, and it has, we confess, given us trouble to determine. Many of our sister states,—we think a majority of them,—have a similar statute; and in three cases only, arising in Kansas and Wisconsin, has the question been raised and determined. In the other states, so far as an extended examination on our part has disclosed, the constitutionality of the statute has been assumed, and never questioned. *Burns v. State*, 5 Ala. 227; *Tuck v. State*, 8 Ala. 664; *State v. Branum*, 23 Ark. 540; *Jacobs v. State*, 20 Ga. 839; *Margrave v. United States*, Morris (Iowa) 452; *State v. Donnell*, 11 Iowa, 452; *Ex parte Cain*, 9 Mo. 760; *State v. Berry*, 25 Mo. 355; *State v. Bowling*, 14 Mo. 508; *State v. Cockerham*, 23 N. C. (1 Ired. L.) 381; *State v. Darr*, 63 N. C. 516; *Guffy v. Com.* 2 Grant Cas. 66; *Hansard v. State*, 5 Humph. 115; *State v. Green*, 2 Head, 356;

539, *supra*, countenanced, if it did not distinctly recognize, the correctness of a charge for solicitors' fees in taxing costs against the prosecuting witness. The court said: "We do not so interpret the language there used, nor does it admit of such inference. The decision is, that costs put upon a prosecutor do not constitute a debt in the sense of the Constitution, imprisonment for which is prohibited, but are essentially punitive, for a false and unfounded clamor, and he who prosecutes such a criminal charge ought to bear the pecuniary consequences; and further, that the general assembly has the right so to enact. The solicitor's fee becomes due only on conviction under an indictment, and in this case has become due from no one."

In *State v. Roney*, 37 Iowa, 30, the court said: "If there is any remedy for a prosecutor in a criminal cause, against a wrongful judgment that he pay the costs of the prosecution, it must be by an appeal. Does our statute afford him this remedy? It is provided respecting trials in criminal cases, cognizable before a justice of the peace, like the case whereon this appeal arises: § 5094. 'Either party may appeal from the judgment to the district court of the county, at the term which commences not less than fifteen days after the day on which the appeal is taken,—the state, in the same manner as the defendant.' It was held by this court in *State v. Talt*, 22 Iowa, 140, that, to entitle the state to appeal, under this statute, it is not necessary to show prejudice, any more than it is for the defendant in the exercise of the same right, and that the right of appeal by the state existed. And in the case of *State v. Van Horton*, 26 Iowa, 402, where it was held that this section of the statute was unconstitutional, in so far as it authorized the retrial of an accused in the district court, when he had been acquitted upon a trial before the justice, yet the invalidity of the section was limited to that portion authorizing a retrial of a defendant once acquitted, or so as to affect the penalty against him. That the state might appeal for other purposes, and to correct other errors, was expressly stated. An appeal may then be taken in such cases."

In *Re Permstick*, 3 Wash. 672, 29 Pac. 350, which held that Wash. Code 1881, § 2103, authorizing a court, justice of the peace, or other magistrate, to decide whether the complaint was frivolous or malicious, and assess the costs

Com. v. St. Clair, 1 Gratt. 556; *State v. Horton*, 89 N. C. 581; *State v. Baldwin*, 79 Mo. 243; *Taylor v. State*, 39 Ark. 291; *State v. Owens*, 87 N. C. 565; *State v. Spencer*, 81 N. C. 519; *State v. Adams*, 85 N. C. 560; *State v. Hughes*, 83 N. C. 665; *Errickson v. State*, 10 Neb. 585, 7 N. W. 333; *State v. Wormick*, 1 Lea, 559; *State v. Reiser*, 20 Kan. 548; *Shields v. Shawnee County*, 5 Kan. 590. In *State v. Rusch*, 44 Wis. 582, the court, while not expressing an opinion on the question, intimated that the statute was invalid; but the only question before the court, and the only one determined, was the question of the right of the complaining witness to appeal from a judgment for costs entered against him, the court holding that no right of appeal existed. In the later case (*State ex rel. McCaslin v. Smith*, 65 Wis. 93, 26 N. W. 258), arising after the statute had been amended to give the complainant a right of appeal from a judgment against him, the

against the complaining witness, did not apply to the superior court, the court said: "We do not find it necessary to pass upon two constitutional questions raised here, *vis.*, whether the petitioner had due process of law, and whether he is imprisoned for debt. They will be interesting when occasion arises requiring their discussion."

And in *State v. Rusch*, 44 Wis. 582, it was said: "Whether a statute can be upheld which attempts to confer power upon a magistrate to render judgment for the costs of a criminal prosecution against a person not a party to the prosecution, and who has no control over it and no opportunity to show cause why judgment should not go against him, is a question not raised by this appeal."

Since this decision the statute was changed, allowing an appeal by the complaining witness. See *State ex rel. McCaslin v. Smith*, 65 Wis. 93, 26 N. W. 258, *supra*.

Under Neb. Crim. Code, § 322, providing that, "whenever the defendant, tried under the provisions of this chapter, shall be acquitted, he shall be immediately discharged; and, if the magistrate or jury trying the case shall state in the finding that the complaint was malicious or without probable cause, the magistrate shall enter judgment against the complainant for all costs that shall have accrued in the proceedings had upon such complaint, and shall commit such complainant to jail until such costs be paid,"—It was contended that so much of said section as authorizes the rendering of judgment for costs against a complaining witness in a criminal case contravened § 3 of article 1 of the state Constitution, which declares that no person shall be deprived of life, liberty, or property, without due process of law. It was held that the invalidity of the judgment could not be questioned in this proceeding as no appeal was allowed by law from such a judgment. *O'Chander v. Hansen*, 48 Neb. 485, 67 N. W. 604. In this case the court said: "It is not improbable that O'Chander was entitled to have the judgment of the county court reviewed by petition in error, under § 580 of the Code of Civil Procedure, but, whether so or not, it is very evident no right of appeal has been given him, either by the statute or the Constitution. The conclusion reached precludes a consideration of the validity of § 322 of the Criminal Code, or the judgment rendered thereunder."

I. T.

statute was sustained, the court saying that, "a complaining witness who instigates a criminal prosecution maliciously and without probable cause in a sense makes himself a party to it. His position is similar to that of a party who signs as surety an undertaking for the return of property replevied. . . . The statute gave the defendant in error the right of appeal from the judgment, where he could have had a trial upon the merits in the appellate court. The law in this respect has been changed since the case of *State v. Rusch*, 44 Wis. 582, was decided. As it now stands, it obviates an objection which has sometimes been taken to a provision authorizing the examining magistrate to impose the costs of prosecution upon the complaining witness, and making the determination of the magistrate in the matter final." It will be noticed from the above quotation that the court sustains the statute upon the theory that the complaining witness by filing the complaint occupies the relation of a surety, and that the statute grants him the right of appeal, where his liability may be passed upon separate and apart from the question of the guilt or innocence of the party against whom the information was filed. In view of the provisions of § 287 of our Criminal Code, which authorizes the magistrate to require the complainant to acknowledge himself responsible for the cost before issuing a warrant of arrest for a misdemeanor, it cannot be supposed that our legislature understood or intended that the complainant bound himself for the costs by signing the information, merely, or otherwise than by becoming expressly obligated therefor; and the reasoning of the Wisconsin case in this respect, if otherwise sound, could hardly apply in this state.

Re Ebenhack, 17 Kan. 618, was a petition for a writ of habeas corpus; the petitioner alleging that he was restrained of his liberty because of his refusal to pay the costs of a prosecution in which he was the complainant. The district court ordered his release upon the ground that the statute was invalid; but this order was reversed by the supreme court, which held that the legislature might not only authorize the taxation of costs against a complaining witness who maliciously or without probable cause instituted a criminal prosecution against another, but might also direct his imprisonment for a refusal to pay them. Judge Brewer, who delivered the opinion of the court, said: The prosecuting witness, "by coming into court and filing his complaint, . . . submits himself to the jurisdiction of the justice; and at the same time that the question of the guilt of the person, by his affidavit charged with the crime, is tried, his own conduct in the premises is inquired into. True, he is not upon the record as a party plaintiff or defendant, but the prosecution is instituted at his instance, and he appears upon the record as the complaining party. Many civil proceedings were formerly in the name of the state upon the relation of some one. . . . It is

true, also, that no formal accusation is presented against the complainant, upon which he is tried and found guilty, and that the first written statement of his wrong is in the finding and order; but the same is equally true in many cases in commitments for contempt. There, often, the first writing is the order of the court committing the offender for the contempt. The proceeding is summary, but it is clear that it is due process of law, and that the offender has had his day in court. Indeed, it may well be considered that he who maliciously or without probable cause invokes the process of a court to oppress and wrong an innocent party, by placing him under arrest and upon trial for violation of law, is guilty of a contempt of court. . . . Again, it is said that this is in conflict with § 16 of our Bill of Rights. 'No person shall be imprisoned for debt except in cases of fraud.' But these costs are cast upon him as a penalty. They do not constitute strictly and simply a debt, in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery is a debt. The legislature has, in effect, declared that an unwarranted appeal in this class of cases to the criminal law is itself a violation of law, and subjects the offender to punishment; and the penalty imposed is the costs of the unwarranted proceedings. *Shields v. Shawnee County*, 5 Kan. 590; *State v. Donnell*, 11 Iowa, 452; *State v. Darr*, 63 N. C. 516." The court followed this case in *Re Love*, 47 Kan. 769, 28 Pac. 1089, but it is evident from the opinion that the supposed binding force of early decisions had much to do with securing the assent of the court as then constituted. It is apparent that the argument above used in support of the validity of the statute is forced, and to our minds it is unsatisfactory. Especially is this so in view of the provisions of § 604 of the Compiled Statutes of 1901, which make it the duty of the county attorney to appear on behalf of the state before any magistrate and prosecute all complaints on behalf of the state of which any magistrate shall have jurisdiction. This statute gives to the county attorney full control of the case, and, while the complainant is, in a sense, represented by counsel,—the county attorney,—he is given no choice as to whom he will employ, except by the consent and favor of the public prosecutor, who may take full control of the case, and exclude other counsel, should the complainant desire additional assistance. He calls such witnesses as he pleases; he controls all offers of evidence; he saves an exception to the rulings of the court, or not, at his pleasure; the interests of the complainant are wholly at his mercy, and are protected or left to suffer, as he may choose; and presuming, as we may and should, that the county attorney is both qualified to try the case, and honestly striving to do his whole duty in the matter, it is still evident that, if the complainant's interests are protected, it is as a matter of favor, and not a legal right which could be enforced, as it is more

than doubtful if the relation of attorney and client exists in such a sense as to render the public prosecutor liable in an action for negligence or unskillfulness. Again, there are many apparent difficulties in trying at the same time and before the same jury the question of the guilt of a defendant, and the good faith of the complaining witness in commencing the prosecution. The advice of an attorney, after a full statement of the facts, would be competent evidence for the complainant upon the question of his good faith in commencing the prosecution, but would be highly objectionable if offered on that of the guilt or innocence of the defendant. The complainant's wife or son, or a neighbor in whom he had the utmost confidence and whose integrity had never been doubted, may have informed the complainant that he saw the defendant steal his property, and this the complainant could show as evidence of his good faith; but as against the prisoner charged with the larceny this would be hearsay and wholly inadmissible. It is evident that many cases may arise where a fair trial cannot be given the defendant on the question of his guilt

of the crime charged, and the complainant on the question of his good faith in commencing the prosecution. That occasion exists for a statute authorizing the taxation of costs against one who maliciously and without probable cause institutes a criminal prosecution against his neighbor is no reason for upholding a statute which may deny the honest complainant his day in court and a fair hearing. If the statute provided for an appeal by the complainant in case he felt aggrieved by a judgment taxing the costs against him, giving him an opportunity to present to the appellate court the single question of his good faith, aided by counsel of his own selection, the present objections to the statute would probably be removed; but in its present form we think it cannot be sustained, and therefore recommend that the judgment be reversed.

Albert and Ames, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed.

NEW HAMPSHIRE SUPREME COURT.

Michael MURRAY, Admr., etc., of Baker,
Deceased,
v.

BOSTON & MAINE RAILROAD.

(.....N. H.....)

1. The elapsing of a couple of minutes between the accident and the making of a declaration will not exclude from evidence, upon the question of the cause of the accident, a declaration by an employee of a railroad company, whose legs were cut off by a car, and who was found lying between planks forming a hand-car stand, that he stumbled over the planks.
2. A declaration by an injured person as to cause of accident is not excluded from evidence as part of the *res geste* because in form of a narrative, and made in answer to a question.
3. A brakeman on a railroad does not assume the risk of accident from the proximity of a jigger stand to a switch, where he does not know of it, and is not chargeable with such knowledge in the exercise of ordinary care in the performance of his duties.
4. The manner of the occurrence of an accident to a railroad employee, when disclosed by the evidence, may warrant an in-

ference in his favor as to want of knowledge of the unsafe condition of his working place, as tending to show that he did not assume the risk of such condition.

5. Knowledge on the part of a brakeman of a jigger stand near a switch which he is required to use is not shown by the fact that he had been over the road ten or twelve times within two months of the accident, when the stand is not so conspicuous as necessarily to attract his attention, and men who worked with him during the time testified that they had not noticed it.
6. That jigger stands are frequently placed along railroad tracks does not charge a brakeman, as matter of law, with notice that one may be near a switch that he is required to use, where they usually lead into car houses, and are not placed near switches.
7. Direct evidence is not necessary to show due care on the part of a brakeman at the time of an accident by which he is injured.
8. The jury may infer that a brakeman proceeding in the night towards a switch which he is required to set would do so in an ordinarily prudent manner, and find from such inference that he was in the exercise of due care, in the absence of evidence to the contrary.

(February 3, 1903.)

NOTE.—As to how near the main transaction declarations must be made in order to constitute a part of the *res geste*, see also *note* to *Ohio & M. R. Co. v. Stein* (Ind.) 19 L. R. A. 733.

As to liability of master for injury to servant by objects placed near track, see *Pidcock v. Union P. R. Co.* (Utah) 1 L. R. A. 131; *Grattis v. Kansas City, P. & G. R. Co.* (Mo.) 48 L. R. A. 399; and *Missouri P. R. Co. v. Columbia* (Kan.) 58 L. R. A. 399. 61 L. R. A.

EXCEPTIONS by defendant to rulings of the Superior Court for Hillsborough County, made during the trial of an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Overruled.*

Baker had been for some time in the employ of defendant as a freight brakeman, belonging to a crew which had no regular

run, but worked on extras running out of Nashua. During the two months before the accident the crew had been over the road from Nashua to Keene ten or twelve times. While making up a train in the yard at Greenfield, about 2 o'clock in the morning, it was Baker's duty to throw a switch after cars had been drawn off a side track. While the cars were in motion someone with a lantern was seen traveling along the track on the side opposite the switch. In the vicinity of the switch the lantern disappeared going down by the side of the track. At this point there was a jigger stand about 6 feet from the switch, consisting of plank placed at right angles with the track, and within 2 or 3 inches of it, and extending back some 15 feet. Its purpose was to assist in removing hand cars from the track. Just after the lantern disappeared, Baker was heard to cry out, and was found lying between the planks with both legs nearly severed from his body. When asked, "How did you do that?" Baker replied, "I fell over these old planks." Baker died a few hours after the accident; and it was not known whether he had ever before operated this particular switch, or whether he had ever gotten off his car at that point. The stand had been there about ten years, and some years prior to the accident Baker went over the road as brakeman a large number of times.

Messrs. Hamblett & Spring and Burns & Burns for defendant.

Messrs. Doyle & Lucier, for plaintiff:

In the absence of all evidence upon the question of Baker's negligence, his exercise of ordinary care may be inferred from the instinct of self-preservation, because there is no testimony as to what he did, or what he omitted to do, for his protection.

Huntress v. Boston & M. R. Co. 66 N. H. 185, 34 Atl. 154; *Snevely v. Jones*, 9 Watts, 433; *Johnson v. Hudson River R. Co.* 20 N. Y. 65, 75 Am. Dec. 375; *Reynolds v. New York C. & H. R. Co.* 58 N. Y. 248; *Hutchins v. Macomber*, 68 N. H. 473, 44 Atl. 602; *Whitcher v. Boston & M. R. Co.* 70 N. H. 246, 46 Atl. 740.

To furnish deceased a reasonably safe place in which to perform his duty was an imperative duty on the master, to be fully performed.

State v. Boston & M. R. Co. 58 N. H. 408; *Evans v. Concord R. Corp.* 66 N. H. 194, 21 Atl. 105.

Whether the defendant furnished the deceased with a suitably safe place to work in was a question for the jury; and whether Baker ought to have known of the danger was also a question for the jury.

Whitcher v. Boston & M. R. Co. 70 N. H. 245, 46 Atl. 740; *Hardy v. Boston & M. R. Co.* 68 N. H. 523, 41 Atl. 179.

Mere knowledge of the existence of this jigger stand would not excuse the defendant, unless Baker should have appreciated the danger.

Demars v. Glen Mfg. Co. 67 N. H. 404, 40 Atl. 902.

61 L. R. A.

The statement made by Baker to Smith is admissible as part of the *res gestæ*.

I Wharton, Ev. p. 259; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49; *International & G. N. R. Co. v. Anderson* 82 Tex. 518, 17 S. W. 1039; *Mitchum v. State*, 11 Ga. 615; *Handy v. Johnson*, 5 Md. 450; *State v. Garrand*, 5 Or. 216; *Tenney v. Evans*, 14 N. H. 350, 40 Am. Dec. 194; *Woods v. Banks*, 14 N. H. 114.

Its admissibility is determined by the judge according to its relation to the fact, and in the exercise of his sound discretion.

Greenl. Ev. 14th ed. p. 144; *Leahey v. Cass Ave. & F. G. R. Co.* 97 Mo. 165, 10 S. W. 58; *Quincy Horse R. & Carrying Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190; *International & G. N. R. Co. v. Smith* (Tex.) 14 S. W. 642; *Cleveland v. Newsom*, 45 Mich. 62, 7 N. W. 222; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Caverno v. Jones*, 61 N. H. 823; *Stein v. Railroad Co.* 10 Phila. 440; *Entwhistle v. Feighner*, 60 Mo. 214; *Augusta Factory v. Barnes*, 72 Ga. 218, 53 Am. Rep. 838; *Fairfield v. Amherst*, 57 N. H. 479; *Lord v. Pueblo Smelting & Ref. Co.* 12 Colo. 390, 21 Pac. 148; *Dela-ware, L. & W. R. Co. v. Ashley*, 14 C. C. A. 368, 28 U. S. App. 375, 67 Fed. 209; *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637; *Ohio & M. R. Co. v. Cullison*, 40 Ill. App. 67; *Pennsylvania R. Co. v. Lyons*, 129 Pa. 113, 18 Atl. 759; *Chicago West Div. R. Co. v. Becker*, 30 Ill. App. 200, 128 Ill. 545, 21 N. E. 524; *Funston v. Chicago, R. I. & P. R. Co.* 61 Iowa, 452, 16 N. W. 518; *Fish v. Illinois C. R. Co.* 96 Iowa, 702, 65 N. W. 995; *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. 607; *Stoeckman v. Terre Haute & I. R. Co.* 15 Mo. App. 503; *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Waldele v. New York C. & H. R. Co.* 29 Hun, 35; *Elkins v. McKean*, 79 Pa. 493; *Texas & P. R. Co. v. Robertson*, 82 Tex. 657, 17 S. W. 1041; *International & G. N. R. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039; *Missouri P. R. Co. v. Bond*, 2 Tex. Civ. App. 104, 20 S. W. 930; *Sullivan v. Salt Lake City*, 13 Utah, 122, 44 Pac. 1039; *Christianson v. Pioneer Furniture Co.* 92 Wis. 649, 66 N. W. 699; *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437.

Walker, J., delivered the opinion of the court:

It is claimed that Baker's statement, made directly after the infliction of his injury, was not admissible. If the declaration was merely a narrative of a past event, the evidence of it would be inadmissible, upon the ground that ordinarily hearsay evidence is not received in proof of the truth of an assertion. The uniform practice of the courts in common-law jurisdictions has resulted in the establishment of this principle, as a necessary and useful rule in the investigation of questions of fact. But when the declaration of one not a sworn witness upon the trial is something more than mere narrative,—when its probative force is derived in part, at least, from sources other than the credibility of the declarant,—an

opportunity is afforded for the argument that it does not fall within the strict rule against hearsay evidence, or that it constitutes an exception to the rule. It is then possible to say that the declaration, while verbally a mere narrative, is something more, and may be, for that reason, of such probative force as to be admissible as evidence upon a material issue. It may be so connected with other controverted facts as to be itself a fact or circumstance naturally growing out of, and in some sense attested by, them. The verbal statement of a person, made under some circumstances, may be a part of the actual occurrence, and be entitled to as much weight as evidence as any other part of the transaction. This is the principle, it is believed, that is involved in the somewhat obscure doctrine of *res gestæ*, which is often resorted to, apparently, more on account of its convenient indefiniteness than for its scientific precision. But the principle, whether expressed in an abbreviated Latin phrase or otherwise, is an important one in any system of evidence whose object is the ascertainment of facts. Its development has been promoted, in modern times, by an effort to afford the triors of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The question is not now, how little, but how much, logically competent proof is admissible.

In cases of this character it is important to ascertain what, if any, relevancy the declaration has,—in other words, what it tends to prove; for unless its natural effect is to prove or explain a point in issue or a controverted fact, it is not admissible. In this case the burden was upon the plaintiff to establish, by a balance of the probabilities, that his intestate received his injury in consequence of the negligence of the defendant. This, in a broad general sense, was the issue tried: but it involved a material inquiry as to the manner in which the accident happened. If it is assumed that suffering the planks to be where it is admitted they were was a negligent act of the defendant, it was important for the plaintiff to show that they were the proximate or effective cause of the accident. If, in the exercise of due care, the deceased would not have received the injury complained of but for the existence of the planks at that particular place and time, the plaintiff would have sustained the burden assumed by him. On the other hand, if the cause of the accident was something other than the planks, as manifestly might have been the case, his failure in this respect might have been fatal. *Nashua Iron & Steel Co. v. Worcester & N. E. Co.* 62 N. H. 159. The controversy was whether the planks caused the deceased to stumble and fall, and thus to suffer the injury inflicted upon him by the car wheel running over his legs. The plaintiff's evidence was that the deceased was found almost immediately after the accident lying between the planks, with his legs practically

severed from his body; that the fragments of his broken lantern were on the ground near him; and that blood and bits of flesh were found upon the car wheel and near the planks. These are all physical facts which, as evidence, afford some information as to how the accident happened. They are relevant details or results of the main fact. In the strictest sense, they may not together constitute or fully evidence the fact in controversy; but in law they are said to be a part of it. The admission of evidence of this character is placed upon the ground that it discloses to the jury the facts and circumstances which attended the principal fact. In a not inappropriate sense, they are a part of the *res gestæ*, and exist as evidence of it. *Willis v. Quimby*, 31 N. H. 485; *Tucker v. Peaslee*, 36 N. H. 167, 181; *Wyman v. Perkins*, 39 N. H. 218; *Willey v. Portsmouth*, 64 N. H. 214, 219, 9 Atl. 220.

When, instead of attendant physical facts and circumstances, the evidence consists of a declaration, made by a person at the time of the event or transaction which is under investigation, its admission depends upon a similar principle. If its materiality or relevancy is conceded, the question whether it is a part of the *res gestæ* arises; that is, whether it occurred in such intimate connection with the event in issue as to constitute it in a reasonable and proper sense a part thereof. If it does, it is, in its probative bearing, superior to mere hearsay remarks, and may, for that reason, be admissible. "Its connection with the act gives the declaration greater importance than what is due to the mere assertion of a fact by a stranger, or a declaration by the party himself at another time. It is part of the transaction, and may be given in evidence in the same manner as any other fact." *Hadley v. Carter*, 8 N. H. 40, 43. "Where evidence of an act done by a party is admissible, his declarations, made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible, as a part of the *res gestæ*." *Sessions v. Little*, 9 N. H. 271, 276.

After approving the statement quoted above from *Hadley v. Carter*, the court, in *Wiggin v. Plumer*, 31 N. H. 251, 267, states the principle as follows: "When a fact is offered in evidence, the whole transaction, if it consists of many particulars, may and ought to be proved. Every additional circumstance proved may vary the effect of the evidence, may neutralize it, or give it point. What is then said by the parties, and what is said by others to them, relative to the subject of the transaction, is a part of the transaction itself. It is admissible on the same principle that every other part of it is, that the whole matter may be seen by the jury. . . . Contemporaneous, but otherwise unconnected conversation, is rejected, on the same ground as other unconnected facts. If the statement offered in evidence does not tend to elucidate or give a character to the acts proved, it is to be rejected. If it is upon the same subject

and relative to the act in proof, it should be received." See also, to same effect, *Mahurin v. Bellows*, 14 N. H. 209, 212; *Tenney v. Evans*, 14 N. H. 343, 350, 40 Am. Dec. 194; *Morrill v. Foster*, 32 N. H. 358.

But, while admitting that the foregoing statements of the law are substantially correct, the defendant insists that a declaration of the character received in this case, in order to be admissible, must have been strictly and literally contemporaneous with the fact it was intended to elucidate or explain. In other words, it is in effect conceded that if, while the car wheels were passing over Baker's legs, he had exclaimed, "I fell over these old planks," that statement would have been admissible as a part of the *res gestæ*; but it is claimed that, although made within two minutes after the actual infliction of the injury, while he was lying between the planks, groaning on account of the pain, and while no substantial change had occurred in the attendant circumstances, it is not admissible, because the accident was then a past event, and the statement a mere narrative. But this technical refinement is not based upon a reasonable view of the principle involved. No satisfactory reason is assigned for the distinction suggested. If the statement of a party, made while a serious injury is being inflicted upon him, is regarded as an evidentiary fact throwing light upon the manner of the occurrence, why does not the same statement, made immediately after the principal event, as an intimately connected and natural result or detail thereof, in the presence of all the physical facts of the accident, constitute an equally admissible part of the proof? Why may it not be as much a part of the *res gestæ* as the fact that the declarant is found at the same time lying in a place and position indicating the manner of the accident? His position as well as his declaration may be to some extent subject to his volition. If the very short period of two minutes after a man's legs have been severed from his body in a railroad accident prevents his declaration then made from being deemed a part of the transaction, it is difficult to understand why his position, which may be as much subject to his intelligent control during that brief and trying interval of time as his power of verbal communication, should be regarded as a competent evidentiary fact explaining the manner of the accident. The fact is that both his declaration and his position may be, under the circumstances, credible and admissible evidence, very similar reasons; and that to exclude the evidence in the one case, because it may be fabricated, would furnish a reason for its exclusion in the other. The possibility of its being unreliable would seem to relate to the weight, rather than to the admissibility, of the evidence. That the doctrine of exact coincidence in such cases is not followed in this state is plainly indicated in *Caverno v. Jones*, 61 N. H. 623, 624, in which it was decided that, in trespass for assault and battery, threats to do the plaintiff bodily harm, made by the defend-

ant so soon after the alleged assault as to constitute a part of the transaction, are competent. Nor do any of the decisions in this jurisdiction warrant the assumption that the defendant's theory has been adopted here. See cases above cited.

Cases in other states and in England, it must be admitted, are not in accord. Some adopt an unreasonably strict construction of the rule (*Reg. v. Beddingfield*, 14 Cox C. C. 341; *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312; *Eastman v. Boston & M. R. Co.* 165 Mass. 342, 43 N. E. 115; *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 215, 12 So. 176; *Cleveland, C. & C. R. Co. v. Mara*, 26 Ohio St. 185); others admit statements only remotely connected with the principal fact (*Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437; *Com. v. M'Pike*, 3 Cush. 181, 50 Am. Dec. 727; *Craig v. State*, 30 Tex. App. 619, 18 S. W. 207); while others adopt what seems to be the more rational view, as stated in *Com. v. Hackett*, 2 Allen, 136, 140, that statements are admissible when "it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact" (*Rawson v. Haigh*, 2 Bing. 99; *Rouch v. Great Western R. Co.* 1 Q. B. 51; *Reg. v. Lunny*, 6 Cox C. C. 477; *Waldele v. New York C. & H. R. R. Co.* 95 N. Y. 274, 47 Am. Rep. 41; *Martin v. New York, N. H. & R. R. Co.* 103 N. Y. 626, 9 N. E. 505; *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118; *Mayes v. State*, 64 Miss. 329, 60 Am. Rep. 58, 1 So. 733; *Pittsburgh, C. & St. L. R. Co. v. Wright*, 80 Ind. 182; *Wood v. State*, 92 Ind. 269; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *Chicago West Div. R. Co. v. Becker*, 128 Ill. 545, 21 N. E. 524; *Lambert v. People*, 29 Mich. 71; *People v. Gage*, 62 Mich. 271, 28 N. W. 835; *People v. O'Brien*, 92 Mich. 17, 52 N. W. 84; *Christianson v. Pioneer Furniture Co.* 92 Wis. 649, 66 N. W. 699; *Fish v. Illinois C. R. Co.* 96 Iowa, 702, 65 N. W. 995; *McMurrin v. Rigby*, 80 Iowa, 322, 45 N. W. 877; *State v. Rider*, 95 Mo. 474, 8 S. W. 723; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49. See also Professor Thayer's article on *Beddingfield's Case*, 14 Am. Law Rev. 817, 15 Am. Law Rev. 71).

The seriousness of the injury, the character of the accident, and the surrounding physical circumstances and results of the occurrence, attending the declaration as well as the principal fact, are necessary matters for consideration in the determination of the question of the admissibility of the declaration. When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically, it may be said, the act speaks through him and discloses its character. It is as if it were a part of the act itself. This view of the common experience of mankind shows that, if the declaration has that character, it possesses an important element of reliability and signifi-

cance which is foreign to narrative remarks made so long after the event as to derive directly no probative force from it, and that it should be admitted like any other material fact or evidentiary detail. If this principle of evidence may be difficult of application in practice, its soundness is not thereby weakened. A discriminating observance of it will promote the successful discovery of truth, which, without its aid, is often involved in great obscurity.

It is not contended that Baker's statement was not relevant, or that it did not tend to show how the accident happened; that is, the proximate cause of it. It was not mere hearsay, depending alone for its truthfulness upon the credibility of an unsworn witness. It was directly connected in point of time with the main fact, and was made while Baker was in the place where the force of the collision presumably threw him, and in view of all the surrounding physical facts connected with his misfortune. It cannot be said, therefore, as a matter of law, that his remark did not derive credit from the occurrence with which it was so intimately connected, or that it was not in a reasonable sense a part thereof and admissible in evidence. Although in form it was a narrative, it could not be excluded for that reason alone, if in other respects it was competent. Nor does the fact that it was made in answer to the witness's question deprive it of its character as a part of the *res gestæ*. *Fish v. Illinois C. R. Co.* 96 Iowa, 702, 707, 65 N. W. 995; *Crookham v. State*, 5 W. Va. 510. To exclude it "would be practically to say that no declaration or statement, however near to the principal fact, or however important and material as giving to it color and significance, could ever be admitted in proof." *Com. v. Hackett*, 2 Allen, 140. How far the question of the admissibility of such testimony may be determined by the trial court as a matter of discretion, it is unnecessary in this case to decide; for the exception to its admission presents no error. In *Com. v. M'Pike*, 3 Cush. 181, 184, 50 Am. Dec. 727, it is said that, "in the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge;" while the contrary of that proposition seems to be maintained in *Lund v. Tyngsborough*, 9 Cush. 36, 41.

The defendant insists that the motion for a nonsuit should have been granted, because Baker must be held to have assumed the risk in consequence of which he was injured. This contention, in effect, concedes that the defendant was negligent in permitting a jigger stand to be where this one was, and that it was an operating cause of the accident; but it is claimed the plaintiff cannot recover, for the reason that the danger incurred was one of the incidents of his interstate employment. If the latter did not know of the existence of the jigger stand near the switch which he was about to operate, or if, in the exercise of ordinary care in the performance of his duties, he was not chargeable with such knowledge, he cannot

be held responsible for consequences resulting from his failure to take such precautions for his safety as a knowledge of the danger would have suggested to a man of ordinary prudence. Otherwise he is precluded by the doctrine of the assumption of risk. "The plaintiff was bound to prove that the special danger causing the injury was not known to" Baker, "and in the exercise of ordinary care by him would not have come to his knowledge." *Burnham v. Concord & M. R. Co.* 68 N. H. 567, 44 Atl. 750.

If the fact that the accident happened is not alone sufficient evidence of the injured party's want of knowledge of the existence of the defective appliance causing it, or of his exercise of due care (*Huntress v. Boston & M. R. Co.* 66 N. H. 185, 34 Atl. 154; *Gahagan v. Boston & M. R. Co.* 70 N. H. 441, 55 L. R. A. 426, 50 Atl. 146; *Waldron v. Boston & M. R. Co.* 71 N. H. 362, 52 Atl. 443), the manner of its occurrence, when that is in part disclosed by the evidence, may warrant an inference in his favor upon these points. In this case the plaintiff's evidence (which, upon this motion, is to be taken as true) showed that it was Baker's duty to set the switch which was near the jigger stand. This stand consisted of two planks about 15 feet long, placed at right angles with the track. When nearly opposite this place, at about 2 o'clock in the morning, Baker, who was on a car, went down over the side of the car to set the switch. The night was a dark one. Very soon thereafter he made an outcry, the car wheels passed over his legs, and he at once said he stumbled over the planks. His position immediately after the accident, the blood on the rail between the planks, as one witness testified, the pieces of his broken lantern near him, corroborated and supported the statement that he stumbled over the planks. If he had known that there was a jigger stand at that place, he would have known that some care was necessary to avoid falling over it in the performance of his work. It is hardly conceivable that he would have knowingly encountered that danger,—that is, knowing the obstruction was directly in his way, he would have stumbled over it. The act of stumbling usually implies the existence of an object in a traveler's way of which he was at the time unconscious. It is no answer to say that Baker must have known of this obstruction because he had been over the road as a brakeman ten or twelve times within two months of the accident; for it appeared that men who worked with him during that time had not noticed it before the accident. It was not so conspicuous as necessarily to attract the attention of brakemen. It is at least apparent that fair-minded men might reasonably draw the inference from the evidence (*Hardy v. Boston & M. R. Co.* 68 N. H. 523, 536, 41 Atl. 179; *Whitcher v. Boston & M. R. Co.* 70 N. H. 242, 245, 46 Atl. 740) that Baker did not know that his approach to the switch lay over a jigger stand.

But it is urged that he ought to have known it. His experience for many years as a freight brakeman must have afforded him the information that such stands are of frequent occurrence on the line of a railroad, and that they are necessary appliances at certain points for the use of the section men. But while it appeared from the cross-examination of the plaintiff's witnesses that these appliances are numerous on lines of road on which Baker had worked, it also appeared that they are seldom placed near a switch, and usually lead into car houses, which would afford some notice of their existence. Upon the evidence, it might be found that a brakeman ought to know that in the vicinity of a car house there would in all probability be a jigger stand, and that its existence near a switch and away from a car house was so unusual as to make it unreasonable to say that a brakeman ought to anticipate such an arrangement at every switching point. It was not unreasonable for the jury to infer from the evidence that men of ordinary prudence in Baker's position, and possessing his knowledge of the means employed in the business of railroading, would not anticipate the existence of a jigger stand at this particular point. If upon this subject fair-minded men might differ, the question should be submitted to the jury. It does not appear that Baker ought to have anticipated the peculiar obstruction which caused him to stumble.

The further contention is made that there is no evidence that Baker exercised reasonable care in the performance of his work at the time of the accident,—a fact that the plaintiff was bound to prove by competent

evidence. But it is not necessary that the evidence should be direct. The fact may be inferred from circumstances; and, in the absence of direct proof, the question is whether the circumstances legitimately warrant an inference of the fact. *Hutchins v. Macomber*, 68 N. H. 473, 44 Atl. 602; *Burnham v. Concord R. Co.* 69 N. H. 280, 282, 283, 45 Atl. 563. When Baker was last seen before the accident, he was getting down over the side of the car nearly opposite the switch, for the purpose, evidently, of setting the switch. He was attending to his duty. He had had extensive experience as a brakeman, and understood perfectly how to perform his work with reasonable safety under ordinary circumstances. The time that elapsed after his lantern disappeared over the side of the car until he cried out was very brief. What he was doing during that short space of time is not a mere matter of conjecture. It was competent for the jury to infer that he was proceeding to reach the switch in the way an experienced brakeman would adopt under the circumstances, and that such a way would be a reasonably prudent one,—not the opposite. The evidence was sufficient to warrant that finding, in the absence of any evidence tending to show that he was negligent. *Hutchins v. Macomber*, 68 N. H. 473, 44 Atl. 602.

As there is no contention that the evidence did not warrant a finding of the defendant's negligence in permitting the jigger stand to be near the switch in question, no error is apparent in the trial, and the verdict must stand.

Exception overruled.

All concur.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

J. B. BLACK, Admr., etc., of Newton Black,
Deceased, *Plff. in Err.*,
v.

TRAVELERS' INSURANCE COMPANY of
Hartford, Connecticut.

(121 Fed. 732.)

1. An injury cannot be declared, as matter of law, to be a bodily infirmity, within the meaning of a warranty in a life-insurance policy, without evidence that it affects to some extent the actual physical condition of the insured.
2. The mere fact that an applicant for insurance is receiving a pension from the government for alleged physical injuries does not show that he has a bodily infirmity, within the meaning of a warranty in the policy.

3. The question whether or not an applicant for insurance was suffering from a bodily infirmity, within the meaning of a warranty in the policy, where he was drawing a pension from the government for vertigo and impairment of sight because of a cannon-shot wound in his head, is for the jury upon all the evidence of the case.

(April 10, 1903.)

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania to review a judgment in favor of defendant in an action brought to enforce a claim alleged to be due on an accident insurance policy. *Reversed.*

The facts are stated in the opinion.

NOTE.—As to what constitutes bodily infirmity or injury, within meaning of warranty in life insurance policy, see also, in this series, *Rancroft v. Home Ben. Asso.* (N. Y.) 8 L. R. A. 68; *Cobb v. Covenant Mut. Ben. Asso.* (Mass.) 10 L. R. A. 666; *Mutual Ben. L. Ins. Co. v. Robison* (C. C. App. 8th C.) 22 L. R. A. 325; *Manufacturers' Acccl. Indemnity Co. v.* 61 L. R. A.

Dorgan (C. C. App. 6th C.) 22 L. R. A. 620; *White v. Providence Sav. Life Assur. Soc.* (Mass.) 27 L. R. A. 398; *Mutual L. Ins. Co. v. Simpson* (Tex.) 23 L. R. A. 765; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 38 L. R. A. 83; and *Barnes v. Fidelity Mut. Life Asso.* (Pa.) 45 L. R. A. 264.

Argued before *Dallas and Gray*, Circuit Judges, and *Archbald*, District Judge.

Messrs. A. T. Black and W. K. Jennings, for plaintiff in error:

It is fair to presume that the insurer desired information as to whether the deceased then had, or had ever had, any bodily infirmity that would render him more than ordinarily liable to accident, or that would increase the risk of death in case an injury was sustained.

Bernays v. United States Mut. Acci. Asso. 45 Fed. 455; *Standard Life & Acci. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105; *Rogers v. Phenix Ins. Co.* 121 Ind. 570, 23 N. E. 498; *Northwestern Mut. L. Ins. Co. v. Hazlett*, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582; *Home Mut. Life Asso. v. Gillespie*, 110 Pa. 84, 1 Atl. 340; *Boos v. World Mut. L. Ins. Co.* 64 N. Y. 236; *Bancroft v. Home Ben. Asso.* 120 N. Y. 14, 8 L. R. A. 68, 23 N. E. 997; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 607; *Wilkinson v. Connecticut Mut. L. Ins. Co.* 30 Iowa, 119, 6 Am. Rep. 657.

Messrs. John A. Murphy, George M. Hosack, and Lev. McQuiston, for defendant in error:

When the evidence is so conclusive that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it, the trial judge not only may, but should, when requested, give binding instructions.

Pennsylvania R. Co. v. Martin, 55 L. R. A. 381, 49 C. C. A. 474, 111 Fed. 586.

Archbald, District Judge, delivered the opinion of the court:

In the application on which the policy in suit is based, dated September 26, 1896, the decedent represented and warranted that he had never had "any bodily or mental infirmity." It was proved, however, at the trial that while a soldier in the Civil War he received a gunshot wound in the back of the head, by which the external table of the skull was fractured, a piece about half an inch square taken out, and a slight depression of the inner table produced. On the strength of this, in December, 1868, he was granted a pension by the United States government of \$8 a month, which was increased to \$12 in July, 1886, and in December, 1889, to \$14 on account of alleged resulting vertigo and impaired vision. Upon this showing the learned trial judge directed a verdict in favor of defendant, holding that the condition produced by the wound was a bodily infirmity within the meaning of the warranty, and constituted a breach of it. In our judgment, this was error, the question being for the jury, and not for the court, under the evidence. Aside from the pension record, there was nothing to show that the wound, which healed over quite speedily, materially affected the general health of the insured, which according to the testimony of several witnesses, was uniformly good. And while it is no doubt true that the injury could not be said to have been of such a passing or temporary nature as to escape 61 L. R. A.

the remembrance of the decedent, particularly in view of the constant receipt of his pension, yet it certainly could not be declared, as a matter of law, to be a bodily infirmity without evidence that it affected to some extent his actual physical condition. An infirmity of the body, as the term implies, is something that materially impairs the bodily powers. In a case where this is clearly made out, it is no doubt the duty of the court to take the question from the jury and dispose of it; but ordinarily it is for them to pass upon, and it ought, in our judgment, to have been left to them here. In *Boos v. World Mut. L. Ins. Co.* 64 N. Y. 236, the decedent declared in his application, which was made a warranty, that he had had no severe sickness, or disease in the last seven years. The fact was that within that period he had been sick with pneumonia for ten days, and had also had a sunstroke on another occasion, which laid him up for eight or ten days. There was other evidence, however, to show that during the time so covered he was, as a rule, a strong, healthy man, doing severe manual labor. The company asked for binding instructions, but the court submitted it to the jury to say whether these were severe sicknesses within the meaning of the policy, which should have been disclosed to the company, and a finding in the plaintiff's favor was sustained. In *Bancroft v. Home Ben. Asso.* 120 N. Y. 14, 8 L. R. A. 68, 23 N. E. 997, to the question in the application, "Have you received any wound, hurt, or serious bodily injury?" the insured had answered, "No." The proof was that while fencing he had received a thrust or blow on the throat from the point of a foil, which produced a wound, and caused the raising of some blood, as the result of which he was confined to his bed for about three days. It was held that the words "hurt" or "wound," as used in the application, meant an injury causing an impairment of health or strength, or rendering the person more liable to contract disease, or less able to resist its effects; and, as no such result followed from the injury in question, it did not fall within the terms of the policy. So, in *Standard Life & Acci. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105, the insured warranted that he had never been physically injured, nor had any "bodily or mental infirmity." The evidence was that while a boy he had received an injury to the left foot, and was afterwards seriously injured in the right leg. The jury found, however, that both foot and leg became well and strong, and that he had as complete use of them as ever, and it was held that, according to the reasonable interpretation of the application, the decedent did no more than represent that he was free at the time from any serious physical injury, and that any which he had previously suffered had disappeared, and left no trace that would render him unfit for accident insurance. In *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617, one of the questions in the application was whether the insured had ever had any serious illness

or personal injury, and it was shown that ten years before she had been seriously injured by falling from a tree. The jury were instructed that, if the effects were temporary, and had entirely passed away, and were not such as to impair her health or shorten her life, the failure to disclose the occurrence did not avoid the policy; and this was affirmed by the supreme court. To substantially the same effect are *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 197, 26 L. ed. 708; *Bernays v. United States Mut. Acci. Asso.* 45 Fed. 455; and *Home Mut. L. Ins. Co. v. Gillespie*, 110 Pa. 84, 1 Atl. 340. These decisions serve to show the position taken by the courts with regard to this class of cases, and just how far they are prepared to go. They sustain the views expressed above, that an injury or infirmity, the existence of which constitutes a breach of the warranty, must be such as amounts to an actual inroad upon the physical health or condition of the insured, and that this, as a rule, is a question for the jury.

It is said, however, that the insured had obtained a pension from the government on

the strength of his wound, which had been increased a few years before because of resulting vertigo and impaired vision. But the mere reception of a pension did not establish that he was affected with a bodily infirmity, but only that it had been so represented by him to the pension department. However far in that direction this may have gone, it is not conclusive on the question of the existence of a disability regardless of the other proofs. *New Home Life Asso. v. Owen*, 39 Ill. App. 413. It is no doubt evidence upon the subject which the administrator has to face, and it may be difficult to persuade a jury that the decedent could draw the pension which he did and yet be free from any serious bodily ailment. But even on the most disadvantageous showing it amounts to no more than a declaration or statement by the decedent, which, like any other, it is for the jury to consider and pass upon along with the other evidence; nor are we prepared to say that a verdict contrary to it could not be sustained.

The judgment is reversed, and a venire facias de novo awarded.

PENNSYLVANIA SUPREME COURT.

C. D. LORAINÉ, *Appt.*,

v.

PITTSBURG, JOHNSTOWN, EBENSBURG, & EASTERN RAILROAD COMPANY.

(205 Pa. 132.)

1. A mine owner may maintain an application in his own name for a writ of mandamus, without the intervention of the attorney general, to compel a railroad company, whose road is his only means of access to market, to furnish cars, which it refuses to do except upon conditions which are illegal; and it is immaterial that the same conditions are exacted of other shippers along the line.
2. The right of an individual to apply for a writ of mandamus to compel a railroad company to serve him is not taken away by a statute which provides that, when the writ is sought to procure the performance of a public duty only, the proceedings shall be in the name of the commonwealth at the relation of the attorney general, where it also provides that it shall issue on the application of a person beneficially interested.
3. Mandamus is a proper remedy to compel a railroad company to furnish cars to a shipper, which it refuses to do except on compliance with illegal conditions.
4. Mandamus proceedings against a railroad company may be instituted in the county where the tracks are laid, and within the limits of which its operating officers are, although its business officers are in another county, under a statute giving to courts of any county jurisdiction to issue writs to corporations "being or having their chief place of business within the county."

(February 23, 1903.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas for Clearfield County refusing a writ of mandamus to compel defendant to furnish cars for the transportation of plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Messrs. A. O. Smith and A. M. Liveright, with *Messrs. Thomas H. Murray and David L. Krebs*, for appellant:

The very life and existence of relator's business are founded on the performance by the defendant of its duty as a common carrier, which it claims to exercise, and which can only exist by virtue of the grant from the state.

Com. ex rel. Hamilton v. Pittsburgh, 34 Pa. 509.

Where the duty is owing to the government as representative of the public, or to the people as represented by the government, then the relation should be filed by the law officer of the government. But if the duty is in its nature such that its performance is a benefit and advantage to a portion of the public, and a special advantage to some, then the relation may be filed by the individual affected injuriously by its nonperformance.

Union P. R. Co. v. Hall, 91 U. S. 343-354, 23 L. ed. 428-432; *People ex rel. Case v. Collins*, 19 Wend. 56; *Pike County v. People*, 11 Ill. 202; *Ottawa v. People*, 48 Ill. 233; *Ham-*

NOTE.—As to duty of carrier to furnish cars, see also, in this series, *Houston, E. & W. T. R. Co. v. Campbell* (Tex.) 43 L. R. A. 225, and *note*, and *Mathis v. Southern R. Co.* (S. C.) *post*, —, 61 L. R. A.

ilton v. State, 3 Ind. 452; *Hall v. People*, 57 Ill. 307; *People ex rel. Stephens v. Halsey*, 37 N. Y. 344; *State ex rel. Rice v. Marshall County Judge*, 7 Iowa, 186; *State ex rel. Hanna v. Kahway*, 33 N. J. L. 110; *Dill. Mun. Corp.* § 695.

The right of a private relator to petition for the writ of mandamus is recognized in—

Miller v. Canal Comrs. 21 Pa. 23; *Pennsylvania R. Co. v. Canal Comrs.* 21 Pa. 9.

Wherever there is a specific legal right, as well as the want of a specific legal remedy, mandamus is a demandable writ of common right.

James v. Bucks County, 13 Pa. 72; *Com. v. Rosseter*, 2 Binn. 360; *Jefferson County Treasurer v. Shannon*, 51 Pa. 221; *Com. v. McCandless*, 129 Pa. 492, 8 Atl. 159; *Williamsport v. Com.* 84 Pa. 487, 24 Am. Rep. 208; *Com. v. Lancaster*, 5 Watts, 155.

The writ of mandamus may issue upon the application of any person beneficially interested.

Act of June 8, 1893 (P. L. 345. § 3); *Chertham v. McCormick*, 178 Pa. 186, 35 Atl. 631; *Com. ex rel. Coulston v. Dickinson*, 3 Brewst. (Pa.) 561.

The corporation exists wherever its property is situate and its functions are performed, and is not confined within the four walls of an office where its officials may occasionally meet to deliberate.

Jensen v. Philadelphia, M. & S. Street R. Co. 201 Pa. 603, 51 Atl. 311; *Whitemarsh Twp. v. Philadelphia, G. & N. R. Co.* 8 Watts & S. 365.

There is an implied undertaking on the part of every corporation that it will render to the public, so far as it reasonably can, that service for which it was incorporated, and that it will not voluntarily disable itself to serve the purpose for which it was created.

Taylor Priv. Corp. §§ 454, 455; *American Rapid Teleg. Co. v. Connecticut Teleph. Co.* 49 Conn. 352, 44 Am. Rep. 237; *Railroad Comrs. v. Portland & O. C. R. Co.* 63 Me. 269, 18 Am. Rep. 208; *State v. Harford & N. H. R. Co.* 29 Conn. 538; *Com. v. Eastern R. Co.* 103 Mass. 258, 4 Am. Rep. 555; *People v. New York C. & H. R. R. Co.* 28 Hun, 543.

Inasmuch as a railroad is bound to carry passengers and freight, the obligation requires it to furnish all necessary rolling stock and equipment for its suitable and proper operation as a carrier of passengers, no less than a carrier of freight.

People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L. R. A. 659, 45 N. E. 824, 52 N. E. 292; *Pittsburgh, M. & Y. R. Co. v. Com.* 104 Pa. 583; *Easton v. Lehigh Water Co.* 97 Pa. 554; *Com. ex rel. Hamilton v. Pittsburgh*, 34 Pa. 496; *Bell Teleph. Co. v. Com.* 17 W. N. C. 505; *Com. v. Fitchburg R. Co.* 12 Gray, 188.

Messrs. Harry Boulton and Oscar Mitchell, for appellee:

The statute means that any person beneficially interested in any public duty shall have the right to apply to the attorney general for the issuance of a writ in the name of L. R. A.

of the commonwealth, and on relation of the attorney general.

Chertham v. McCormick, 178 Pa. 186, 35 Atl. 631.

A public duty is an obligation to perform acts which are conformable to laws requiring things to be done for the people in common.

6 Am. & Eng. Enc. Law, p. 100; *Bouvier*, Law Dict. 575; 19 Am. & Eng. Enc. Law, p. 302.

The prayer of the relator is for the enforcement of a public duty.

The relator does not show a right independent of that which he holds in common with the public at large.

Com. ex rel. Gurnsey v. Park, 9 Phila. 481; *Heffner v. Com.* 28 Pa. 109; *Reading v. Com.* 11 Pa. 196, 51 Am. Dec. 534.

A court of common pleas has not jurisdiction to issue a writ of mandamus to a railroad corporation whose office or chief place of business is not in the county from whence the writ issues, although its road may pass through the same.

Whitemarsh Twp. v. Philadelphia, G. & N. R. Co. 8 Watts & S. 365.

The duties to be enforced by mandamus must be specific and distinct, such as are capable of being accurately enforced by specific injunctions or decrees, and not such as are indefinite, depending upon conditions, or measured or ascertained by comparison with the rights and duties of others.

14 Am. & Eng. Enc. Law, p. 101; *Heffner v. Com.* 28 Pa. 108.

The granting of the writ of mandamus being discretionary, no appeal lies to a denial of it.

Com. v. Lackawanna County, 133 Pa. 180, 19 Atl. 351; *Com. ex rel. Pughe v. Davis*, 109 Pa. 128.

No appeal lies to review the exercise of a discretionary power.

White v. Leeds, 51 Pa. 187; *Gump's Appeal*, 65 Pa. 476.

Dean, J., delivered the opinion of the court:

The defendant company was chartered some time before 1897 under the general railroad act of 1868, as the Altoona & Phillipsburgh Connecting Railroad Company. In the year 1897 it was leased to the Pittsburgh, Johnstown, Ebensburg, & Eastern Railroad Company, the principal line of which last-named road extended beyond the boundaries of Clearfield county; but the Altoona & Phillipsburgh, the lessor road, was wholly within that county. The lessee road was only a project,—was never constructed, and existed only on paper. The lessor road was actually constructed for about 12 miles to connections with the Beech Creek and Pennsylvania railroads, and was in operation between those points, carrying freight and passengers. It owned about 300 coal cars, for the transportation of coal upon its 12 miles of line to the through roads with which it connected. Along these 12 miles were several coal-mining plants in active

production, which could reach the market in no other way than over this short railroad. Among them was plaintiff's, fully equipped and in active operation, mining and shipping coal to market. While in the active pursuit of his business, plaintiff avers that on November 19, 1902, by written communication from defendant company, through its superintendent he was notified, in substance, that on and after the 20th of that month no more cars for shipment of his coal would be furnished him unless he sold it to the American Union Coal Company. This latter company at the time offered to pay him \$1.50 per ton for coal delivered on cars at his mine, while in the market it was worth \$3. This offer he declined. Since that time defendant has refused to furnish him cars. He therefore prayed the court of common pleas of Clearfield county for a mandamus on defendant, requiring it to place cars upon his siding for coal shipment as before November 19, 1902, as it is legally bound, as a common carrier, to do. On this petition the court awarded a writ of alternative mandamus, directed to defendant, which was served by the sheriff on defendant by delivering personally, within his bailiwick, to the superintendent of defendant company, a copy of the writ. No answer was made to the averment of facts in the petition by the defendant. It moved, however, to quash the writ, mainly on two grounds: (1) Because the writ was prayed for in the name of a private individual, to enforce a public duty; and (2) because the defendant is not a corporation within the county of Clearfield, under the act of June 8, 1893, and therefore the court of Clearfield county had no jurisdiction to entertain the petition or to issue the writ. Thereupon the court dismissed the petition.

The facts as stated in the petition, in their full scope, must be taken as averred by plaintiff, for they are not denied by defendant. Therefore the first and main question is, Can the plaintiff ask, on his own complaint, for the issue of the writ, without the intervention of the attorney general? We concede that there is apparent conflict in the decisions,—not, however, in the principle on which they are based, but in the application of the principle to the varying facts of different cases. The test of right of a private relator to the writ is not, as stated by appellee, whether the duty sought to be performed be a public one, but whether the complainant by breach of the public duty has suffered an injury special and peculiar to himself. The defendant, under the statute from which it derives its being, is a common carrier, and as such has imposed upon it certain public duties, such as to construct its road, to equip it with cars and locomotives, and employ hands to run them for all the public. This is a public duty. If it fail in performing it, it fails to carry out the very purpose of its charter, and the public, without distinction, suffers by the breach of duty. In such case, both at common law and under our statute of 1893, proceedings should be instituted by the commonwealth 61 L. R. A.

at the instance of the attorney general. But it is held in England that, "in general, all those who are legally capable of bringing an action are also legally capable of applying to the court of King's bench for the writ of mandamus. This is true in all cases, it is believed, where the defendant owes a duty in the performance of which the prosecutor has a peculiar interest." Tapping on *Mandamus*, p. 28. The right is distinctly recognized in this state in *Com. ex rel. Hamilton v. Pittsburgh*, 34 Pa. 496, and in many cases following it. Nor, as argued by appellee's counsel, is it taken away by our mandamus act of June 8, 1893 (P. L. 345). True, the act directs that, when the writ is sought to procure the performance of a public duty only, the proceeding shall be in the name of the commonwealth at the relation of the attorney general, or the district attorney of the proper county; but it also provides, in the 3d section, that it shall issue on the application of any person beneficially interested. While we have no doubt that these words would give standing to anyone interested to make application to the attorney general for his intervention, they just as clearly save to each person the right, existing before the act, to sue out the writ when he seeks to protect an interest special to himself as distinct from the general public. Had this plaintiff such special interest? The defendant constructed its railway and equipped it. Plaintiff then opened his coal mine, and constructed his sidings, chutes, and tipples, with a view to shipment on this road, and no other. Defendant up to November 19, 1902, furnished him with cars. Then it peremptorily refused to perform its duty to him unless he sold his coal to another coal company at a price much below what it was worth, this latter company being controlled by the president of the railroad company. If this was not a wrong special to plaintiff, as distinguished from the public, we are at a loss to conceive what would constitute such a wrong. It is not a refusal to supply cars and motive power on the road, or to keep the road in repair. It is a refusal to carry his coal because he will not sell it at a low price to the president's coal company. As the court below, in substance says, it was iniquitous. It, in effect, if kept up, would completely destroy his plant, with the consequent loss of his invested capital; and even if now his wrong is, to some extent, remedied, he has lost months of active business. The public duty of defendant was to carry freight and passengers. Suppose it had refused to sell him a ticket as a passenger, and notified him that such refusal would be kept up unless he sold his coal to the president's coal company; the wrong would have been a violation of a duty which defendant owed to the general public as a common carrier of passengers, but it would also have been a wrong special to himself, distinct from the public of which he was one, and from which he alone specially suffered. It would have been a demand on him to do something having no connection with defendant's business of transportation.

and, if he refused, to deprive him of a right which, under the most solemn forms, it had undertaken to accord to him. And it is wholly immaterial that the defendant treated some shippers of coal along its road in like manner. The injury in each case was special. The general public—all the inhabitants of a city or township—suffer by the neglect of a municipal corporation to keep in repair its highways and bridges. The loss to some individuals of the general public by the breach of duty is much greater than to others, but this does not give a right of action to the individual who merely suffers the greater loss. But if a horse break a leg by falling into a hole, or if a vehicle be wrecked from the same cause, the owner suffers an injury different in kind, and a loss special to himself, for which he can sue as an individual; and, if a dozen or more persons suffered like special injury, each has his remedy by personal action. We are of opinion that on the particular facts of this case, not disputed by defendant, plaintiff's injury was different in kind, and special to himself, and that therefore he could properly seek the remedy by mandamus.

The argument that injustice may be done by the enforcement of this form of remedy is without force. If a railroad corporation, by reason of storms, floods, or other disaster, is unable to perform its duty to the public in supplying cars to shippers, or because of sudden demands, beyond what could have been anticipated by reasonable foresight and prudence, or by congestion of traffic beyond reasonable expectations, and shippers' demands cannot be immediately responded to, the court, in the exercise of a proper discretion, will refuse the writ, and leave the complaining party to his remedy at law or in equity. But here there was no room for the exercise of discretion, because the facts were undisputed, and clearly demonstrated the right of plaintiff to demand the writ.

The court below argues that, while relief in some form should be given plaintiff, it cannot be by mandamus, because the decree would necessarily be too indefinite to remedy the wrong. We do not think so. The duty and the measure of it owing by defendant to plaintiff was performed up to November 19, 1902. With its performance prior to that no complaint is made. We can see no obstacle in the way to framing a writ compelling defendant's continuance in the performance of that duty, and the court below has ample power to enforce its commands against defendant and its officers, and should see to it that its orders are obeyed.

The court below is further of the opinion that under the act of 1893 it is without jurisdiction. The words of the act give to the courts of common pleas of any county juris-

diction to issue writs of mandamus to corporations being or having their chief place of business within the county. Although defendant's charter limits extend beyond the boundaries of Clearfield county, it is constructed and operated wholly within Clearfield county, and its operating officers—the superintendent and others—are within that county. The words are, shall have jurisdiction as to "all corporations being or having their chief place of business within such county." In *Bailey v. Williamsport & N. B. R. Co.* 174 Pa. 114, 34 Atl. 556; *Jensen v. Philadelphia, M. & S. Street R. Co.* 201 Pa. 603, 51 Atl. 311, and in other cases, we endeavored to interpret these words, and held that a corporation might be subject to service in at least two places,—one within the territorial limits of the county where its roadbed and rails were laid, and where it did its carrying business; the other, where its general office was located, its books kept, and its corporate seal preserved. While it is true the words are almost a copy of those in the act of June 14, 1836, on which this court passed in *Whitemarsh Twp. v. Philadelphia, G. & N. R. Co.* 8 Watts & S. 365, decided in 1845, opinion by Justice Rogers, and where a somewhat narrower interpretation was given them, yet that decision must be taken in view of the conditions then existing. It will be noticed that in that case the road was located in but two counties,—one of them, Philadelphia, where the general office and chief place of business was established, and where nearly all the business was transacted. The court says that the last words of the section, "chief place of business in the county," mean that where the road runs through more than one county, and has its chief place of business in but one of them, service must be had in that one. But the act of 1893 must be interpreted in view of conditions existing when it was passed, with carrying corporations and mining and manufacturing corporations located in the interior of the state, and to a large extent doing business there; still having a principal office located hundreds of miles distant, in Philadelphia. In this act the words mean that service can be had either where the office is located, or in the county where the corporation is located and has its being. In this case the plaintiff might have applied for his writ in Philadelphia, where defendant has its office, or he could do as he has done,—commence proceedings in the courts of Clearfield, where the corporation is located.

The decree of the court below is therefore reversed, and it is directed that a mandamus issue from that court as prayed for by plaintiff.

Petition to modify decree denied.

WASHINGTON SUPREME COURT.

O. LUND, Appt.,
v.

ST. PAUL, MINNEAPOLIS, & MANITOBA
RAILWAY COMPANY, Resp't.

(.....Wash.....)

1. The closing of a street under authority of the municipality for the purpose of constructing a bridge to carry it across a river is not a nuisance so long as reasonable diligence is exercised in the prosecution of the work.
2. Delay in the construction of a bridge because of inability to procure the necessary steel work, which has been ordered from the best-equipped plant in the country for furnishing such work, but which plant cannot fill the order because of strikes and labor troubles, does not render the one who has undertaken to construct the bridge liable for injuries caused by the continued obstruction of the street, where there is nothing to show that the material could have been procured from any other source any quicker.
3. One to whom a municipal corporation has delegated the right to close a street for the purpose of constructing a new bridge is liable for injuries caused by such closing only when the municipality itself would be.
4. The liability of one who has contracted to furnish the steel work for a bridge to respond to the builder for delay in complying with the contract cannot be considered in an action by abutting owners against the builder for injuries resulting from keeping the street closed for an unreasonable time.
5. There is no abuse of discretion on the part of the trial court in limiting an abutting owner who sues for injuries to his business by the unreasonable closing of a street to a period of three months after the street is reopened in showing the difference in profits between the times when the street was open and closed.
6. Under a general denial in an action for negligence in keeping a street closed for the construction of a bridge for an unreasonable time, evidence is admissible as to the condition of the steel and coal markets, as tending to show that the delay was caused by circumstances over which the defendant had no control.

(March 17, 1903.)

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County in favor of defendant in an action brought to recover damages for the alleged unlawful obstruction of a highway. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hamblen & Lund for appellant.

Messrs. Will H. Thompson and M. J. Gordon, for respondent:

When the legislature, acting within its

constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence cannot be wrongful. If damage results as a consequence of its being done, it is *damnum absque injuria*, and no action will lie for it.

8 Am. & Eng. Enc. Law, 2d ed. p. 679; *Shepherd v. Baltimore & O. R. Co.* 130 U. S. 427, 32 L. ed. 970, 9 Sup. Ct. Rep. 598; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Thomp. Neg.* § 1368; *Coyne v. Mississippi & R. River Boom Co.* 72 Minn. 533, 41 L. R. A. 495, 75 N. W. 748; *Taylor v. Baltimore & O. R. Co.* 33 W. Va. 39, 10 S. E. 29; 1 *Shearm. & Redf. Neg.* § 14.

Plaintiff's property and business did not adjoin that portion of the street which was obstructed. He was not cut off from access to the general system of public streets. The most that can be said in support of his claim is that his property was rendered less convenient of access. Under such circumstances, the law will not permit a recovery.

Smith v. Boston, 7 Cush. 254; *Stanwood v. Malden*, 157 Mass. 17, 16 L. R. A. 591, 31 N. E. 702; *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743; *Buhl v. Ft. Street Union Depot Co.* 98 Mich. 596, 23 L. R. A. 392, 57 N. W. 829; *Sedgw. Damages*, §§ 1093-1124; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395; *State, Kean, Prosecutrix, v. Elizabeth*, 54 N. J. L. 462, 24 Atl. 495; *Lakkie v. Chicago, St. P. M. & O. R. Co.* 44 Minn. 438, 46 N. W. 912; *Rochette v. Chicago, M. & St. P. R. Co.* 32 Minn. 201, 20 N. W. 141.

Hadley, J., delivered the opinion of the court:

The respondent railway company applied to the city council of the city of Spokane for leave to construct its line of railroad along and across certain streets and alleys of said city. An ordinance granting said privilege was passed and approved. Washington street, in said city, extends upon both sides of the Spokane river; the portions of the street separated by the river having been connected by a wooden bridge at the time of the passage of the ordinance above mentioned. By the terms of said ordinance a steel bridge was required to be constructed, and the plans called for certain changes in the grade of the street. The respondent entered upon the work of changing said grade and constructing said bridge as required by the ordinance. In the prosecution of the work, it became necessary to close up the street at the place where it crosses the river, and the traveling public were thereby prevented from crossing there. The street was a much-traveled one, and the work of construction upon the bridge occupied more than a year, during which time no travel was permitted to cross the river at that place. Appellant was the owner of real estate upon said street, situate a short distance from the end of the bridge. The prem-

NOTE.—As to obstruction of street or sidewalk for business or building purposes, see *Flynn v. Taylor* (N. Y.) 14 L. R. A. 556, and *note*; *Raymond v. Kiseberg* (Wis.) 19 L. R. A. 643, and *note*; and *Kansas City v. McDonald* (Kan.) 45 L. R. A. 429, 61 L. R. A.

ises were, however, accessible from another direction. For a time before the street was closed at the bridge crossing, appellant had been conducting a hotel, with barroom attached, upon said premises. He claims that the interference with travel across the river upon that street greatly affected his business, and reduced the profits thereof, to his serious damage. He brought this suit to recover from respondent for such alleged damages. He alleges that by the exercise of reasonable and proper diligence in the making of said improvements the respondent might have constructed said bridge, and opened it for public use and travel, within three months from the time of commencing the work, and that said period of three months was a reasonable time within which to complete the same. He further alleges that, if said bridge had been constructed within a reasonable time, the profits of his business would have been at least \$20 per day greater; that, in consequence of the unreasonable delay, travel was diverted from his premises; and that he has been damaged in the sum of \$5,000. The material allegations of the complaint are denied by the answer. A trial was had before a jury, which resulted in a verdict for respondent. Appellant moved for a new trial, which was denied. Judgment was entered upon the verdict that appellant take nothing by his suit, and from said judgment he has appealed.

Error is assigned upon certain instructions in relation to the question of reasonable time for the construction of the bridge. The criticism urged is that the case was submitted to the jury upon the theory that, in order for appellant to recover, it was necessary to show want of care and diligence on the part of respondent. It is insisted that such a theory is a wrong conception of the case, and that the real question is whether the facts concerning the street obstruction constituted a nuisance, and, if so, that respondent cannot be relieved from liability, though the work of construction may have been done in the most approved manner. It is further urged that the mere fact that injurious results were occasioned by the work is sufficient, if a nuisance existed, and that care on the part of respondent is not an element in the case. It appears to us that the theory of counsel and that of the court both lead to the same result. The city had the undoubted right to close the street for the purpose of building the bridge, and the obstruction occasioned thereby could not within a reasonable time have been classified as a nuisance. The city delegated the respondent company to make the improvement, and thereby vested it with authority to exercise the privileges belonging to the city in the premises. Therefore, as long as respondent exercised reasonable diligence, the obstruction could not constitute a nuisance. But if want of care and diligence existed, then the obstruction was no longer a necessity, and became a nuisance. It follows that the instructions criticised correctly stated the law of the case.

It is assigned that the court erroneously
41 L. R. A.

instructed the jury to the effect that if the obstruction of the street was continued by reason of the failure of the steel company to furnish the necessary steel, and not because of any lack of diligence on respondent's part, then appellant could not recover. The evidence showed that respondent had promptly contracted with the American Bridge Company to furnish the structural steel required by the plans approved by the city for use in this bridge. That company was shown to be probably the best-equipped one in the entire country. The testimony was not contradicted that such material as was required for this bridge is not kept in stock by any company, but must be manufactured under special order, according to plans submitted. There was no showing in the evidence that the manufactured material could have been procured at an earlier date from any other source. There was also evidence to the effect that the delay of the manufacturing company was due to strikes and labor troubles, and that element was also made a feature of the instructions of the court in the connection now under consideration. The respondent had been delegated by the city to do this work, and no time was specified within which it should be done. It was therefore under obligation to finish the structure within a reasonable time. It applied to probably the best-recognized source for obtaining the manufactured material,—a material which respondent itself was not prepared to manufacture, and which must have been known to the city at the time it delegated respondent to do the work. There was testimony that the work was forwarded with dispatch, with the exception of that portion thereof which required the steel, and that the delay was really due to the failure of that material to arrive. Appellant urges that respondent cannot be excused for any delay beyond the reasonable time required for the actual constructive work, and that the only excuse that can be offered for failure to perform a public duty must be the act of God or the public enemy. Such a harsh rule, applied to a case of this kind, cannot be the law. Appellant invokes the rule adopted in *Herrman v. Great Northern R. Co.* 27 Wash. 472, 57 L. R. A. 390, 68 Pac. 82, which is to the effect that one cannot evade liability because of the neglect of another to whom certain duties have been delegated by him, for the reason that the primary liability rests with the one who has delegated the neglectful party. There, however, the duty neglected by the delegated party was such as, in its nature, could have been easily discharged by the one primarily liable, and the rule stated is reasonable and right in such cases. But here the respondent could not manufacture the steel, and was compelled to depend upon another, who was prepared for such skillful work. It is manifest, in the nature of things, that great expense and skillful preparation are required for such manufacture. The evidence shows that but few are thus engaged, and it follows that those who wish the manufactured product may, without any neglect of their

own, be delayed. Under such unusual and really compulsory conditions, liability should not be lodged against one who has himself been diligent. Such is the effect of the instructions criticised under this assignment of error. Respondent's obligation, as we have said, was to complete the work within a reasonable time, and what is a reasonable time must depend upon the circumstances of each particular case. In this case, under the evidence, the delay occasioned by the manufacturing company was an important circumstance. "If it is proper to attempt any definition of the words 'reasonable time,' that given by Chief Baron Pollock may be suggested, namely, that 'a reasonable time means as soon as circumstances will permit.'" 2 Thompson, Trials, § 1531.

The respondent stood in the place of the city, and we should inquire under what circumstances the city would have been liable. "It may be stated, as a general rule, that if the legislature, acting within its constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way, and without negligence, cannot be wrongful. If damage results as a consequence of its being done, it is *damnum absque injuria*, and no action will lie for it." 8 Am. & Eng. Enc. Law, 2d ed. p. 697. The city, as a subdivision of the state, was empowered by the legislature to maintain streets and to erect bridges where required for necessary street purposes. That power in this instance was delegated to respondent, and the rule above stated as applicable to the city itself must apply to respondent. It is a recognized rule that the right of transit in the use of a highway is subject to such incidental, temporary obstructions as necessity may require; and "these are not evasions of, but simply incidents to, or, rather, qualifications of, the right of transit, and the limitation upon them is that they must not be unnecessarily and unreasonably interposed or prolonged." *Clark v. Fry*, 8 Ohio St. 358, 374, 72 Am. Dec. 590. See also *Shepherd v. Baltimore & O. R. Co.* 130 U. S. 426, 32 L. ed. 970, 9 Sup. Ct. Rep. 598; *Coyne v. Mississippi & R. River Boom Co.* 72 Minn. 533, 41 L. R. A. 494, 75 N. W. 748; *Taylor v. Baltimore & O. R. Co.* 33 W. Va. 39, 10 S. E. 29; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; 2 Thomp. Neg. § 1368. Under the above authorities, the city itself would not have been liable if the work had been necessarily delayed without any neglect of its own, and if the delay had been solely due to the failure of the manufacturer to furnish material of such unusual character as the product of a limited field of manufacture. The same was true of respondent, and we think the instructions were not erroneous.

It is urged that the court erred in instructing the jury not to consider any statement of counsel relative to the liability of the American Bridge Company to reimburse respondent for any sum it may be required

to pay on account of the delay occasioned by the bridge company. We think the instruction was correct. The bridge company was not a party to the case, and the question of its liability to respondent was not an issue for the jury to consider. Moreover, the remarks of counsel upon this subject are not shown in the record, and we cannot say that they may not have been such as warranted the instruction.

It is further assigned that error was committed in instructing the jury that the respondent would be liable under the same circumstances as would make the city liable. For the reason, as alleged, that the court failed to state under what circumstances the city would be liable. This assignment is not well taken, for the reason that in a previous instruction the court had clearly stated the conditions which would make the city liable. Under the well-known rule that all the instructions must be considered together, the particular instruction criticised was not erroneous.

Error is predicated upon the court's refusal to permit appellant to show the amount of receipts from his business for a period of more than three months after the completion of the bridge and the opening of the street. The purpose of this testimony was to endeavor to establish the amount of loss to appellant's business by comparison between the monthly receipts after the opening of the bridge and those during the time it was closed. It was not unreasonable that some limit should be placed upon the scope of that class of testimony. What that limitation should be was largely a matter for the discretion of the trial court. Other influences than those arising directly from the opening of the street may have operated to affect the amount of receipts as time progressed. We think there was no manifest abuse of discretion.

Error is urged that the court permitted respondent to introduce testimony as to the condition of the steel and the coal markets, for the alleged reason that it was incompetent, under the answer, which was a general denial. That testimony tended to show that the delay was occasioned by circumstances over which respondent had no control, and therefore negated the theory of negligence and want of care on its part. This may be done under the general denial, in an action based on negligence, which, as we have already said, this action was. 14 Enc. Pl. & Pr. 344.

The last error assigned is upon the denial of the motion for new trial. We find no error in the conduct of the trial, and, the jury having passed upon the evidence, the verdict will not be disturbed.

The judgment is affirmed.

Mount, Dunbar, and Anders, JJ., concur. **Fullerton, Ch. J.,** did not sit in this case.

WISCONSIN SUPREME COURT.

Edward TWEEDDALE, *Appt.*,

v.

Daniel TWEEDDALE *et al.*, *Respts.*

(.....Wis.....)

- *1. If a person makes a contract with another for the benefit of a third person, the latter may enforce it at law regardless of his relations with the first person or whether he had any knowledge of the transaction between such first person and such other at the time of its occurrence, and regardless of any formal assent thereto on his part prior to the commencement of the action.
2. Upon the happening of such a transaction as that above mentioned, the law operates upon the acts of the immediate parties thereto, at once creating all the relations of privity between the one making the promise and the one to be benefited thereby requisite to binding contractual relations between them.
3. Contractual relations being established in the manner indicated in the preceding paragraph, neither one nor both of the immediate parties to the transaction can rescind the same or in any way interrupt or prejudice the rights of such other without his consent.
4. A having conveyed land to B, and, in consideration thereof, taken a contract obligating B to perform certain services for him conditioned upon B's retaining the title to the property during the term the services are to be performed and further obligating himself, in case of a sale thereof, to pay A a specified sum of money, and to pay C and D, strangers to the transaction, certain specified sums of money also, and having taken a mortgage on the land to secure the performance of such contract, the total consideration mentioned in the same being the aggregate of all the contingent payments, and such mortgage being so drawn as to indicate the terms of such contract though it went to A only, and B having sold the property, he became, immediately upon the consummation of such sale, absolutely indebted to A, C, and D for the sums agreed to be paid as aforesaid.
5. In the circumstances above named, though the amounts which B, for the consideration moving from A, promised to pay to C and D, were in effect gifts to the latter, the consideration between the immediate parties to the transaction supported the promise as between B and the beneficiaries C and D, as effectually as if they were actual parties to such transaction and parted with a consideration to either A or B to support the promise made for their benefit, the effect thereof being to vest in them the absolute right to the benefit of the promise, regardless of anything the immediate parties to such transaction subsequently did without their consent.

*Headnotes by MARSHALL, J.

NOTE.—For earlier authorities in this series as to right of third party to sue on a contract made for his benefit, see *Jefferson v. Asch* (Minn.) 25 L. R. A. 257, and *note*; *Schmidt v. Louisville & N. R. Co.* (Ky.) 38 L. R. A. 809; *Baxter v. Camp* (Conn.) 42 L. R. A. 514; *Buchanan v. Tilden* (N. Y.) 44 L. R. A. 170; 61 L. R. A.

6. In the circumstances above mentioned, the mortgage securing the contract having been properly recorded, though the same was fully satisfied of record, in form, by A at the request of B at the time of his sale of the property, and his vendee having paid the full consideration agreed upon by him, and all the circumstances related having occurred before C and D had any knowledge of their rights under the contract and security, such rights were nevertheless not impaired by such satisfaction. The debt of B to them became absolute by the operation of law upon the acts of A and B in the original transaction, and the record of the mortgage constituted constructive notice thereof to B's vendee, rendering him a party to the wrongful satisfaction of the mortgage by A.
7. Under the circumstances stated in the foregoing, it was competent for either C or D, notwithstanding the satisfaction of the mortgage, to prosecute a suit for a foreclosure of the same to enforce the performance of the promise made for their benefit.

(February 3, 1903.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Kewaunee County in favor of defendants in an action brought to enforce a promise which was alleged to have been made for plaintiff's benefit. *Reversed.*

Statement by Marshall, J.:

Action to foreclose a mortgage. The facts admitted by the pleadings and found by the court are as follows: October 21, 1896, Mary Tweeddale owned certain land constituting her homestead. She conveyed the same to her son, the defendant Daniel Tweeddale, taking therefor a bond for her support. Said parties thereafter united in conveying the land to one Perry. In consideration therefor, in part, he conveyed the land covered by the mortgage in suit, to Mr. Tweeddale. Such land was then encumbered by a mortgage, and a second mortgage was placed thereon by the grantee to the grantor. In lieu of the interest which Mary Tweeddale had in the land conveyed to Perry, her son gave to her a bond for support, and secured the same by the mortgage in suit upon the land conveyed by Perry to her. The indebtedness was \$1,350. It was conditioned, among other things, that in case Tweeddale should at any time sell the land or any portion thereof covered by the mortgage, \$1,200 should immediately become due from him to his mother, \$50 should likewise become due to his sister, Margaret Merverden, and \$100 to his brother, Edward Tweeddale. The mortgage specified that it was given to secure all the

Embler v. Hartford Steam Boiler Inspection & Ins. Co. (N. Y.) 44 L. R. A. 512; *Case v. Hoffman* (Wis.) 44 L. R. A. 728; *Ferris v. American Brewing Co.* (Ind.) 52 L. R. A. 305; *Electric Appliance Co. v. United States Fidelity & Guaranty Co.* (Wis.) 53 L. R. A. 609; and *Ransdel v. Moore* (Ind.) 53 L. R. A. 753.

obligations and conditions of the bond. It was executed and acknowledged so as to entitle it to be recorded under the registry laws of this state, and was duly recorded. The land covered by the mortgage passed under the control of Daniel Tweeddale, and the bond and mortgage, when executed, were delivered to his mother. Subsequently the condition mentioned in the bond, making operative the promise to pay \$1,200 to Mrs. Tweeddale, \$50 to her daughter, and \$100 to her son, who is the plaintiff in this action, was satisfied by Daniel Tweeddale selling the land covered by the mortgage to John Paul. At the time of such sale the claim of Mary Tweeddale under the bond was settled and paid at \$680. She thereupon, in form, fully satisfied the mortgage by signing the usual memorandum to that effect in the margin of the record thereof. Plaintiff did not give her any authority to satisfy the mortgage as to his interest therein. Being unable to obtain payment of the sum secured to him by the mortgage, he commenced this action to foreclose the same. Neither he nor his sister knew that the bond and mortgage made any provision for them till after the mortgage was discharged.

In the nature of conclusions of law, the court made findings to the effect that the provisions in the bond and mortgage as to plaintiff and his sister, under the circumstances existing at the time the mortgage was discharged, were mere incomplete gifts, subject to be recalled by Mrs. Tweeddale, and that she then recalled them. All matters of fact not specifically mentioned, entitling plaintiff to the relief prayed for in his complaint if the interest in form secured to him by the bond and mortgage vested in him beyond the control of his mother upon the execution and delivery of the papers to her, were found by the court or admitted by the pleadings.

The court held, as a matter of law, that plaintiff had no cause of action, and ordered the complaint dismissed with costs. Judgment was entered accordingly.

Messrs. Nash & Nash, with **Mr. John Wattawa**, for appellant.

Mr. George W. Wing, with **Mr. M. T. Parker**, for respondents.

Marshall, J., delivered the opinion of the court:

The agreement by Daniel Tweeddale to pay plaintiff \$100 and his sister \$50, as part of the consideration for the property which came to him from his mother, stands upon the same footing as any promise made by one person to another, for a consideration, for the benefit of a third person. As soon as the title to the land was vested in Daniel Tweeddale and the bond and mortgage were delivered to his mother, he became obligated to pay to them that part of the consideration for the land represented by the sums secured to his brother and sister, if the principle controls that a grantee of land becomes obligated to pay the whole or a part of the consideration for the property conveyed to him to a stranger to the

transaction if it is left in his hands for that purpose, and upon his promise to make such payment. We apprehend the trial court so viewed the matter. Notwithstanding the finding that the sum secured to appellant and that secured to his sister were mere gifts, the turning point in the case, in the mind of the circuit judge, we apprehend, was that the beneficiaries did not know of the agreement, and did not accept the same or in any way become parties thereto till their mother, with the consent of Daniel Tweeddale, rescinded the transaction. An agreement by one person, upon a good consideration, to pay his debt to another by paying the same to a third person, is just as binding where there is no consideration for the promise between the immediate promisee and the third person as where there is such consideration. Whether the benefit secured to the third person is a gift, strictly so called, or one intended, when realized, to discharge some liability of such promisee to the third person does not change the situation. It is the exchange of promises between the immediate parties, and the operation of law thereon, that binds the promisor to the third person. The idea which ruled this case,—that where a person for a consideration paid to him by another agrees to pay a sum of money to a third person, a stranger to the transaction, the latter does not thereby become possessed of the absolute right to the benefit of the promise, nor until he accepts the same in some way; and that while he is ignorant of the promise, or thereafter, at any time before he assents to the transaction, it may be rescinded,—we must admit is well supported in the books. The authorities so holding, in the main, go upon the ground that privity between parties is absolutely essential to a liability of one to another of a contractual nature, and that until the third person brings himself into privity with the one who has promised to be his debtor by at least assenting thereto, he has at least no legal right to the benefit of the promise; and that, till then, the parties to the transaction may rescind it or change it as they see fit. There is also much authority to the effect that, while the element of privity between the promisor and the third person is essential to render the promise absolutely binding upon the former, no act of the latter is necessary thereto; that the law, operating upon the acts of the parties to the transaction, creates the privity immediately upon its being consummated between them, and that neither one nor both of them can thereafter, without the third person's consent, enforce the promise. The first class of authorities is well represented by the following: *Trimble v. Strother*, 25 Ohio St. 378; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Crowell v. Hospital of Saint Barnabas*, 27 N. J. Eq. 650; *Durham v. Bischof*, 47 Ind. 211; *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671; *White v. Hunt*, 64 N. C. 496. The second class of authorities is fairly well represented by the following: *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340; *Dean v.*

Walker, 107 Ill. 540, 47 Am. Rep. 467; *Hare v. Murphy*, 45 Neb. 809, 29 L. R. A. 851, 64 N. W. 211; *Graves v. Macfarland*, 58 Neb. 802, 79 N. W. 707; *Brewer v. Dyer*, 7 Cush. 337; *Mallett v. Page*, 8 Ind. 364; *Henderson v. McDonald*, 84 Ind. 149; *Pruitt v. Pruitt*, 91 Ind. 595; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Frank v. New York, L. E. & W. R. Co.* 7 N. Y. S. R. 814; *Esling v. Zantinger*, 13 Pa. 50.

It is useless to endeavor to review the authorities touching the subject before us with a view of harmonizing them upon any one single theory as to the principle upon which the liability to the third person is based, or as to what are the essential elements to effect it. There is as much confusion, probably, in the judicial holdings in respect to the matter, as on any question of law that can be mentioned. As indicated, there are authorities to the effect that there is no absolute liability to the third person till in some way he is brought into privity with the promisor. Others are to the effect that such privity is entirely unnecessary. Others, as we have indicated, hold that while the element of privity is necessary, the law creates it, no act of the third party being necessary thereto. There are others to the effect that there is no liability at law without the element of privity between the promisor and the third person; hence, if he has a right to enforce the promise the remedy is in equity, unless he can show that he adopted the promise made for his benefit so as to become a party thereto. There are many other phases of the question that find support in the books. The liability is sustained in some cases under the doctrine of novation, and held not to exist in the absence of any of the elements necessary to satisfy the law on that subject. In other cases it is held that there is no principle of subrogation or novation involved in the liability; that it rests solely upon, and is fixed absolutely by, the transaction between the person making the promise and receiving the consideration and the person to whom the promise is made and from whom the consideration moves. There is confusion, not only between different courts, but confusion in the decisions in many jurisdictions in the same court. The supreme court of Illinois, in *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340, speaking on the subject, correctly described the situation in the following language:

"The courts are not harmonious,—not even the courts in the same states,—and it may be added that the cases are not capable of being reconciled. . . . On the mere authority of adjudged cases in other tribunals, we would have to vacillate to keep in line."

The extent to which the first class of cases we have mentioned goes in one direction is indicated by the following from the syllabus of *Trimble v. Strother*, 25 Ohio St. 378: "In an action to recover a debt which the defendant agreed with a third party to pay the plaintiff, it is a good defense to show that, before the plaintiff assented to 61 L. R. A.

or acted on the promise made in his favor, the agreement had been rescinded."

The sharp conflict between the two principal classes of cases is well indicated by reading, in connection with that quotation, the following from the syllabus of *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340: "A purchaser of mortgaged premises from the mortgagor, who assumes payment of the mortgage debt, or who accepts a conveyance reciting his assumption of the same with a knowledge of such recital, will at once become personally liable to the mortgagee for the mortgage indebtedness; and he cannot defeat the mortgagee's right to hold him responsible, by procuring a release from the mortgagor."

It is believed that this court is committed to that doctrine, though it must be admitted that there are expressions in several opinions that may well be taken as indicating either a contrary view or that it is uncertain just what the rule here is on the subject. To illustrate: in *Putney v. Farnham*, 27 Wis. 187, 9 Am. Rep. 459, we find this language: "After notice, therefore to them [the third persons], and their assent, the liability of the defendant . . . was absolutely fixed. . . . It was no longer in the power of Corlett [the immediate promisee] to forbid such payment or to withdraw his assent, or to require payment to be made to himself without the consent of Fallon and Gallagher."

There is impliedly a decision that, till the third person receives notice of the agreement made for his benefit, and assents to it, the immediate parties to the transaction may rescind it, or the immediate promisee may himself change the direction of the benefit. In *Bassett v. Hughes*, 43 Wis. 319, the expression in *Putney v. Farnham* was repeated. In *Enos v. Sanger*, 96 Wis. 150, 37 L. R. A. 862, 70 N. W. 1069, language was used, taken by itself, indicating that privity between the third person and his promisor does not exist prior to his adoption in some way of the promise. But after discussing authorities in this and other states bearing on the subject, the law as stated in *Brewer v. Dyer*, 7 Cush. 337, and *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340, was approved as more fully stating the established doctrine here than any language used in our own decisions. For the purpose of clearing up any uncertainty existing here the following, substantially, as a judicial rule, was deduced from our decisions and the authorities which met with our approval: "Where a grantee in a conveyance assumes and agrees to pay the debt of a third person to his creditor, neither such person nor such creditor being connected contractually with the grantor, as part of the consideration for his purchase, there is no necessity for any consideration to pass from such third person or his creditor to such grantee to support such agreement. A portion of the consideration for the purchase being left in such grantee's hands, appropriated by the grantor to the payment of the debt which such grantee agrees to pay in consideration

of the conveyance and of such appropriation, he cannot be heard to object to the performance of his contract because his grantor was not liable for such debt. When the grantor makes such an appropriation, and the grantee, for a sufficient consideration, promises to pay the amount so appropriated to the creditor of such third person, such grantee thereby becomes liable to such creditor; and such liability rests solely on such consideration and such promise." That is in harmony with the language used on the subject in *Bishop v. Douglass*, 25 Wis. 696, and *Palmeter v. Carey*, 63 Wis. 420, 21 N. W. 793, 23 N. W. 586. In *Stites v. Thompson*, 98 Wis. 329, 73 N. W. 774, it was said that out of the transaction of one person promising, for a consideration paid to him by another, to pay a sum of money to a third person, the promisor becomes a debtor of such third person the same as if the promise were made directly to him, as liability is determined by his undertaking with his immediate promisee. In *Etscheid v. Baker*, 112 Wis. 129, 88 N. W. 52, the last case here where the subject is discussed, *Bassett v. Hughes*, 43 Wis. 319, is cited and some significance given to the fact that the person for whose benefit the promise was made knew of and assented to it before any attempt was made to revoke it. However, *Enos v. Sanger*, 98 Wis. 150, 37 L. R. A. 862, 70 N. W. 1069, was cited, and there was no intention to disturb the rule there laid down and re-enforced in *Stites v. Thompson*.

Without further discussion of the matter we adhere to the doctrine that where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former, and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person without his consent. It is plainly illogical to hold that, immediately upon the completion of the transaction between the immediate parties thereto, the law operates upon their acts, and creates the element of privity between the promisor and the third person, and

at the same time to hold that such third person's status as regards the promise may be changed thereafter without his consent. The idea that privity between the promisor and the third person is necessary to render the transaction between the original parties thereto beyond the reach of either of them to revoke it, or both acting together to rescind it, springs from the supposed necessity of contractual relations between the promisor and the third person, binding upon the promisor at law. The moment such essential is established, it seems clear that such third person's right accrues and becomes absolute.

True, the doctrine that the element of privity may be established without the knowledge or assent of the third person, other than that constructive assent arising from the operation of law upon the acts of the parties, is inconsistent with the rule prevailing here as to all but married women, that a mere beneficiary of a policy of life insurance has no vested rights therein; but so is the doctrine that mere assent by a third person to a promise made for his benefit will render it irrevocable, inconsistent therewith. Neither the assent of a mere beneficiary in a policy of life insurance, to the promise made for his benefit, nor such assent coupled with an independent promise by the insurance company to him to abide thereby, has any effect upon the power of the assured to control the policy by changing the beneficiary or disposing of the insurance fund by will. The doctrine here in that regard was established at an early day. It is contrary to the rule which prevails generally. It is adhered to under the rule of *stare decisis*, and the doctrine that rules of property established by judicial decisions long adhered to should not be disturbed, even if a different decision would be rendered if the court were permitted to treat the subject from an original standpoint. The rule as to insurance contracts has not been applied by this court to any other class of contracts. The court is not disposed to treat it as a principle of general application, or extend it beyond the special class of contracts to which it has been applied.

In view of what has been said, we must hold that, upon the sale of the land to Paul, Daniel Tweeddale became absolutely indebted to plaintiff upon the bond and mortgage mentioned in the complaint for the sum of \$100; that the satisfaction of the mortgage by Mary Tweeddale is void as regards such debt; that his interest in the bond and mortgage was sufficiently brought home to Daniel Tweeddale's grantee, Paul, by the record of the mortgage, to preclude him from being an innocent party to the void satisfaction and successfully invoking the registry laws for protection.

The judgment is reversed and the cause remanded with directions to render judgment in favor of plaintiff in accordance with this opinion.

GEORGIA SUPREME COURT.

BRUNSWICK & WESTERN RAILROAD
COMPANY, *Plff. in Err.*,
v.

Ida WIGGINS.

(113 Ga. 842.)

- *1. While a jury trying a case should give to the evidence of a witness only the weight to which it is, in their opinion, entitled, yet they cannot, in the determination of the issues involved, because of the fact that a particular witness was in the employ of one of the parties, arbitrarily disregard his testimony; and a proper request to (in effect) so charge should not have been refused.
2. To entitle the defendant to the opening and conclusion of the argument in the trial of a case arising *ex delicto*, when the act complained of was not one which, under the law, could be justified, it is necessary that the defendant by proper pleadings admit, not only the commission of the act which it is alleged was wrongful, but also such other facts as would entitle the plaintiff to have a verdict, without proof, for the amount claimed in the petition.

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sary that the defendant by proper pleadings admit, not only the commission of the act which it is alleged was wrongful, but also such other facts as would entitle the plaintiff to have a verdict, without proof, for the amount claimed in the petition.

3. In the trial of an action brought to recover damages against a railroad company for injuries sustained by the running and operation of a train of cars, it was error to charge in such manner as to convey to the jury the impression that, if they should believe that both the company and the person injured were equally negligent, the plaintiff could recover.
4. In an action instituted by a widow for the homicide of her husband, caused by the negligent operation of a train of cars by a railroad company, evidence going to show that the deceased, at the time he was killed, left no estate or property, was inadmissible.

(July 19, 1901.)

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I. Scope of note.

As the title of the note indicates, it will be limited to the discussion of those authorities in which the burden of proof and consequent right to open and close is, or is not, located by the requisite admission by the party claiming it, or upon whom it is imposed.

It will, however, be necessary, as a preliminary to a correct understanding of the special subject under consideration, to recur briefly to certain general rules concerning the *onus probandi* and right to begin, which have come to us through the medium of the decisions and rules of the common-law courts.

II. General principle.

In Best's little work "Right to Begin and Reply" it is stated that, by the affirmative of the issue is meant the affirmative in substance, and not the affirmative in form, i. e., that the judges, in examining the record in order to see on whom the *onus probandi* lies, and consequently in whom the right to begin resides, will consider, not so much the form of the pleadings, as the substantial question between the parties, and will cast the *onus probandi* on the party with whom the real affirmative seems to lie. The author then goes

ERROR to the Superior Court for Berrien County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged negligent killing of her husband. *Reversed.*

The facts are stated in the opinion.

Mr. D. H. Pope for plaintiff in error.

Messrs. W. M. Hammond and L. E. Lastinger for defendant in error.

Little, J., delivered the opinion of the court:

An action was instituted by the defendant in error against the railroad company to recover damages for the homicide of her husband, which she alleged was occasioned by the operation of a train of cars over defendant's railroad at a public crossing. The evidence relied on by the plaintiff in the court below as a basis of recovery was sub-

stantially as follows: Robinson, the husband of the plaintiff, was a watchman at a sawmill located at a point near the railroad. He was fifty-four years old at the time he was killed, was earning \$30 per month, and was in good health. Among other things, it was his duty to fire up a tramway engine on the south side of defendant's road, near where he was killed, and to look after a lot of mules, which were stabled on the north side of the railroad. The public road crosses the railroad in going from the mill to where the tramway engine was stationed. Usually, the trains of defendant's railroad stopped at that crossing. At the time of his death the deceased had no property or estate other than his daily and monthly wages. Very early in the morning on which he was killed the deceased was at the mill, a few minutes before the

on to give two cases which afford, in terms, two different tests for the discovery as to with which party the affirmative lies, and states that they are the same proposition in different dresses. In the first of the cases mentioned, *Amos v. Hughes* (1835) 1 Moody & R. 464, the test was laid down by Alderson, B., to be, which party would be successful if no evidence at all were given, as upon the opposite party would necessarily rest the *onus probandi*, and, according to the author, the consequent right to begin. In the other case, *Millis v. Barber* (1836) 1 Mees. & W. 425, 5 Dowl. P. C. 77, 2 Gale, 5, 5 L. J. Exch. N. S. 204, the same judge, in holding that a defense to an action on a bill of exchange against the acceptor, that the bill had been accepted without consideration for the accommodation of the drawer, and had been subsequently indorsed to the plaintiff without consideration, to which the plaintiff replied that the drawer indorsed the bill to the plaintiff for a good consideration, placed the *onus probandi* on the defendant notwithstanding the affirmative shape of the replication, said: "The replication is in the affirmative, but it is in answer to a negative. Upon the question as to who is to begin, is it not the proper test to examine whether, if the particular allegation be struck out of the plea there will or will not be a defense to the action?"

Thus the two general rules for determining the *onus probandi* are, (1) to conceive the negative and affirmative allegations by which the issue is joined both struck out of the record, and then the *onus probandi* lies on the party against whom judgment must, in their absence, pass; (2) to consider at the trial which party would succeed if no evidence at all were given, as the *onus probandi* must lie upon his adversary.

In the natural course of litigation this burden and right usually reside with the plaintiff,—the party who initiates the action, proceeding or suit; and, this being so, it follows that, so long as the affirmative of any substantial issue, however slight, remains with the plaintiff, he retains the right to open and close, even though the affirmative of a majority of such issues is with the defendant. But where the latter, either in positive terms, or by the nature and character of his pleading, absolutely admits the cause of action, thereby absolving the plaintiff from the necessity of making any proof thereof, in order to succeed, the burden and right are said to shift and rest with the defendant. It must be borne in mind, however, that we are now considering the principle of the common law, and that alone, for, as will be seen hereafter, in many of the jurisdictions the rule has

been variously altered by court rule, statute, and Code provision.

"The general rule is, that the party who has the affirmative of the issue to maintain shall begin and close. This rule, however, has been held subject to several limitations, and been more or less fluctuating, both in England and America; so much so, that it would be difficult, perhaps, at the present time, to lay down any definite rules of practice as well sustained by authority, which could not be contradicted by other authority equally respectable. Some jurisdictions hold it to be a matter of right, while others decide that it rests in the legal discretion of the court at the trial." *Thurston v. Kennett*, 22 N. H. 151.

In considering which party ought to begin, it is not so much the form of the issue which is to be regarded as the substance and effect of it; and the judge will consider what is the substantial fact to be made out, and on whom it lies to make it out. *Bills v. Vose*, 27 N. H. 212.

Whenever the general issue is in the case, the plaintiff has the right to open and close: *Jarboe v. Scherb*, 34 Ind. 350; *Cox v. Vickers*, 35 Ind. 27; *Fountain v. West*, 23 Iowa, 9, 92 Am. Dec. 405; *Kearney v. Gough*, 5 Gill & J. 457; *Toppan v. Jenness*, 21 N. H. 232; *Hudson v. Wetherington*, 79 N. C. 3; *Harvey v. Brouillette*, 61 Vt. 525, 17 Atl. 722; *Farrington v. Jennison*, 67 Vt. 569, 32 Atl. 641; *Price v. Seaward*, Car. & M. 23.

The result of an examination of all the authorities on the subject shows that the general rule or principle at common law is that, where the defendant does not admit the entire demand of the plaintiff, and where there are several issues, if the plaintiff is called on to maintain a single one, he retains and has the right to open and close. *Beall v. Newton*, 1 Cranch C. C. 404, Fed. Cas. No. 1,164; *Henderson v. Casteel*, 3 Cranch C. C. 365, Fed. Cas. No. 6,350; *Kitner v. Whitlock*, 88 Ill. 513; *Razor v. Razor*, 42 Ill. App. 504, Affirmed in 149 Ill. 621, 36 N. E. 963; *Shaw v. Barnhart*, 17 Ind. 183; *Camp v. Brown*, 48 Ind. 575; *Abat v. Sigura*, 5 Mart. N. S. 73, *infra*, V. b. 2; *Ross v. Gould*, 5 Me. 204 (*dictum*); *Crapson v. Wallace Bros.* 81 Mo. App. 680; *Cortellyou v. Hiatt*, 36 Neb. 584, 54 N. W. 964; *Citizens' State Bank v. Baird*, 42 Neb. 219, 60 N. W. 551 (*dictum*); *Welsh v. Burr*, 56 Neb. 361, 76 N. W. 905; *Sorensen v. Sorensen* (Neb.) 94 N. W. 540; *Belknap v. Wendell*, 21 N. H. 175; *Buzzell v. Snell*, 25 N. H. 474; *Bills v. Vose*, 27 N. H. 212; *Clarkson v. Meyer*, 39 N. Y. S. R. 188, 14 N. Y. Supp. 144; *McKae v. Lawrence*, 75 N. C. 289; *Johnson v. Maxwell*, 87 N. C. 18; *Lexington Fire, L. & M.*

train was to pass. When the train which killed Robinson approached the crossing the bell on the engine was not tolled, nor the whistle blown, but the train ran over the crossing at a speed of from 30 to 40 miles an hour, and stopped some distance beyond the crossing to put off a passenger at that station. Then it was discovered that a man, who proved to be the husband, had been struck by the train on or near the crossing. The dead body was found on the south side of the railroad, and about 30 feet from the crossing. The track was straight for a considerable distance from the crossing, and there was nothing to prevent the deceased from seeing the train after he had gotten within 18 feet of the side track. The Carlisle mortality tables were introduced. The engineer testified in behalf of the company to the following effect:

Ins. Co. v. Paver, 16 Ohio, 324; *Montgomery v. Swindler*, 32 Ohio St. 224; *Sanders v. Bridges*, 67 Tex. 93, 2 S. W. 663; *Harris v. Pinckney* (Tex. Civ. App.) 55 S. W. 38; *Stephens v. Harvey*, 7 Leigh, 501; *Vuyton v. Brenell*, 1 Wash. C. C. 467, Fed. Cas. No. 17,026; *Wisconsin Central Bank v. St. John*, 17 Wis. 157; *Edwards v. Murray*, 5 Wyo. 153, 38 Pac. 681; *Curtis v. Wheeler*, *Moody & M.* 493, 4 Car. & P. 196; *James v. Salter*, 1 *Moody & R.* 501; *Overbury v. Muggridge*, 1 Fost. & F. 137 note; *Thompson v. Security Trust & L. Ins. Co.* 63 S. C. 290, 41 S. E. 464.

See *infra*, IV. e; VII.

In *Cheesman v. Hart*, 42 Fed. 98, which was an action of trespass for taking ore from plaintiff's mine, error was assigned on motion for new trial, because the court allowed defendants' counsel to open and close the argument to the jury. Defendants admitted plaintiff's title to the surface location, and that they had invaded the side lines of his claim, and the single judge before whom this motion was tried said that the only burden which the law imposed on plaintiff was the mere formal introduction of the patent to the claim and proof of the quantity and value of the ore taken. It would seem from this that the quantity and value of the ore were not admitted, but the judge states that, as it was not to the interest of the defendants to disprove the presence of valuable ore at this point, the evidence on this issue was brief and merely as to the value; that it was manifest that the real burden rested, and heavily, on the defendants, adding: "They held the laboring oar throughout on all vital issues in question. From them the burden of the real issue never shifted. Under such a peculiar condition of the trial I felt that common fairness demanded that defendants' counsel should open and close the argument. This view of the real equity of the rule in question I have long entertained. I fought for it while at the bar, and shall endeavor to impartially maintain it as one founded in justice and equality while I remain on the bench."

Inasmuch as nearly all of the decisions, both English and American, hold that, where it is incumbent upon the plaintiff to make any proof in order to recover, it is his right to begin and close, it would seem that the best reason for this decision is, that the judge, having "fought for it while at the bar," carried the predilection, thus obtained, with him upon the bench.

This decision was followed, and apparently approved, in *Bell v. Skillicorn*, 6 N. M. 399, 28 Pac. 768, but strongly criticised and disapproved in *Jones v. Prospect Mountain Tunnel* 61 L. R. A.

The station near which defendant's husband was killed was a flag station. After he sounded the road-crossing signals he got the signal from the conductor to stop. He saw a lamp in the hands of someone, 2 or 3 feet from the crossing, when the locomotive was 75 or 100 yards distant. When he had gotten within one or two car lengths of the crossing he saw that the lamp was held by someone who attempted to cross the track in front of the engine, which was running at about 20 miles an hour. He stopped the train about 125 yards from that point, and backed up near the crossing, where the body of the deceased was found. Usually the train stopped on the crossing. This occurred between 3 and 4 o'clock in the morning. The bell was rung, and the speed of the train reduced from 35 or 40 miles to about 20 miles per hour at the crossing. He was

Co. 21 Nev. 389, 31 Pac. 642, citing numerous authorities in favor of the view there taken.

But where there is but one issue, and the affirmative is upon the defendant, or where the affirmative of all the issues is upon him, then he has the right to begin. *McRae v. Lawrence*, 75 N. C. 289.

And so, where the defendant pleads by way of confession and avoidance, or in such other manner as to admit the plaintiff's cause of action, or in open court, before entering upon the trial, he admits the plaintiff's cause of action, and thus obviates the necessity of any proof on his part, the defendant will be entitled to open and close. *Aurora v. Cobb*, 21 Ind. 492. See cases in *infra*, V. b, 2, 5, c.

III. When regulated by rule of court or provision of statute.

As many of the decisions which follow are more or less dependent upon, or qualified by, rules of court and provisions of Code or statute, these will be first given in brief form.

a. In the United States.

1. By rule of court.

In Alabama it was the practice, from the organization of the state government, up to the July term, 1820, of the supreme court, for the party holding the affirmative of an issue to open and conclude the argument to the jury. At that term rules were adopted in lieu of those pre-existing, and the previous rule, declaring such to be the practice, was omitted.

The 19th rule for the government of the practice in the circuit and county courts directs: "If the counsel for the plaintiff waives the right of opening the argument, he shall not have the right of concluding."

In *Worsham v. Goar*, 4 Port. (Ala.) 441, the court said that this rule, if it does not give the right to plaintiff to open and conclude his argument, is certainly founded upon a concession that he always had that right, and the refusal to allow it to the defendant is no error.

In *Chamberlain v. Gaillard*, 26 Ala. 504, the court said, as to the counsel for the defendant, on the trial below, being entitled to open and conclude the investigation and argument of the cause, in consequence of having the affirmative of the issue as presented by the plea: "We do not regard that question as an open one in this court. Under our practice the plaintiff is entitled to the opening and conclusion in every case, unless he waives the right to open;" citing *Worsham v. Goar*, 4 Port. (Ala.) 441; *Grady v. Hammond*, 21 Ala. 427.

looking forward, and first saw the light when he was about 100 yards distant, and was checking the speed of his train. The deceased attempted to run across in front of the engine. A man standing at the crossing could have seen the train a mile and a half. When he first saw the light it was 8 or 10 feet from the track, and it appeared that the person holding it ran from that point in front of the engine. The fireman also testified for defendant as follows: He was on the engine that killed the deceased. As the train approached the station he was ringing the bell. He saw a lamp held by someone going down to the track from the mill on the north side. It remained stationary until just before the train reached the crossing, when the man holding the lamp stepped on the track in front of the engine. The whistle was sounded for the crossing at

the blow post. Witness saw the light of the lamp as it was brought down to the side of the road, as if a person was walking with it. He first saw it when the engine was at the blow post. The bell was rung until the crossing was passed, and just as the man holding the lamp (who was the deceased) stepped in front of the engine the pilot of the locomotive struck him, and threw him on the other side. The engineer then said that he thought he had killed the watchman. The train stopped, and then backed, and the engineer went back. "No alarm was given to the engineer by me when the man holding the light was first discovered, because I thought he was going to wave down the train, but the light made no signal to stop." On this evidence the jury returned a verdict for the plaintiff for \$1,500. Defendant made a motion for a

In *Spaulding v. Hood*, 8 Cush, 602, note, it is stated that from February, 1846, to July, 1853, the 41st rule of the court of common pleas in Massachusetts provided that, "whenever the defendant in any action shall file a statement in writing of any specific matter of discharge or avoidance of the action, he may, at any time before trial, file also in writing an admission of all the facts necessary to be proved by the plaintiff in his opening on the general issue; and such defendant shall then be entitled to open and close; unless the plaintiff shall file, in writing, an admission of all the material facts alleged in the defendant's statement, and shall, by way of reply, state some specific and substantive matter in discharge or avoidance thereof."

An admission by the defendant, to obtain the right to open and close, under the 41st rule of the court of common pleas, must be filed before the trial commences; and it is too late to do so after the writ and declaration, and specification of defense, have been read to the jury. *Wigglesworth v. Atkins*, 5 Cush, 212. To the same effect, see *Merriam v. Cunningham*, 11 Cush, 40.

Under this rule, where the defendant in an action on the trial in the common pleas filed an admission in writing that he had purchased and received the goods which were the subject of the action, and at the prices at which they were charged by the plaintiff, but alleged that the goods were so purchased and received on barter account; but does not admit that the balance (the amount sued for, after deducting the set-off) was to be paid in cash,—he is not entitled to open and close. *Bradley v. Clark*, 1 Cush, 223.

So, also, where the defendant does not admit that the plaintiff has a *prima facie* case, which is a condition precedent under this rule of the common pleas to give the defendant the opening and close, he is not entitled thereto. *Snow v. Batchelder*, 8 Cush, 513.

In order to entitle a defendant, on the trial of an action in the court of common pleas, to open and close the case, according to the 41st rule of that court, he must admit the facts, and not generally that the plaintiff has a *prima facie* case. *Wigglesworth v. Atkins*, 5 Cush, 212. To the same effect, see *Spaulding v. Hood*, 8 Cush, 602.

In *Page v. Osgood*, 2 Gray, 260, the rule as to opening and closing, adopted by the supreme judicial court of Massachusetts, was thus stated by Dewey, J.: "This vexed question, frequently arising under the earlier practice, where the right shifted from the plaintiff to the defendant, according to the state of the pleadings

and the burden of proof, is, in our practice, at length settled by this court's adopting the uniform rule of giving the right of opening and closing in all cases to the plaintiff." In this case the court held that, where the defendant admits the plaintiff's cause of action, and the only issue for the jury is on the defendant's declaration in set-off, the plaintiff is still entitled to open and close. Judge Dewey further stated that this rule was adopted in 1836. In 1853 the court of common pleas changed its rule so as to make it identical with that of the supreme judicial court giving the right to the plaintiff in all cases.

In *Door v. Tremont Nat. Bank*, 128 Mass. 340, the court said: "The tendency of decision in this commonwealth has been to simplify the practice in this respect, and to hold the plaintiff to be entitled to the opening and close in all cases. . . . And, since the new practice act has abolished the general issue in personal actions, and required an answer stating the defenses intended to be relied on, the same rule has prevailed, even where the defendant admits the plaintiff's cause of action, and the only issue for the jury is upon a declaration in set-off."

An opposite view seems to have been taken in *Laney v. Ingalls*, 5 S. D. 183, 58 N. W. 572, *infra*, III. a. 2.

In North Carolina the rules of practice in the superior court (which is the court of original general jurisdiction) provide that in all cases, civil or criminal, when no evidence is introduced by defendant, the right of reply and conclusion shall belong to his counsel. And further, that in a case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply, etc., the court shall decide who is so entitled, and, except in the cases above mentioned, this decision shall be final, and not reviewable. 119 N. C. 958, 959, 27 S. E. V., VI.

These rules are here given upon the theory that, when the defendant introduces no evidence, he practically admits the case of the plaintiff or prosecution as the case may be.

These rules have been passed upon and construed in *Brooks v. Brooks*, 90 N. C. 142; *Cheek v. Watson*, 90 N. C. 302; *Austin v. Secrest*, 91 N. C. 214; *State v. Keene*, 100 N. C. 509, 6 S. E. 91; *State v. Anderson*, 101 N. C. 758, 7 S. E. 678; *Shober v. Wheeler*, 113 N. C. 370, 18 S. E. 328; *Morehead Bkg. Co. v. Walker*, 121 N. C. 115, 28 S. E. 253.

In *Burckhalter v. Coward*, 16 S. C. 435, the present rule of court in South Carolina upon the right to begin and close is said to be as follows: "And on all motions or special mat-

new trial, which was overruled, and it excepted. Other grounds of the motion for a new trial than those herein specifically considered and passed on allege that the trial judge erred in the rulings therein set out. After having given these careful consideration, we are of the opinion that none of them presents sufficient legal cause for the reversal of the judgment and the grant of a new trial. While some of the rulings are subject to criticism, the causes of error alleged do not have such a material bearing on the rights of the plaintiff in error as of themselves to work a reversal.

1. One of the grounds of alleged error is that the trial judge refused, on a proper request, to charge the jury that the evidence of persons in the employment of the railroad company, in the absence of anything to discredit or contradict such evidence,

cannot be arbitrarily disregarded. Undoubtedly, this is a sound proposition of law. The jury cannot arbitrarily disregard the evidence of any witness which is not contradicted or discredited by other evidence or circumstances. The jury should regard the testimony of every witness sworn. They are not obliged to believe it, but it is their duty to give to the evidence of witnesses the weight to which in their opinion, as conscientious men seeking the truth, they believe it is entitled; but the employment or business of a witness affords no reason why this evidence should arbitrarily or without reason be disregarded. *Western & A. R. Co. v. Beason*, 112 Ga. 553, 37 S. E. 863; *Georgia R. & Bkg. Co. v. Wall*, 80 Ga. 202, 7 S. E. 639. It is urged that, in view of the violent and unwarranted attack made by plaintiff's counsel on railroads generally and

ters, either springing out of a cause or other wise, the actor or party submitting the same to the court shall, in like manner, begin and close; and so shall the defendant, when he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof, have the like privilege."

The defendant's right to the general reply in evidence, and the reply in argument, depends on the question, whether he has by his pleading made himself plaintiff in all the issues before the court. And the general issue plea deprives him of this benefit and advantage. *Anonymous*, 1 Hill L. 251.

Of course, making "himself plaintiff" must be the admission in his pleading of all the averments of the plaintiff's pleading.

In *Gray v. Cottrell*, 1 Hill L. 38, which was an action of debt on a single bill, the plea was general issue, and unsoundness of a negro, part of the consideration of the bill. On the trial the defendants admitted the execution of the single bill, which was payable to the plaintiffs, by name, as administrators. A great deal of evidence was given, on both sides, as to the soundness of the negro. After the plaintiffs had finally closed, the defendants claimed the right of replying in evidence and argument. The court ruled otherwise, and the plaintiffs had a verdict. Defendants appealed on two grounds, the last of which was because the trial court refused to permit the defendants to reply in testimony, although the plaintiffs' case was admitted by the defendants. After stating that the first ground was not tenable, all that was said upon the last, by the court, was that it concurred, also, on the last ground of the motion.

In *Johnson v. Wideman*, Dud. L. 325, it was stated that, in *Gray v. Cottrell*, 1 Hill L. 38, it was decided that the defendant was not entitled to begin and close when he admitted the plaintiff's cause of action at the trial. That the 62d rule of court, which was then in force, must be so construed as to allow the privilege to those defendants, only, who admit the plaintiff's case on the record; the issue must be the test of admission or denial.

In *Moses v. Gatewood*, 5 Rich. L. 234, it is stated that the general rule as it formerly prevailed in England (being the rule adopted in *Cooper v. Wakley*, 3 Car. & P. 474, *Moody & M. 248*, and cases of like import), that the plea of justification gave the defendant the right to begin, and which the fifteen judges repudiated in adopting the rule mentioned in *Carter v. Jones*, 6 Car. & P. 64, 1 *Moody & R. 281*, and afterwards approved and confirmed in *Mercer v. Whall*, 5 Q. B. 447, 14 L. J. Q. B. N. S. 267, 61 L. R. A.

9 Jur. 576, *infra*, III. b, had long been established by rule of the court of appeal and court of errors, and is contained in the revised rules which were adopted in 1887 (62 Rule, Miller 42).

This construction and application of old rule 62 would seem to be at variance with the three preceding cases.

In *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305, it is stated that the present rule was adopted in 1879, and that the only change from the former rule is that in the old rules the provision was that the defendant should be allowed this privilege "when he admits the plaintiff's case." Whereas in the present rule this is made more distinct by the addition of the words, "by the pleadings." And the court in the same case proceeds to say, further, that the only effect of the change was to make the rule conform in words to the construction which had been previously placed upon the language of the former rules; and that it might be seen by reference to the cases of *Gray v. Cottrell*, 1 Hill L. 38; *Anonymous*, 1 Hill L. 252, and *Johnson v. Wideman*, Dud. L. 325, *supra*, that it was always held that the rule should be considered as meaning an admission by the pleadings, and therefore, where the defendant pleaded the general issue, and at the trial admitted the plaintiff's case, he was not entitled to open and reply, because such admission was not of record.

On a trial *de novo* in the circuit court on an appeal from the justice's court, where the pleadings were altogether oral, the plaintiff stated as his cause of action a promissory note which he exhibited, and stated that he was the owner of, and the defendant admitted the execution of the note and the plaintiff's ownership of it, and, alleging that he was a surety, pleaded as his defense usury and discharge by extension of time to the principal maker of the note, and thereupon claimed the right to open and reply. Such right was held to belong to the plaintiff, as defendant did not thereby "admit by his pleadings." *Mitchell v. Fowler*, 21 S. C. 298.

See also *Singleton v. Millet*, 1 Nott & M'C. 355, *infra*, V. b. 7.

In Texas, rule 31, prescribed by the supreme court for the government of the district and county courts, provides: "The plaintiff shall have the right to open and conclude, both in adducing his evidence and in the argument, unless the burden of proof on the whole case under the pleadings rests upon the defendant, or unless the defendant, or all of the defendants, if there should be more than one, shall, after the issues of fact are settled and before the trial commences, admit that the plaintiff has a good cause of action as set forth in the petition,

the witnesses of the railroad in this case as such, the request was called for as a matter of justice. This may be so. Certainly, such attack, if made, was, to say the least, improper under the evidence in this case, but we cannot consider the refusal to charge in the light of such an attack, because no question concerning it was made before the trial judge and passed on by him, nor do the details of it appear in the record. If it were otherwise, it is possible that the fact that it was unwarrantably made might call for a ruling which would reverse the judgment on that ground; but in any event, as a matter of law, the refusal to give the charge requested was error.

2. For the purpose of securing the opening and conclusion in the argument of the case before the jury, the defendant pro-

posed to amend its plea by admitting that the "petitioner's husband was killed by a locomotive engine of the defendant, which was at the time running at the rate of from 20 to 25 miles an hour over a public crossing; that the deceased was of the age alleged in the petition, and that he was in good health; and that the defendant assumed the burden." This amendment was rejected by the trial judge as being insufficient to change the burden of proof, and to give the defendant the right to open and conclude the argument, and, in our opinion, properly. The question of the right of the defendant to assume the burden of proof, and thus secure the opening and conclusion of the argument before the jury, is, and has been for many years, a much vexed one. Our Civil Code (§ 5160) declares: "The burden of proof generally lies upon the party asserting or af-

except so far as it may be defeated, in whole or in part, by the facts of the answer constituting a good defense, which may be established on the trial; which admission shall be entered of record when the defendant, or the defendants, if more than one, shall have the right to open and conclude in adducing the evidence and in the argument of the cause." 84 Tex. 713, 20 S. W. XIV.

See *Ayers v. Lancaster*, 64 Tex. 305; *Munn v. Martin* (Tex. App.) 15 S. W. 195; *Heath v. First Nat. Bank*, 19 Tex. Civ. App. 63, 46 S. W. 123, *infra*, IV. b.

When it is desired to proceed under the rule (31), the request must be made before any evidence has been introduced, and the admission of the plaintiff's cause of action must be made by the defendants who have filed answers. *Hittson v. State Nat. Bank* (Tex.) 14 S. W. 780.

In order to take the right to open and conclude from the plaintiff, and give the same to the defendant, the admission provided in rule 31 should not be in the general terms of the rule, but should be so specific that the jury, who are not presumed to be judges of the legal effect of the pleadings, will fully understand the facts admitted upon which they are to decide; but, where the admission is relied upon and introduced in evidence by the plaintiff himself, and its general terms are so modified by the judge presiding, in his charge, as to cast the proper burden of proof upon the defendant, it is not prejudicial error to give the defendant the right to open and conclude. *Alstin v. Cundiff*, 52 Tex. 453.

In *Hittson v. State Nat. Bank* (Tex.) 14 S. W. 780, the court held that there was no conflict between the rule and the statute, as the rule relates to the opening and conclusion upon the evidence and the argument, while the statute relates to the argument alone. The language of the statute gives the right to open and conclude the argument to the party having, "under the pleadings," the burden of proof. And, if the defendant desires to avail himself of its benefit, he may do so by admitting in his own pleadings, plaintiff's cause of action, and thus acquire the right, as against him, to open and conclude the argument. (For statute, see *infra*, III. a. 2.) This case was decided before the amendment was made to rule 31, which amendment makes it coincide exactly with the statute by inserting after the word "argument" the words "unless the burden of proof on the whole case under the pleadings rests upon the defendant."

After a defendant has put his admission into writing in the language prescribed by rule 31, and asked that it be entered of record, he should

be allowed to open and close in the conduct of the cause, and deprivation of that right is error for which a judgment will be reversed. *Ney v. Rothe*, 61 Tex. 374.

Where the defendant requested the court to permit him to admit in open court that the plaintiff had a good cause of action as set forth in the petition, except so far as the same might be defeated in whole or in part by the facts of his special answers; and requested that the admission be entered of record, and that he be granted leave to open and conclude in the introduction of the evidence and in the argument; bringing himself strictly within the provision of rule 31,—it was error to refuse such request. *Ramsey v. Thomas*, 14 Tex. Civ. App. 431, 38 S. W. 259.

An admission "that plaintiff has a good cause of action, except in so far as the same may be defeated in whole or in part, by the matters hereinafter set up by this defendant," is a substantial compliance with the rule; and a ruling to permit the defendant to open and conclude the argument is correct. *Blooming Grove Cotton-Oil Co. v. First Nat. Bank* (Tex. Civ. App.) 56 S. W. 552; *Atkinson v. Reed* (Tex. Civ. App.) 49 S. W. 260.

To entitle defendants in an action to the opening and conclusion, they must bring themselves within the rule, which requires the party making such demand to concede that plaintiff has a good cause of action, except in so far as the same may be defeated by the matters of defense relied on in the answer, and this concession must be entered of record. Here the admission was made after the close of the evidence. *Smith v. Eastham* (Tex. Civ. App.) 56 S. W. 218.

It is too late, after the plaintiff has opened and concluded the evidence, for the defendant to make an admission which would entitle him to the opening and conclusion of the argument if made before the trial commenced. *Mutual L. Ins. Co. v. Simpson* (Tex. Civ. App.) 23 S. W. 837.

In an appeal from a judgment for the plaintiff in an action which had been commenced in a justice's court it appeared that the defendant filed an admission in the justice's court in accordance with the rule entitling him to open and conclude the case before the jury. In the county court, after the plaintiff had stated his case, and the defendant had read his answer, and before the introduction of the evidence, the defendant called the court's attention to his written admission, and requested the right to open and conclude the case, to which it was objected that the request came too late and this objection was sustained by the court,

firming a fact, and to the existence of whose case or defense the proof of such fact is essential." Ordinarily, this burden lies upon the plaintiff, who, alleging certain facts to exist, claims a right of recovery against the defendant; but when, in such a case, the defendant comes in and admits the facts stated in the petition to be true, and sets up matter in avoidance, then the defendant is the party who asserts the truth of the facts so set up, and the burden is shifted to him to establish the facts so pleaded, failing to do which the plaintiff is, without more, entitled to a verdict. But just when admissions by the defendant of the truth of the facts asserted by the plaintiff changes the onus is a matter which, because of contrary rulings of various courts and divergent opinions of eminent jurists, has not been made entirely plain. In this state, however,

and the request was refused. It was held that this was error; that, the admission having been filed before the announcement of ready for trial, the request, having been made before evidence was offered, was in time, and should have been granted. *Clements v. McCain* (Tex. Civ. App.) 49 S. W. 122. See rule 81, *supra*.

In an action of trespass to try title, where the plaintiff claimed through his father, while the defendant claimed under an execution sale upon a judgment against the father, and, in answer, alleged that the father deeded to the son when he was insolvent, for the consideration, simply, of love and affection, and at a time when he was owing the debt upon which defendant's judgment was based, and after plaintiff had introduced his evidence as to title requested to be allowed to open and conclude the case, both in the production of evidence and in the argument; it was error to grant such request, as the burden of proof on the whole case was not on the defendant, and he did not make the required admission before the trial commenced, and it was not entered of record. *Heath v. First Nat. Bank*, 10 Tex. Civ. App. 63, 46 S. W. 123.

In *Smith v. Traders' Nat. Bank*, 74 Tex. 541, 12 S. W. 221, it is said that the manifest purpose of rule 31 was to secure to a defendant the right to open and conclude when, upon the real issues in the case, the burden of proof rests upon him; that, to construe it so as to accomplish, in a reasonable and practical manner, its object, an admission made in the very language of the rule must be construed to mean that the defendant admits every fact alleged in the petition which it is necessary for the plaintiff to establish in the first instance to enable him to recover, but does not admit allegations in the petition which merely deny new matter alleged in the answer, the burden of proof of which is upon the defendant. This was an action upon a promissory note, and the defendant in his answer alleged a failure of consideration, and that plaintiff received a transfer of the note with notice of this defense. The plaintiff, instead of replying to this answer by supplemental petition, filed an amended original petition in which it averred that he became the owner of the note by indorsement and delivery before maturity for a valuable consideration and without notice of any defense thereto. The defendant then made his admission on the record in the very words of the rule, and claimed the right to open and conclude upon the issues presented by his special answer. This right was conceded by the court, but, when the defendant attempted to prove the failure of consideration, this was objected to by counsel 41 L. R. A.

the rule in a civil case arising *ex contractu* is now well settled, and, to entitle the defendant to the opening and conclusion of the argument in such a case, he must admit by his plea, filed before the introduction of any evidence, facts which, without further proof, would entitle the plaintiff to a verdict for the amount claimed in the declaration. *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 453; *Reid v. Sewell*, 111 Ga. 880, 36 S. E. 937; *Phoenix Ins. Co. v. Gray*, 113 Ga. 424, 38 S. E. 992. For a very comprehensive and interesting discussion of this question, see *Bailey, Onus Probandi*, pp. 603 *et seq.* But a question which seems not to have been determined heretofore in this state by any ruling is, What admissions in a case brought to recover damages for a tort or arising *ex delicto* are sufficient to shift the burden of proof that rests

for plaintiff upon the ground that the admission entered of record conceded the truth of the allegation in the amended petition to the effect that plaintiff became the owner of the note before maturity without notice of any defense. But this objection was overruled and the evidence admitted.

In *Kalme v. Omro*, 49 Wis. 371, 5 N. W. 888, the court stated that the 23d rule of the new rules adopted by the supreme court for the government of proceedings and trials in the circuit courts affirmed the practice which had always prevailed in Wisconsin, that "the party having the affirmative shall be entitled to the opening and closing argument."

2. By provision of statute or Code.

In the following states and territories the plaintiff has the right to open and close without regard to the burden of proof or affirmative of the issue, by virtue of Code or statutory provision: Alaska; California; Idaho; Louisiana; North Dakota; South Dakota; Oregon; Utah.

And yet in *Laney v. Ingalls*, 5 S. D. 183, 58 N. W. 572, the supreme court of South Dakota refused to reverse a judgment in an action upon a promissory note, the execution and delivery of which the defendant admitted, but alleged and proved a breach of warranty in the animal for the purchase of which the note was given, saying that, if the (trial) court erred in permitting defendant to have the affirmative, to open and close, or in refusing to allow the plaintiff, who had nothing to prove, to open and close the argument to the jury, such error, if any, was without prejudice to the plaintiff, and the case, for that reason, ought not to be reversed.

This case would seem to be opposed in principle to *Dorr v. Tremont Nat. Bank*, 128 Mass. 349, *supra*, III. a, 1.

The defendant in an action on a note in which he sets up as a counterclaim damages occasioned by negligence in foreclosing a mortgage given to secure notes transferred to plaintiff as collateral security for the note sued on, is not entitled, under Dakota Comp. Laws, § 5047, to open and close the argument to the jury. *Plymouth County Bank v. Gilman*, 9 S. D. 278, 58 N. W. 735.

The title of this note was selected upon the theory of the common-law rule that the burden of proof and the right to open and close go together. But, as has been seen, this is not so in those jurisdictions where the right to open and close is, by rule, statute, or Code provisions, given arbitrarily to the plaintiff. And in the body of the note there will be found decisions

on the plaintiff, and give to the defendant the right to open and conclude? We are met at the threshold of this inquiry with a number of conflicting decisions from courts entitled to high consideration, concerning which Mr. Best says that all the authorities agree that when the damages claimed, or, rather, claimable, are nominal or liquidated, the right is not affected by their consideration. Best, Right to Begin & Reply, §§ 46-49. Mr. Bailey, in his work cited *supra*, says that the rock upon which the cases have split is when the damages are to be assessed within the discretion of the jury. In 2 Elliott, Gen. Pr. § 538, after laying down the proposition that the party who would be defeated if no evidence were given on either side must first produce his evidence, the authors cite upon the question of the right to open and conclude, on page

675, note 4, a number of adjudicated cases which support the doctrine that this rule applies where the plaintiff has only to prove his damages; but where the damages are liquidated, and nothing more than a mere computation of interest or attorneys' fees or the like is necessary, the law is otherwise. The compilers of the American & English Encyclopedia of Pleading & Practice declare the rule to be that in actions in which it is necessary for the plaintiff to prove the amount of his damages, whether arising *ex contractu* or *ex delicto*, he has the right to open and close, unless the defendant admits the whole amount of damages claimed by the plaintiff, which doctrine seems to be supported by adjudicated cases in the states of Arkansas, Indiana, Maine, Missouri, Nebraska, New York, Ohio, South Carolina, Virginia, Wisconsin, and Wy-

of the court, in those jurisdictions where the plaintiff has such arbitrary right, showing when the burden of proof is shifted by the admission, even though the right to open and close remains with the plaintiff. Such cases are, of course, some authority that in cases substantially identical, in jurisdictions where no such rule or statute exists, the right to open and close should also shift.

In Arizona plaintiff first reads his complaint and states his case, and, after the defendant has read his answer and stated his case, the plaintiff first introduces his evidence. Rev. Stat. 1901, 1393, § 184.

The party having, under the pleadings, the burden of proof on the whole case is entitled to open and close the argument. *Id.* 1395, § 186.

By statute of Arkansas, the party having the "burden of proof in the whole action" has the right to open and conclude the argument. Mansfield's Digest, § 5,131.

Such a burden lies upon the party who would be defeated if no evidence was given on either side. *Id.* § 2871.

In Sandels & Hill's Digest, 1894, § 5820, it is provided that a trial shall proceed in the following order: The plaintiff must first briefly state his claim and the evidence by which he expects to sustain it. The party on whom rests the burden of proof in the whole action must first produce his evidence in the argument. The party having the burden of proof shall have the opening and conclusion.

In an action on a penal bond, where the plaintiff in the action has assigned his breaches, and is compelled to prove his action, as well as the breaches and damages, he has the right to conclude, although the defendants below pleaded affirmative pleas; as, under the practice in Arkansas, although these are pleas of confession and avoidance, they do not dispense with the necessity of the plaintiff proving his breaches, and he is, therefore, upon principle as well as practice, entitled to open and conclude. Sillivant v. Reardon, 5 Ark. 140.

In Georgia, by § 5160 of the Code, it is provided that "the burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential. If a negation, or negative affirmation, be so essential, the proof of such negative lies on the party so affirming it."

In Colorado the party on whom rests the burden of the issue first states his case and the evidence by which he expects to sustain it, and also, after the adverse party has stated his defense, first produces his evidence. Nothing is 61 L. R. A.

said about the argument to the jury. Mills's Anno. Code, § 187.

In Florida it is provided that in criminal cases, when the defendant, upon his trial, introduces no testimony, he shall, by himself, or by his counsel, be entitled to the concluding argument before the jury. For the purpose of this section, the statement of the defendant, under oath, shall not be considered as testimony. Rev. Stat. 1892, § 2019.

In Georgia what was formerly § 3051, but is now § 3891 of the present Civil Code, is a provision relating to particular torts. Inasmuch as the cases which are here given relate almost, if not entirely, to the construction of this section, the first of them previous to the amendment of 1888, and the last subsequent to such amendment, and showing how the amendment practically did away with the effect of the first-mentioned cases,—it has been deemed best to insert them here as their most cognate and appropriate place, together with such statement in regard to them as seems to make most intelligible the rule in Georgia as to this particular class of cases.

Previous to December 24, 1888, § 3051 of the Georgia Code provided that, "in every case of tort, if the defendant was authorized by law to do the act complained of, he may plead the same as a justification; by such plea he admits the act to be done, and shall be entitled to all the privileges of one holding the affirmative of the issue."

Under this provision and the provisions of § 3479 of the same Code, providing that the defendant might amend his plea at any stage of the trial, it was held, in Ransome v. Christian, 56 Ga. 351, that in an action for libel, where the defendant had pleaded justification, and afterwards withdrawn his plea when the plaintiff proved the publication of the libel, and the defendant then renewed the plea of justification, assumed the burden of showing the libel to be true, and claimed the right to open and conclude the argument, this was practically an amendment of his plea, which he had a right to make at any stage of the trial, and that he, by doing it, became entitled to open and conclude.

This was followed by Ocean S. S. Co. v. Williams, 69 Ga. 251, where, in an action for false imprisonment, the defendant pleaded in justification, but such plea was not filed until the plaintiff had made out his case and closed his evidence; and the court held that, after the defendant had thus filed his plea, a refusal by the trial court to allow his counsel the opening and concluding argument to the jury was error.

oming, which will be found cited in note 3, p. 189, of volume 15 of that work. There is a class of cases, however, sounding in tort, to which, under the provisions of our Civil Code, this rule does not apply, to wit, those to which a plea of justification may be interposed. Section 3891 of that Code declares that in every case of tort, if the defendant was authorized by law to do the act complained of, he may plead the same as a justification, and that by such plea he admits the act to be done, and he is then entitled to all the privileges of one holding the affirmative of the issue. It will be noted that the provisions of this section apply only to cases arising *ex delicto*, where the act complained of was authorized by law to be done, and in such a case it is not necessary that the admission, in order to entitle the defendant to the opening and conclu-

sion, shall go to the extent of admitting the amount of the damages claimed by the plaintiff; but the defendant, by admitting the act to be done, is entitled to the privileges of one holding the affirmative of the issue. It is true, then, that the provisions of this section do not apply to all cases sounding in tort. Indeed, in the case of *Central R. Co. v. Morgan*, 110 Ga. 171, 35 S. E. 347, Mr. Justice Lewis, in delivering the opinion of this court, drew the distinction between the plea of justification and one denying negligence on the part of the railroad company for destroying property belonging to the plaintiff. He said: "Pleas of justification usually refer to such torts as malicious prosecution, assault and battery, libel, slander, and the like, and in them the defendant admits committing the acts complained of, and claims justification

This case was afterwards approved and followed in *Henderson v. Francis*, 75 Ga. 178.

Afterwards, in *Johnson v. Bradstreet Co.* 81 Ga. 425, 7 S. E. 867, and *Rigden v. Jordan*, 81 Ga. 668, 7 S. E. 859, the court held that the defendant might file the plea of general issue and the plea of justification, and still be entitled to the opening and conclusion of the argument, under § 3051, taking the position that, under that section, such a plea of justification, without regard to whatever else was pleaded, absolved the plaintiff from the necessity of making any proof, and saying, further, that, when the plea of justification is filed, the burden is shifted upon the defendant, and he necessarily has the opening and conclusion of the argument.

In the first of the above cases the judge who delivered the opinion said: "It may appear illogical—it does to my mind—to allow a party to open and conclude to the jury who denies the plaintiff's right of action."

Thereafter, in *Horn v. Sims*, 92 Ga. 421, 17 S. E. 670, it was decided that a plea in an action for malicious prosecution, to the effect that the defendant, without any malice whatever, consented to become prosecutor as a matter of friendship to another, and upon the assurance of the solicitor general that so doing was only a matter of form, is not a plea of justification, and does not entitle the defendant to the opening and conclusion.

So, also, in an action for libel, justification as to any part of the libelous matter less than the whole does not entitle the defendant in such case to open and conclude. *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655.

But in *Strickland v. Atlanta & W. P. R. Co.* 99 Ga. 124, 24 S. E. 981, in an action for alleged assault and battery, a plea admitting the beating and alleging that it was lawful because done by defendant's servant for the purpose of protecting his master's property was a plea of justification, and defendant's counsel was entitled to open and conclude the argument.

By the provisions of the act approved December 24, 1888 (Acts of 1888, p. 35), the provisions of § 3051 were amended by adding the following words: "But such plea shall not give to the defendant the right to open and conclude the argument before the jury, unless it is filed before the plaintiff submits any evidence to the jury trying the case." The law as amended is now embodied in the present Civil Code (§ 3891).

In *Central R. Co. v. Morgan*, 110 Ga. 168, 35 S. E. 345, it is stated that the rule laid down in the decision of the supreme court of Georgia in the cases of *Ransone v. Christian*, 61 L. R. A.

56 Ga. 351, and *Ocean S. S. Co. v. Williams*, 69 Ga. 251, *supra*, was repealed by the provisions of the act of 1888, and that the manifest policy indicated in that act is to deny to the defendant in any case the right to open and conclude, unless he relieves the plaintiff of the burden of making out a *prima facie* case; and that those cases, being based upon the law as it was before the amendment of 1888, manifestly did not necessarily decide the question under the laws that now exist. And the action of the trial court refusing the defendant the opening and concluding argument to the jury, where, after the conclusion of the evidence, and before the argument, it amended its answer, was affirmed. The action was for killing a cow by a train of the defendant, and it was held that the provisions of the section referred to did not apply, as in such an action there could not be strictly a plea of justification. That such pleas generally referred to such torts as malicious prosecution, assault and battery, libel, slander, and the like, and in them the defendant admits committing the acts complained of, and claims justification for his conduct.

This view was also taken in *Horton v. Pritchunck*, 110 Ga. 355, 35 S. E. 663.

In *BRUNSWICK & W. R. Co. v. WIGGINS* it was held that the provisions of this section (3891) apply only to cases arising *ex delicto*, where the act complained of was authorized by law to be done; and in such a case it is not necessary that the admission, in order to entitle the defendant to the opening and conclusion, shall go to the extent of admitting the amount of the damages claimed by the plaintiff.

Defendant in an action for assault and battery is not entitled to open and close where the plea does not plainly admit that the act as charged in the petition was committed by the defendant; such an admission being necessary to make the plea one of justification under § 3891 of the Civil Code. *Berkner v. Dannenberg* (Ga.) 60 L. R. A. 559, 43 S. E. 463.

This section (3891) of the Georgia Code, mentioned in *BRUNSWICK & W. R. Co. v. WIGGINS*, would seem to reverse the procedure in the very cases to which (as all the English courts and judges admit) the rule adopted by the fifteen judges applies. See *infra*, III. b.

In Indiana the party having the burden of the issue shall have the opening and close in the argument. *Horner's Anno. Stat.* 1901, § 536.

The defendant in a proceeding under Ind. Rev. Stat. 1843, chap. 30, art. 3, to contest the probate of a will on the ground of the in

for his conduct. In this sort of a tort, however, of injuring property by the running of a railroad train, we do not well see how there can be any plea of justification," etc. So that our conclusion is that in actions brought to recover damages for an act of a defendant, where the latter was authorized by law to do the act complained of, it is not necessary, to entitle him to the opening and conclusion of the argument, that he shall admit that the plaintiff is entitled to recover the amount of damages which he claims, but he is entitled to these privileges, on filing a plea, at the proper time, by which he admits that he did the act complained of. But in cases arising *ex delicto*, where the defendant was not authorized by law to do the act complained of, his right to the opening and conclusion of the argument must be based on the general

rule previously stated; and such admission must not only go to the extent that the defendant did the act, but must go further, and admit every material allegation made in the petition which would authorize the plaintiff to recover without any proof on his part. In the case of *Western & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130, it appeared that the defendant in error had instituted an action against the railroad company to recover damages for the negligent killing of a jennet belonging to the plaintiff. The defendant company admitted the killing, and claimed the right to open and conclude. This right was denied, and this court, in passing upon that point, said: "The effect of the admission did not go far enough to shift the burden. To entitle the plaintiff to recover he must have shown two things,—the killing; the value. The killing

competency of the testator and the fraud of the defendant, cannot be deprived of the right to open and close, because the words, "the execution of the same being admitted," are added to the issue made up in compliance with § 60, providing that, in such proceedings, an issue shall be made up whether the writing produced be the last will and testament of the testator, and that upon this issue the defendant shall have the affirmative, on the theory that, although the execution of the will was admitted, it was left to the plaintiffs to sustain the affirmative upon the issue as to the incompetency and fraud, since § 56 provides that it may be objected, against the admission of a will to probate, either that the testator was of unsound mind, or that the will was not duly executed or was executed under duress or restraint or obtained by fraud, or that any other valid objection exists, and the language of the statute is imperative and embraces all cases arising under it, where any one of the objections specified is alleged. Neither does the fact that plaintiffs were permitted to introduce their evidence first before the jury without objection preclude defendant from claiming his right to open and close the argument. *Perry v. Bland*, 4 Ind. 297.

In an action to recover the value of certain bonds which it was alleged that the defendant had in his hands as the agent and attorney of the plaintiff, a university, and which he had converted to his own use, the defendant has the burden of proof, and is entitled to open and close, where the answer averred that the university was indebted to defendant for professional services performed under a special contract, evidenced on the part of the university by a resolution of its board of trustees, to which the plaintiff replied, first by a denial, and second, that at the date of the resolution defendant was secretary of the board of trustees, and falsely entered the resolution on the records. *Judah v. Vincennes University*, 23 Ind. 272. In this case the court discussed the question under the rule of the common law as to the right to begin, concluding that the rule as stated in *Mercer v. Whall*, 5 Q. B. 447, 14 L. J. Q. B. N. S. 267, 9 Jur. 576, *infra*, III. b, had been settled in England; but that the Code of Indiana, which enacts that the party upon whom rests the burden of the issues shall begin, changed the rule of the common law as laid down in that case.

In *Fetters v. Muncie Nat. Bank*, 34 Ind. 251, 7 Am. Rep. 225, it is held that whenever the plaintiff has any proof to make, either as to the fact necessary to make out his case, or as to the amount of damages which he ought to

recover, he has the right to open and close. This was an action against an accommodation indorser of a bill of exchange containing a stipulation for the payment of attorneys' fees and the costs and charges for the collection of the bill. The defendant admitted the indorsement of the bill, but set up a defense based on misappropriation of the proceeds, and claimed the right to open and close. No general denial was in, and there was nothing in the special paragraphs of the answer as to attorneys' fees, but the court held that, under the Indiana statute (2 Gavin & H. 100, § 74), providing that allegations of value or amount of damages shall not be considered as true by failure to controvert them, the plaintiff had the burden of proving the amount of the attorneys' fees, and so was entitled to open and close.

The court stated, further, that, if the opinion differed from the opinion on the same question in *Judah v. Vincennes University*, 23 Ind. 272, that opinion must be, to that extent, regarded as modified.

The case seems to differ in its reasoning with *Louisville & N. R. Co. v. Brown*, 13 Bush, 475, *infra*, V. e, 2, (c), as to the effect upon the right to open and close, of the requirement of a statute which provides that the plaintiff shall be under the necessity of proving value or damages whether denied or not.

In *Baltimore & O. B. Co. v. McWhinney*, 36 Ind. 436, it was held, following *Fetters v. Muncie Nat. Bank*, 34 Ind. 251, 7 Am. Rep. 225, that it might now be regarded as settled that, where the plaintiff, under the issues, has anything to prove in the first instance, in order to entitle him to recover, or where he is required to prove his damages in cases where the damages cannot be ascertained by mere computation, he is entitled to open and close.

In an action for libel charging the plaintiff with bribery of voters at an election, where the answer was justification only, the defendant has the burden of proof, and is entitled to open and close. *Helman v. Shanklin*, 60 Ind. 424. This decision, like all other Indiana authorities which hold that, even in an action where the plaintiff's damages are unliquidated, if the defendant does not deny anything in the plaintiff's complaint, but sets up an answer purely affirmative in its nature, he has the right to begin and close, would seem to rest and depend upon the provisions of the statutes of Indiana, as they would seem to be decidedly in opposition to the common-law rule as laid down in *Mercer v. Whall*, 5 Q. B. 447, 14 L. J. Q. B. N. S. 267, 9 Jur. 576, *infra*, III. b, and held in most of the cases following that decision, in the absence of particular statutes.

being shown, the law would presume negligence; but it would not have presumed a value, as we understand it. The burden is not shifted until the admissions show a prima facie right to recover, to rebut which the defendant undertakes. So long as any portion of the burden of making out his case by proof rests on the plaintiff, he is entitled to open and conclude, unless the defendant introduces no evidence." In the *Morgan Case*, 110 Ga. 171, 35 S. E. 347, where the suit was instituted to recover damages from the company for the killing of a registered Guernsey cow by the running and operation of its train, it was ruled that, in order to entitle a defendant to open and conclude, he must in his answer admit enough to make out a prima facie case for the plaintiff. So it must be ruled in this case that the court did not err in refusing

to allow the defendant to open and conclude the argument on the plea which was sought to be filed for that purpose, but that, in order for the defendant to have obtained the desired privilege, the plea should have gone further, and admitted such facts as would have entitled the plaintiff to a prima facie right to recover the amount of damages stated in her declaration; otherwise, the burden of proof to establish the amount of her recovery would have still remained on her. The admission only of her right to recover some amount still left on her the burden to establish by evidence the amount of damages which she sustained. Without it she would not be entitled prima facie to a verdict.

3. Error is also assigned because, after instructing the jury that no person should recover damages from a railroad company

In *Reynolds v. Baldwin*, 93 Ind. 57, which was an action on a note containing a provision for attorneys' fees, the question decided was the sufficiency of the defendant's evidence to support his answer arising upon a demurrer by the plaintiff to such evidence. In deciding such demurrer, the court said: "And in many cases involving the question of the right to open and close it has been held by this court that, in such an action as this, the plaintiff would have the burden of proving the allegation of the complaint in relation to the amount of a reasonable attorney's fee, and would, therefore, be entitled to the open and close."

In the foregoing it would appear that the rule in Indiana is governed by the provisions of the Code giving the right to open and close to the party having the "burden of the issues." It would seem, however, that the rule is as stated in *Baltimore & O. R. Co. v. McWhinney*, 36 Ind. 430, *supra*.

In Indian territory the plaintiff must first briefly state his claim and the evidence by which he expects to sustain it. The party on whom rests the burden of proof in the whole action must first produce his evidence, and the party having the burden of proof shall have the opening and conclusion. Stat. 1899, § 3336 (*Mansfield's Digest*, 5131).

In Iowa the party on whom rests the burden of proof first states his claim and the evidence by which he expects to sustain it. The party on whom rests the burden of proof in the whole action first produces his evidence. Anno. Code 1897, § 3700.

In the argument the party then having the burden of the issue shall have the opening and closing. Id. § 3701 (Code 1873, § 2780; Revision, § 8048).

A suggestion arises as to what is meant by using the term, in the first place, "the burden of proof;" in the second, "the burden of proof in the whole action;" and in the third "the burden of the issue," in these provisions. It will be noticed that a distinction in form of expression arises, also, in the provisions in other states. The rule of construction is well known to be that, where an expression is made use of in a statute in one place, and is either omitted or a different expression inserted in another, such omission or insertion, if it can effect a change of meaning in the section or sentence, will do so.

An examination of the several cases construing the provisions of the Code or statutes of the several states where these differences occur has not shown that the courts have treated them as material.

In *Milwaukee Harvesting Co. v. Crabtree*, 101 61 L. R. A.

Iowa, 526, 70 N. W. 704, it was said to be the better practice to claim the right to open and close before the introduction of evidence.

In *Schoonover v. Osborne* (Iowa) 90 N. W. 844, it was said that the order of the argument at the time of the decision in the last-mentioned case depended on the issues made by the pleadings, and not the issues which, after the introduction of the evidence, are to be submitted to the jury; and that the insertion of the word "then" after "party," in the last sentence of the present § 3701 means, no doubt, that the right to open is to be settled after the introduction of the evidence, and not, as formerly, before the trial begins. So that the effect of this provision of the Iowa Code is absolutely to change and avoid the rule laid down in *infra*, IV. a, 1.

In Kansas the party on whom rests the burden of the issues may first briefly state his case, and the evidence by which he expects to maintain it, and also first produce his evidence. "After the instructions have been given to the jury, the cause may be argued. [Civil Code, § 275, as amended by Laws 1881, chap. 120, § 8, May, 10]." Gen. Stat. 1901, § 4722.

This is all there is said in regard to the order of argument.

The supreme court, in an action for libel, where the defendant admitted the writing and publishing of the letter in his answer, and justified the same upon the ground that the charges therein stated were true, decided that the burden of the issue was then upon the defendant, and, under the statute, he was entitled first to introduce his evidence, and to have the opening and closing. *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314.

In *Perkins v. Ermel*, 2 Kan. 325, it is decided that, under the provision of the Kansas Code, § 277, that "the party who would be defeated if no evidence were given on either side must first produce his evidence," if the answer of the defendant contains a general denial, though coupled with an affirmative defense, the plaintiff has the right to open the case. But, as this decision was evidently made under a different provision of the Code, which must have given way to the present provision, it is of no present effect.

In an action brought to foreclose an equitable mortgage on real estate, consisting of deeds executed by the defendants to the plaintiffs, and a defeasance executed by the plaintiffs to the defendants, the exact nature of the defendants' answer or plea does not appear from the report of the case, but upon the question under consideration the court of appeals said: "The next error alleged is in refusing the defendants

for injuries to himself or property where the same is done by his consent, or because of his negligence; and that if the deceased and the agents of the company were both negligent the plaintiff might recover damages, but they might be diminished by the jury in proportion to the amount of default attributable to him,—the court charged as follows: "If the plaintiff himself was guilty of negligence, and the railroad company was guilty of negligence, then you may take into consideration the amount of negligence on each side. If the deceased was guilty of negligence, you may then diminish the recovery which the widow would be entitled to in proportion to the default of the defendant to that of the deceased." Without further explanation, this charge was error. Under it, if the jury believed that both the company and the deceased were equally neg-

ligent, then they could still find for the plaintiff. As a matter of law, the plaintiff cannot recover for injuries inflicted by the negligence of an agent of a railroad company in the operation of its trains, if both the agent and the person injured were equally negligent at the time the injury was sustained. Section 2322 of the Civil Code declares that no person shall recover damages from a railroad company for injuries to himself where the same is caused by his own negligence; but, if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him. This section of the Code has been repeatedly construed by this court. See *Southern R. Co. v. Watson*, 104 Ga. 243, 30 S. E. 818. In the case of *Central R. &*

the right to open and close the argument. The court held that the burden of the only material issues in the case was on the defendants, and they should have been allowed to open and close the argument." *Degan v. Tufts*, 8 Kan. App. 338, 56 Pac. 1126.

In Kentucky the plaintiff must first briefly state his claim and the evidence by which he expects to sustain it, and the party on whom rests the burden of proof in the whole action must first produce his evidence. In the argument, the party having the burden of proof shall have the conclusion, and the adverse party the opening. Code 1899, § 317 (347).

"The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." *Id.* § 526 (587).

The remarks in regard to variance of terms applied to the provisions in Iowa are applicable here.

In an action upon a fire-insurance policy, where the answer admitted the insurance, the destruction by fire of the goods and produce insured in the building, and the amount of loss sustained by the plaintiff, but pleaded that the falling of the building caused the fire, and not the fire the fall of the building, it was held, under these provisions of the Civil Code of Kentucky, that, the burden being on the defendant, he was entitled to conclude the argument, as there was an affirmative allegation made by the defendant susceptible of proof. *Royal Ins. Co. v. Schwing*, 87 Ky. 410, 9 S. E. 242; *Fireman's Ins. Co. v. Schwing*, 10 Ky. L. Rep. 883, 11 S. W. 14.

And in an action upon a promissory note, where the defendant answered that the note was obtained from him by fraud of the payee, and a reply traversed these allegations, and further alleged that the plaintiffs took the note relying upon the written assurance of the defendant that the note was a bona fide debt against him, the court, in construing the foregoing § 526, providing that "the burden of proof in the whole action lies on the party who would be defeated if no evidence was given on either side," held that the burden was upon the defendant to establish the allegation of fraud, as on failure to do so the plaintiffs would be entitled to judgment to the full amount of the note. *Crabtree v. Atchison*, 93 Ky. 338, 20 S. W. 260.

And where, in an action to recover judgment for the alleged price of a lot of carpeting, it appeared under the pleadings that the defendant admitted receiving a considerable amount of goods shipped to her by the plaintiffs, but alleged failure to ship some portion as a coun-

terclaim, and the plaintiffs denied all the averments of the counterclaim which tended to show a right to recover damages, it was held that it was clear that plaintiffs would recover a judgment for some amount if no evidence had been introduced; that, therefore, by the express provisions of the Code of Practice, the burden of proof was upon the defendant, and she was entitled to introduce her testimony first, and to conclude the argument. *Denhard v. Hirst*, 23 Ky. L. Rep. 789, 64 S. W. 393.

And in *Vance v. Vance*, 2 Met. (Ky.) 581, it was held that the defendant had the right to the conclusion of the argument to the jury because the burden of proof was upon him, and, if he had failed to introduce evidence to repel the presumption against him, a judgment would have been rendered for the plaintiff.

In Minnesota, unless the court for special reasons otherwise directs, the plaintiff shall first state the issue and open the case and produce evidence on his part, and the defendant shall commence, and the plaintiff conclude, the argument to the jury. Stat. 1894, § 5371.

In an action to recover a balance due for goods sold and delivered, where the defendants admitted the purchase and sale, but alleged a special contract by which the plaintiffs were to accept in payment three promissory notes; and the reply denied that the plaintiffs agreed to receive the notes in payment without the indorsements of the defendants, which the latter refused, under Minn. Gen. Stat. chap. 66, § 227, plaintiffs had the affirmative, and the right to open and close. *Paine v. Smith*, 33 Minn. 495, 24 N. W. 305. (It would seem that this is the same statute.)

In an action upon a promissory note given for a harvesting machine sold by plaintiff to defendant, where the answer alleged a breach of warranty made on the sale of the machine, and the reply pleaded a written contract for the purchase of the machine, signed by defendant, and stating that the machine was subject to the warranty printed on the back of it, and alleged that no other warranty was made, it was held that the trial court properly exercised the discretion given it by statute in directing that the defendant have the opening and the closing. *Aultman v. Falkum*, 47 Minn. 414, 50 N. W. 471.

In Mississippi the only statutory provision is the following: In replevin of goods taken on distress for rent where the plea is a denial that the defendant caused the officer to take the property, "on the trial of this plea the burden of proof shall be on the plaintiff." Anno. Code 1892, § 2523.

Bkg. Co. v. Newman, 94 Ga. 560, 21 S. E. 219, it was ruled in reference to this subject that, "where the injury complained of was the result of mutual negligence by the plaintiff's servant and the defendant, there can be no recovery unless the servant was less in fault than the defendant." In the case of *Macon & W. R. Co. v. Winn*, 19 Ga. 445, Judge Lumpkin, in discussing the principle now under consideration, said: "And the law, in conformity with common sense, declares that, if both parties are equally in the wrong, neither can or ought to maintain an action against the other." In the case of *Macon & W. R. Co. v. Davis*, 27 Ga. 119, McDonald, J., in delivering the opinion of the court, used this language: "It might so happen, in a case of mutual negligence, that the jury could not determine the preponderance of the blame; and some author-

ities say that in such case, there being no mode of apportioning damages at law, there can be no recovery." In a very recent case (*Willingham v. Macon & B. R. Co.* 113 Ga. 374, 38 S. E. 843) this court approved the following charge on that subject: "If the defendant [the railroad company] was less negligent than plaintiff, plaintiff could not recover." It would seem, under these authorities, that the charge that the jury might take into consideration the amount of negligence on each side, and if the deceased was guilty of negligence they might diminish the recovery to which the widow would be entitled in proportion to the fault of the defendant to that of the deceased, was error, for the reason that, if they were both equally negligent, the widow of deceased might, nevertheless, under this charge, have recovered; the duty devolving

"And on the trial of an issue on an avowry, the burden of proof shall be on the avowant, the landlord, and he shall have the right to open and conclude the argument." Id. § 2526.

In Montana the party on whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it, and must first produce his evidence, and, when the evidence is concluded, the plaintiff must commence, and may conclude the argument. 3 Anno. Code 1895, § 1080.

In New Mexico the party on whom rests the burden of proof may state his claim and the evidence by which he expects to sustain it, and shall then produce his evidence. In the argument the party having the burden of the issue shall have the opening and closing. Comp. Laws 1897, § 2990.

The variance in terms in the provisions in regard to proof and those in regard to the argument are also noticed here.

In Nebraska the plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it. The party who would be defeated if no evidence were given on either side must first produce his evidence; and in the argument shall have the opening and conclusion. Comp. Stat. 1901, 5555, § 253.

In *Vifquain v. Finch*, 15 Neb. 505, 19 N. W. 706, the court held that the meaning of the section was, in other words, that the party holding the affirmative of the issue is entitled to open and close. That if, however, anything remains to be proved affirmatively by the plaintiff, he is entitled to open and close. This case was an action for libel. The defendants below admitted the publication of the alleged libel, and claimed that the words so published were true, but in the 4th paragraph of the answer was a plea of general rumor as to the matter published, and that the publication was without malice; and it was held that the two paragraphs of the answer must be construed together in this regard, and the question of malice was put in issue by the pleadings, and entitled the plaintiff below to open and close.

In an action upon a promissory note, where the defense is usury, and an examination of the answer shows that the defendant admitted the making and delivery of the note and all the facts stated in the petition, so that no proof would be required on the face of the pleadings, if the cause was submitted in that form, to entitle the plaintiff to recover, the defendant is entitled to open and close. *Sutter v. Park Nat. Bank*, 35 Neb. 372, 53 N. W. 205.

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In an action of replevin against a sheriff, in which it was admitted that but for the affirmative matter set forth in the answer the plaintiffs would have been at the commencement of the suit, and at all times, entitled to the immediate possession of the goods or property, and also entitled to judgment against the defendant for the costs of the suit and for damages in the sum of one cent for the wrongful detention of the goods, plaintiffs were, nevertheless, entitled to open and close, where the petition asserted damages to the amount of \$300, and the plaintiffs might have introduced proof of substantial damages, since, to make their case as pleaded, there was something for them to prove. *Summers v. Simms*, 58 Neb. 579, 79 N. W. 155.

In an action by a railroad company to enjoin a defendant from destroying and leaving open a gate of a farm crossing over the company's tracks, where the defendant had interposed an answer to the effect that the fence was inadequate, the gates unfit, too heavy, defectively constructed, and that he had been compelled to repair, and claimed the right to open and close to the jury, and the plaintiff then offered, if its right to relief sought was admitted without evidence, to allow this, and the defendant refused to so admit, and his request was then refused,—it was held that this was in accordance with the statute, which provides that the party against whom judgment will be entered, if no evidence is introduced, shall have the privilege of opening and closing. *Axthelm v. Chicago, R. I. & P. R. Co.* (Neb.) 89 N. W. 313.

Where an examination of the pleadings discloses that, if there had been no evidence introduced, the plaintiff would have been entitled to a judgment, the defendant is entitled to open and close under § 283 of the Code, which provides that the party who would be defeated, if no evidence were given on either side, must first produce his evidence and shall have the opening and conclusion. *Brumback v. American Bank*, 53 Neb. 714, 74 N. W. 264.

In Ohio "the plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it. The defendant must then briefly state his defense, and may briefly state the evidence he expects to offer in support of it. The party who would be defeated if no evidence were offered on either side must first produce his evidence, and the adverse party must then produce his evidence."

The parties may then submit or argue the case to the jury; the party required first

on the jury to make the recovery in proportion to the fault. In the *Watson Case*, 104 Ga. 243, 30 S. E. 818, which was reversed, the trial judge distinctly charged the jury that if the fault was half and half, one party as much at fault as the other, they would have the right to give the plaintiff damages. This was stating the conclusion that could be drawn from the charge in the present case in plain words. That charge was held to be error, and because the same rule of liability might be taken by the jury from the charge in this case a reversal of the judgment must follow.

4. The remaining ground of the motion which we have to consider is the assignment that the court erred in allowing plaintiff's counsel over defendant's objection to prove by the plaintiff herself what estate or property her husband had at the time he was killed, her testimony being that he had none. If there were no other reason which required a reversal of the judgment, the admission of this testimony, under the facts of this case, would certainly be sufficient to set it aside. If the plaintiff was entitled to recover at all, she was only so because of the negligence of defendant com-

pany. The rights of each party are well established by law. If the negligence of the company was the cause of the homicide of her husband, then, whether the deceased was rich or poor, whether the defendant was a corporation or an individual, she was, in the absence of fault or want of care on his part sufficient to bar a recovery, entitled to have a verdict for the full value of his life. We are unable to see how the fact that deceased was or was not possessed of any estate at the time he was killed could affect the measure of the recovery or the liability of the defendant. Evidently, the evidence was not sought to be introduced for the purpose of fixing a liability on the defendant company, and it ought not to have been received, because it might have affected the measure of the recovery. Certainly, it had nothing to do with the case, and inasmuch as it was admitted as a part of the evidence, over the objection of defendant's counsel, no other recourse is left to a reviewing court than to set aside the verdict and grant a new trial.

Judgment reversed.

All the Justices concur.

to produce his evidence shall have the opening and closing argument, and if several defendants, having separate defenses, appear by different counsel, the court shall arrange their relative order." 2 Bates's Anno. Stat. § 5190.

In *Dille v. Lovell*, 37 Ohio St. 415, which was an action for assault and battery in which the answer alleged justification, it was said that, the action being one for unliquidated damages, both upon reason and the weight of authority plaintiff should have the right to begin and close; citing *Mercer v. Whall*, 5 Q. B. 447, 14 L. J. Q. B. N. S. 267, 9 Jur. 576, *infra*, III. b. But it was held that, as, under the Code, providing that the party who would be defeated if no evidence were given on either side, must first produce his evidence, the judge was given a discretion to change the order of proof for special reasons, the case would not be reversed because the defendants were permitted to open and close, where there was nothing to show that the plaintiff had been prejudiced thereby, or that special reasons justifying the judge in exercising his discretion did not exist.

In Oklahoma "the party on whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it. The adverse party may then briefly state his defense, and the evidence he expects to offer in support of it. The party on whom rests the burden of the issues must first produce his evidence. After he has closed his evidence the adverse party may interpose and file a demurrer thereto, and, if that is overruled, the adverse party will then produce his evidence. . . . After the instructions have been given to the jury the cause may be argued." Oklahoma Stat. 4166, § 287.

Nothing further is said about the order of argument.

In Texas the plaintiff shall first read his petition to the jury. The party, plaintiff or defendant, upon whom rests the burden of proof on the whole case under the pleadings shall first be permitted to state to the jury briefly the nature of his claim or defense and facts relied on in support thereof; and shall then introduce his evidence. Rev. Stat. 1895, art. 1297.

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The party having, under the pleadings, the burden of proof on the whole case shall be entitled to open and conclude the argument. *Id.* art. 1299.

In *Jones v. Smith*, 21 Tex. Civ. App. 440, 52 S. W. 561, it was decided that a defendant was not entitled to open and conclude the argument where the admission required by statute in order to secure that right was first made by him, but was withdrawn and not again renewed.

For rule of court in Texas, see *supra*, III. a, 1.

In Washington the plaintiff must first briefly state his cause of action and the evidence by which he expects to sustain it. "The plaintiff, or the party upon whom rests the burden of proof in the whole action must first produce his evidence." The plaintiff or party having the burden of proof may address the court and jury upon the law and facts of the case, after which the adverse party may address the court and jury in like manner, and be followed by the party, or counsel of the party, first addressing the court. Ballinger's Anno. Codes & Statutes, 1897, § 4993.

In Wyoming the party on whom rests the burden of the issues must first briefly state his case and the evidence by which he expects to sustain it, and must first produce his evidence. Before the argument of the case is begun the court shall give such instructions upon the law to the jury as may be necessary, etc. Rev. Stat. 1899, § 3644.

This is all that is said about the argument of the case, nothing being said in the statute as to which shall begin and conclude.

b. In England.

In England, as well as in the United States, there has been among the courts and judges a great divergence of opinion as to the location of the burden of proof and the consequent right to begin and reply, especially in actions sounding in wrong; and in other actions in which the damages are unliquidated; and also as to whether in the former class of actions a distinct rule is to be applied to actions for personal injuries, libel, and slander. This

latter diversity of opinion is owing chiefly to the construction ordinarily put upon the rule stated in *Carter v. Jones*, 6 Car. & P. 64, 1 Moody & R. 281, *infra*, to have been adopted by the fifteen judges, or rather as to what that rule was; the difficulty growing out of the fact that the statements of the rule in the two reports of the case in 6 Car. & P. 64, and 1 Moody & R. 281, are not identical.

To fully understand the reason for the adoption of the rule, it will be necessary briefly to review the few cases on the subject which preceded its adoption.

Hodges v. Holder, 3 Campb. 366, was an action for breaking, etc., the plaintiff's close, in which the defendant pleaded not guilty as to the force and arms, and as to the residue a right of way. Bayley, J., held that the plea of not guilty as to force and arms was not a general issue, and that, as there was no necessity of any proof by the plaintiff, the defendant should begin.

This was followed by *Jackson v. Hesketh*, 2 Starkie, 518, almost an identical case, and the same judge decided it in the same way after having consulted with Wood, B.

Bedell v. Russell, Ryan & M. 293, was an action for assault and battery by the plaintiff, a mariner, against the defendant, the commander of the vessel, the defense being that the plaintiff, with others, was engaged in mutiny, and that the alleged assaults were in suppressing it. The defendant claimed the right, citing the last two cases, and Best, Ch. J., in deciding that the defendant had the right to begin, said: "But for the authorities cited, I should certainly have thought that the onus of proving the damages sustained gave the plaintiff a right to begin; but, as it is of the uttermost consequence that the practice should be uniform I shall consider myself bound by those cases, until the matter should be settled in full court."

Next came the case which gave rise to the adoption of the rule before mentioned. It was an action for libel in charging the plaintiff with unskillfulness as a surgeon in performing a certain operation. The defendant in his several pleas justified the several libels alleged. To the claim that the plaintiff had the right to begin because it was incumbent upon him to give evidence of his skill, and in the matter of damages to show the extent of the injury he had received, the court replied that, as to the first, the charge that the plaintiff had occupied too long a time in the operation specified in the libel was an affirmative; and, as to the second, that until the issue was tried the question of damages did not arise, and, after conferring with Bayley, Littledale, and Park, J.J., gave the defendant the right to begin, citing the case of *Bedell v. Russell, Ryan & M.* 293, *supra*. *Cooper v. Wakley*, 3 Car. & P. 474, *Moody & M.* 248.

This was followed by *Cotton v. James*, 3 Car. & P. 505, *Moody & M.* 273, which was an action of trespass for breaking and entering the plaintiff's house and taking his goods, and the plea was a justification under a warrant of commissions of bankruptcy, and averred that the plaintiff had become a bankrupt, and there was a replication denying that the plaintiff became a bankrupt. The defendant claimed the right to begin, and cited *Cooper v. Wakley*, 3 Car. & P. 474, *Moody & M.* 248, *supra*, and the court held that on those pleadings the defendant was entitled to begin. (Both these cases were decided by the same judge [Lord Tenterden].)

Carter v. Jones, 1 Moody & R. 281, 6 Car. & P. 64, is a case celebrated as being the first promulgation of the rule adopted by the fif-

teen judges. It was an action of libel, in which there was no plea of the general issue; but there were several pleas which justified the whole of the libel, and thereupon the defendant claimed a right to begin, the affirmative of the issues lying on him. In the report of the case in 1 Moody & R. 281, Tindal, Ch. J., is made to say: "A resolution has recently been come to by all the judges, that in cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant." And the report further states that the plaintiff thereupon opened his whole case and called his witnesses.

The report of the case in 6 Car. & P. 64, is simply the following: The fifteen judges have made a resolution that the plaintiff shall begin on the trial in all actions for personal injuries, libel, and slander, although the general issue may not be pleaded, and the affirmative be on the defendant.

As has already been said, much of the difference of opinion in courts and judges as to the application of this rule is due to the different statement of it in the two reports as seen above. It is admitted that the rule applies in all cases of slander and libel, but beyond that the English courts have differed as to whether it is to be asserted only in other actions for personal injuries, or may be so in all other actions where the plaintiff seeks to recover actual damages of an unascertained amount.

In a note to *Reeve v. Underhill*, 1 Moody & R. 440, it is stated that in *Absalom v. Beaumont* and others, tried at Westminster, February 8, 1837, which was an action on a policy of insurance against fire, there were four pleas, in all of which the affirmative was on the defendants. Lord Denman, Ch. J., after argument in which *Carter v. Jones*, 6 Car. & P. 64, 1 Moody & R. 281, and *Cooper v. Wakley*, 3 Car. & P. 474, *Moody & M.* 248, *supra*, were cited, ruled that, "in all cases where any affirmative issue, or, to speak more correctly, any affirmative proof, lay on the plaintiff to show what damages he was entitled to, the plaintiff had a right to begin."

In the case of *Wootton v. Barton*, 1 Moody & R. 518, which was an action on a covenant to repurchase stock at the end of the term, to which the defendant pleaded that the plaintiff had removed all the valuable part of the stock, and left nothing but worthless goods, on which issue was joined, Baron Parke said: "The only rule laid down by the judges was, that in actions for personal injuries where damages are sought, as in actions of assault, etc., and in libel and slander, the plaintiff should begin. The general rule is, that the party on whom the issue is shall begin. This was not altered by the resolution of the judges referred to in *Carter v. Jones*. I shall rule that the defendant is entitled to begin."

And in *Lewis v. Wells*, 7 Car. & P. 221, it was decided that if, in an action of covenant for nonrepair, etc., the defendant pleads affirmative pleas, which are denied by the replication, the defendant is entitled to begin; that the new rule of practice, made by the judges as to the right to begin, does not extend to actions of contract.

Later, in an action by the marshal of Queen's bench division, where it was alleged that the defendant promised that, if the plaintiff would allow a prisoner for debt to reside within the rules, he would indemnify him for any escape of the prisoner, and the plaintiff did so, and the prisoner escaped, and plaintiff was obliged to

pay the amount for which he was imprisoned and other expenses, and the plea was that the execution creditor conspired with another creditor of the debtor to have the prisoner arrested and detained out of the rules till the execution creditor first mentioned could commence an action against the marshal for the escape, which was done in pursuance of such conspiracy, and that the prisoner debtor could and would have returned into the rules before any action could have been commenced against the marshal if he had not been so arrested, and that the plaintiff well knew the premises and would not plead the same as a defense to the execution creditor's action against him, nor allow the defendant to defend that action; and there was a replication admitting the writ and warrant with *de injuria* as to the residue,—it was held that, on these pleadings, the defendant should begin, notwithstanding that the plaintiff would have to prove the amount of his damages if the defendant failed in proving his plea; and that the rule of the judges as to the right to begin did not extend to actions of covenant; and, *semble*, that it did not extend to any cases of contract. *Chapman v. Emden*, 9 Car. & P. 712.

On the other hand, in an action of covenant to repair a demised messuage the breach alleged was that the defendant failed to repair and suffered the premises to be in a ruinous state, etc. and left the same in that condition contrary to the covenant, and the plea was that the defendant did repair and did not leave the same in such ruinous, etc., state, or suffer and permit it to be in that state during the term, and put himself on the country. Lord Abinger said: "Looking at these things according to common sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered as the substance and effect of it. In many cases a party, by a little difference in the drawing of his pleadings, might make either affirmative or negative as he pleased. The plaintiff here says, 'You did not repair;' he might have said, 'You let the house become delapidated.' I shall endeavor by my own view to arrive at the substance of the issue, and I think in the present case that the plaintiff's counsel should begin." *Soward v. Leggatt*, 7 Car. & P. 613.

In an action for assault and false imprisonment there was no general issue of pleading. The plea was, that the plaintiff stole a quantity of feathers, and that the defendant therefore assaulted and beat him and gave him in charge to a metropolitan police officer according to the statute, and that the police officer overcame the plaintiff's resistance, and for that purpose did beat him and oblige him to go to a station house, and kept him there for a reasonable time, and then conveyed him before a magistrate to be dealt with according to law. It was held that, although there was no general issue pleaded, under the rule in *Carter v. Jones*, 6 Car. & P. 64, 1 *Moody & R.* 281, in cases of this kind, the plaintiff now begins, although by the plea the affirmative is on the defendant. *Atkinson v. Warne*, 6 Car. & P. 687, 1 *Crompt. M. & R.* 827, 5 *Tyrw.* 481, 3 *Dowl. P. C.* 483.

After this came *Aston v. Perkes*, 9 Car. & P. 231, where, in an action of trespass for taking the plaintiff's goods, the first plea was that they were taken by distress by the defendant as bailiff for the person to whom an annuity was due, and the second was that the residue of the goods was taken by the defendant as bailiff for another of whom the plaintiff held one undivided moiety of messuage, to which person there was due from the plaintiff 61 L. R. A.

rent, and the said residue was taken as a distress for those arrears; with a replication to the first plea that no part of the annuity was in arrear, and to the second that the plaintiff did not hold the premises as tenant of the person to whom the rent was claimed to be due,—it was held that the plaintiff was entitled to begin.

In *Mercer v. Whall*, 5 Q. B. 447, 14 L. J. Q. B. N. S. 267, 9 Jur. 578, which was an action by an articulated attorney's clerk against the attorney for discharging him previous to the expiration of the term for which he was articulated, and the defense in which was that the plaintiff was guilty of misconduct in the service, it was held by Denman, Ch. J., at the trial that the plaintiff had the right to begin, since it lay upon him to prove some damage. On a rule nisi for a new trial, the same judge rendered the final opinion of the court in banc, and, after advertising to the decision in *Cooper v. Wakley*, 3 Car. & P. 474, *Moody & M.* 248, *supra*, among other things, said: "Yet, an appeal may be made to all who were then practising at the bar, whether the decision was not universally felt to be wrong, both as against principle and as an innovation." His lordship then proceeded to say that, soon after he was raised to the bench, this ruling became the subject of discussion among the judges. And that many of them attended at his house to consider it; and the following short resolution was then drawn up and signed by those present, and afterwards adopted by Lord Lyndhurst, C. B., Bayley, B., Taunton, J., and himself: "In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on defendant." And that he was in possession of this document signed with the initials of the then present chief justice of the common pleas, Sir J. B. Bosanquet, and of the late Mr. Justice Park, Littledale, and Gaselee, JJ., and Bolland and Gurney, Barons. That among the judges who adhered to this retraction of the decision in *Cooper v. Wakley*, 3 Car. & P. 474, *Moody & M.* 248, *supra*, were the two whom he had named as assessors to Lord Tenterden, when that decision was made (Bayley and Littledale). And if ever a decision was overruled on great deliberation and by an undeviating practice afterwards, it was that in *Cooper v. Wakley*. That the judges had confined the rule of practice thus declared to the case then under consideration, wisely avoiding any matters not then before them. And, having corrected what they thought a grievous mistake, they excluded from their consideration every other point, and left the practice on actions of contract in its former state.

The court then proceeded to reason, further, that there could be no difference between actions on contract and cases of tort, as there was the same general reason applicable to either,—the propriety of first hearing from the plaintiff the nature of his complaint and his estimate of the damage sustained. He gave an illustration tending to show that a plea in an action of contract for breach of promise might be the same as a plea of justification in libel and slander for publishing or uttering the facts stated in the plea, and further stated: "The very case now before us is an example. Covenant by an attorney's clerk for improperly dismissing him. Plea: He was guilty of misconduct in the service. On what principle can it be right for the plaintiff to begin if the same plea were pleaded as a justification for libel or slander, and to follow the defendant when the very same facts are made the excuse for breach of covenant?" *Ibid.*

This case is given at considerable length be-

cause it is believed that it states the true rule and gives the best reasons for it, and that it has been practically followed since its rendition by most of the courts, both in England and the United States, where the common-law rule has not been changed by local rule or statute; and the rule as thus stated is reasoned for and carried out in *BRUNSWICK & W. R. Co. v. WIGGINS*.

It is also suggested that the rule laid down in *Mercer v. Whall*, and practically adopted, as stated, by most of the courts, is, in reality, to the effect that, where there is anything to be proved which is essential to a recovery, by the plaintiff, of his whole claim, he retains the right to open and close which was originally inherent in him; and that, whenever the plaintiff is entitled to a complete recovery without making any evidence of any kind or upon any subject whatever, the defendant is entitled to open and close.

It is hardly necessary to add that the latter situation can only obtain when the defendant admits the whole of the plaintiff's claim, even his damages. And no more forceful exhibition of this can be found than the reasoning on the subject, of the judge who delivered the opinion in *BRUNSWICK & W. R. Co. v. WIGGINS*.

IV. How and when admission made.

a. Necessity of incorporating in pleadings.

1. General rule.

When, where, and how the admission essential to shift the burden of proof from the plaintiff to the defendant, and thereby give to the latter the right to open and close, is to be made, has been the subject of much discussion in the various courts; that is to say, whether such admission must be found and determined by an inspection of the pleadings; or whether it may be in any other way made upon the record; or whether it may be made in any other manner, either before or at the trial, like any other admission or concession.

As has been seen, in several of the jurisdictions the matter has been settled by statute or Code provision, or rule of court. *Supra*, III.

It will be noticed that by some of these provisions the common-law rule has been practically confirmed and adopted; in others, modified; and in still others, entirely changed and a complete divorce effected of the "right to begin and reply" from the "burden of proof."

Aside from such provisions, the weight of authority would seem to be in favor of the doctrine that the burden of proof, and the consequent right to open and close, must be determined at the commencement of the trial, and from an inspection of the pleadings only; and that matter *aliunde* the pleadings will not be considered in arriving at such determination. And the following are authorities to that effect: *Dorough v. Johnson*, 108 Ga. 812, 34 S. E. 168; *Goodrich v. Friedersdorff*, 27 Ind. 308; *Boyd v. Smith*, 15 Ind. App. 324, 43 N. E. 1056 (Implied); *Woodruff v. Hensley*, 28 Ind. App. 502, 60 N. E. 312; *Kentucky Wagon Mfg. Co. v. Louisville*, 97 Ky. 348, 31 S. W. 130; *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367; *Kobbe v. Price*, 14 Hun, 55; *Woodruff v. Hunter*, 65 App. Div. 404, 73 N. Y. Supp. 210; *Trenkmann v. Schneider*, 23 Misc. 336, 51 N. Y. Supp. 232; *Clarkson v. Meyer*, 39 N. Y. S. R. 188, 14 N. Y. Supp. 144 (but in *Katz v. Kuhn*, 9 Daly, 166, while admitting the general rule, it was held that, where it seemed to be admitted that the allegation of the plaintiff, although not admitted by the pleadings, was practically not contro-

verted at the trial, and he made no proof of it, such an admission has the same effect as though it had been incorporated in the answer, and that there was no good reason for a distinction between the effect of an admission in the pleading and the effect of an admission made at the trial. This case is at variance with all the New York cases on this subject, with the possible exception of *Plenty v. Rendle*, 43 Hun, 568, *infra*, V. a. 2; *Richards v. Nixon*, 20 I'a. 19; *Brown v. Kirkpatrick*, 5 S. C. N. S. 207; *Burckhalter v. Coward*, 16 S. C. 435, 42 Am. Rep. 641; *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845 (these cases in South Carolina affirm what is believed to be the common law, but they are made under the rule in South Carolina, which see *supra*, III. a. 1); *Dahlman v. Hammel*, 45 Wis. 466; *Brooks v. Clarke*, 4 Fost. & F. 484; *Doe ex dem. Pile v. Wilson*, 6 Car. & P. 301, 1 Moody & R. 323; *Pontifex v. Jolly*, 9 Car. & P. 202. See cases under rule, etc., in *supra*, III. b. See also *Johnson v. Wideman*, Dud. L. 325; *Gray v. Cottrell*, 1 Hill L. 38; and *Anonymous*, 1 Hill L. 251, *supra*, III. a. 1.

Probably in no jurisdiction have the courts been more uniform in the strict enforcement of the doctrine here considered than in New York, with the exception of the two cases mentioned, *viz.*: *Katz v. Kuhn*, 9 Daly, 166, *supra*; *Plenty v. Rendle*, 43 Hun, 568, *supra*, and *infra*, V. a. 2. In the latter case, however, the court seems virtually to concede the existence of the rule, but gives as a reason for making an exception to it that the defendant had reason to suppose that the plaintiff intended to rely for his right to recover upon proof of the contract between the parties, out of which the question arose; and that the first notice that the defendant had that he intended to rely solely upon the promissory note was given when the plaintiff opened the case, stating that to be his sole cause of action. For a complete understanding of what is said here, see the case, *infra*, V. a. 2.

2. When not made in good faith.

Cases seem to have arisen in which affirmative defenses have been inserted in an answer or plea when the pleader must have known, or at least had good reason to know, that there was not evidence to sustain them; but they were so inserted for the single purpose of securing the right to open and close. It is believed that such attempts have invariably been revealed, and, with the exception of the first of the following cases, frustrated, by the courts by denying the apparent right to which the party thus pleading would have been entitled had the affirmative averment been made in good faith:

Where, in an action for assault and battery, the defendant pleaded *son assault demeans*, but did not produce any evidence to prove an assault upon him by the plaintiff, he was nevertheless entitled to open and conclude. *Goldsberry v. Stuteville*, 3 Bibb, 345. In this case the court said: "It is true, as was alleged in the argument, that the defendant may, and often will, file an affirmative plea for the mere purpose of giving to himself the right to open and conclude, knowing at the same time that the plea cannot be supported by evidence. This circumstance, however, does not appear to furnish a solid objection to the rule. The right to open and conclude must belong either to the plaintiff or defendant; and, the law knowing no partiality for either of them, in legal estimation it must be a matter of indifference to which party the attitude of the cause gives the right. If, therefore, the defendant can, by pursuing a legal course, place the cause in

such an attitude as to acquire the right, he ought not to be deprived of its exercise."

The conclusion is a ridiculous one, and, as will be seen, it was afterwards overruled by the same court. See Kentucky cases immediately following.

Where the issue formed was made upon the plea of payment, if the defendant gives any evidence conducing to sustain the plea or issue on his part, the court should allow his counsel to open and conclude the argument. *Davless v. Arbuckle*, 1 Dana, 525. In this case the court said that, when the defendant gives no evidence in support of his affirmative plea there is no reason for allowing him to open and conclude the argument, as the false pleading of the party ought never to be the means of securing to him an advantage, and referring to *Goldsberry v. Stuteville*, 3 Bibb, 345, said that it was not inclined to go to the extreme decided in that case.

While in an action *indebitatus assumpsit* the general plea of *non assumpsit* is, in modern practice, so comprehensive that the fact of payment may be proved, it does not follow that the plea of payment amounts to the general issue, or that it is inadmissible; but it is not by the mere filing of such a plea, but by the introduction also of such proof as shows it not to be a mere sham plea, that the defendant acquires the right of opening and closing. *Wheatly v. Phelps*, 3 Dana, 303.

In an action for a battery upon a slave of the plaintiff where the plea was *son assault*, and the defendant made no proof that there had been anything like the shadow of justification, he was held not to be entitled to open and conclude the argument before the jury, the court having, in the exercise of a sound judicial discretion, withheld from him an advantage sought improperly by perverting the technical right of defense by a legal plea. *Van Zant v. Jones*, 3 Dana, 464.

This case would seem expressly to overrule *Goldsberry v. Stuteville*, 3 Bibb, 345, *supra*.

A defendant, by failing or refusing to introduce any evidence, in the proper order, in support of his affirmative, may waive his precedence in the argument; or, if it clearly appears that he pleaded affirmatively, for the sole purpose of gaining an unjust advantage in the argument, the priority to which he might otherwise be entitled may be denied. *Sodousky v. McGee*, 4 J. J. Marsh. 267. The court stated that in this case there was not even the semblance of justification. That the affirmative plea was filed for an improper purpose. That the circuit judge, therefore, had a right to rebuke the party so pleading, and withhold from him the undue advantage which he was seeking.

In an action of *assumpsit* for money loaned, where pleas of *non assumpsit* and payment were filed, and also a plea of the statute of limitations, a demurrer to which latter was sustained; and a large mass of testimony was introduced by plaintiff to support her cause of action, controverted by the general issue; and thereafter the plea of general issue was withdrawn by the defendant, manifestly for the purpose of obtaining the supposed advantages of opening and closing the argument,—the action of the trial court in refusing such opening and closing to the defendant will not be condemned as an abuse of discretion. *Perkins v. Guy*, 55 Miss. 153, 30 Am. Rep. 510.

In an action for assault and battery, where the defendant pleaded the general issue, and in a second plea *son assault demeane*, and the usual replication was interposed by the plaintiff, and the defendant's counsel was awarded

the right to open the case, and, after he had called and examined several witnesses, it appeared from their testimony that defendant himself first commenced the assault, the plaintiff's counsel has the right to conclude before the jury. *Coleman v. Hagerman*, 5 N. Y. City Hall Rec. 63. In this case the court said it would be an utter perversion of justice to suffer the defendant to deprive the plaintiff of that which is considered an important advantage on the trial, by interposing a plea, the allegation of which is expressly negatived by all the testimony.

A denial contained in an answer that the agreement set forth in the complaint was a truthful and accurate copy of the original contract raises no issue; but it does not lie with the defendants to claim that this was so, where the court took the defendants' action in interposing it to have been in good faith, accepted their claim that the matter set forth constituted a good defense, and proceeded with the trial accordingly; and a denial of their right to open the case to the jury is correct. *Boehm v. Lies*, 28 Jones & S. 436, 18 N. Y. Supp. 577.

In an action of trespass *quare clausum fregit* the defendant had pleaded not guilty with leave to give title in evidence. Shortly before the trial the defendant asked leave to alter the plea, by withdrawing the plea of not guilty, with leave, etc., and substituting instead thereof the plea of *liberum tenementum*; which the court refused. It was held that the rejection of the application was proper. That the alteration did not give to the defendant any substantial meritorious advantage; that he could have given the same evidence on the first plea, as the one desired to be substituted; it would give him the benefit of a reply,—the last word,—and nothing more; and that this has constantly been refused. *Weidman v. Kohr*, 18 Serg. & R. 17.

The right of the defendant to change his plea is not limited by anything but the discretion of the court, and by that he is held merely to good faith.

In *Hartman v. Keystone Ins. Co.* 21 Pa. 466, it was alleged, and the court said with some reason, that an amendment was made to give the defendant the right of addressing the jury in conclusion. The court held that if it was, and the trial court discovered it in time, the purpose should have been defeated and the conclusion given to the plaintiff.

b. Admission on record.

There seems to be a diversity of opinion among the courts as to whether there can, strictly speaking, be an admission on the record which is not included in the pleadings. Some, however, seem to think that such a thing can obtain; and such cases as look that way are here given. The Texas cases, as they refer to matters of requirement and effect, are given here instead of *supra*, III. a, 1, although they are made under rule 31 there mentioned.

In an action against a railroad company for killing and injuring stock, the defendant is entitled to begin and conclude the argument to the jury where the record shows that the defendant in open court agreed to admit that the plaintiff's horse was of the value, and that the injury to the plaintiff's mule was the amount claimed by the plaintiff, and that the horse had been killed and the mule injured by the defendant's train, and, without objection, defendant proceeded to pass upon the jury; and also without objection from the plaintiff or his counsel, and under the direction of the court, defendant proceeded to state his cause to the

jury, and the plaintiff, by counsel, stated his cause to the jury, and thereupon defendant, without objection of plaintiff, and under the direction of the court, introduced its proof, as, the defendant having admitted the extent of the injury, had no proof been introduced, the verdict should have been for the plaintiff. After the defendant, under the direction of the court and by the acquiescence of the plaintiff, had taken the initiative in passing upon the jury, stating the case and introducing the proof, there should not have been a "change of front" at the critical moment when defendant expected the only reward for its admission, to wit, the right to open and conclude the argument. *St. Louis & S. F. R. Co. v. Thomason*, 59 Ark. 140, 26 S. W. 598.

Where an execution has been levied on land, and a claimant thereto under the Georgia practice,—in which an issue is raised by his sworn claim to the property,—admits the possession of the property to have been in the defendant in the execution, he cannot disprove that admission, because it is a solemn admission *in judicio*, and secures the right to conclude the argument,—especially an important advantage in a case involving issues of fraud or no fraud. *Smith v. Wellborn*, 75 Ga. 799.

In order to transfer the right to open and conclude from the plaintiff to the defendant under rule 31, the admission provided for in the rule must be entered of record, and, if the defendant fails to do so, the burden of proving the facts therein contained and the right to open and conclude remain with the plaintiff. *Ayers v. Lancaster*, 64 Tex. 305.

In an action in which an attachment had been issued, and the defendant had replevied the goods attached, and had filed in the cause, before the trial commenced, an admission in writing that plaintiff had a good cause of action as set forth in his petition, except so far as it might be defeated, in whole or in part, by the facts stated in the defendant's answer, etc., which admission was entered of record, it was held that this entitled the defendant to open and conclude the evidence, and that it was not necessary for the sureties on the defendant's replevy bond to join in such admission. *Munn v. Martin* (Tex. App.) 15 S. W. 195.

These two cases are, of course, instances of admission on the record under court rule 31 of Texas, *supra*, III. a. 1.

See Texas cases in *supra*, III. a. 1.

c. Withdrawal or waiver of general issue.

And whether such an admission on the record can be effected in cases where the defendant has included the general issue in his plea or answer, by permitting him to withdraw the general issue and thereby secure the right to open and close, has also been a mooted question; and the cases on both sides of it are here given. Some of the decisions seem to indicate that the manner in which it is done affects the right; and that, while an oral admission of the fact alleged by the plaintiff and denied by the general issue will not avail to secure the right,—the eliminating of the general issue from the case by amendment or striking it out will accomplish it. *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367.

In *Jackson v. Winchester*, 4 Dall. 205, 1 L. ed. 802, the issues were joined on pleas of *non assumpsit* and payment. When the jury were about to be impaneled, the defendant's counsel moved to strike out the plea of *non assumpsit*, by which (leaving only the affirmative plea of payment) he would be entitled to the conclusion, in addressing the jury, to 61 L. R. A.

which the plaintiff's counsel objected. The court refused to allow the plea of *non assumpsit* to be struck off.

In an action of trespass *de bonis asportatis* the defendant pleaded the general issue, and filed a brief statement alleging that, as an officer, he attached the goods as the property of a stranger. It was held that the plaintiff was entitled to the opening and closing argument before the jury, notwithstanding the defendant admitted at the outset that the property was once in the plaintiff, and assumed the burden of proving a transfer to such stranger. In this case, the court said: "In all such cases, however, if the defendant pleads the general issue also, the right of reply has been accorded to the plaintiff, even if on trial the defendant waives any proof on the part of the plaintiff to maintain that issue." *Ayer v. Austin*, 6 Pick. 225.

This was previous to the adoption of the rule giving the right to open and close arbitrarily to the plaintiff. See *supra*, III. a. 1.

Where to a declaration in assumpsit the defendant pleaded, first, the general issue, and second, usury, it is proper for the court on the trial to permit the defendant, upon request, to withdraw the plea of the general issue, and to open and close the case to the jury. *Harvey v. Ellithorpe*, 26 Ill. 418.

In an action of assumpsit on a promissory note where the defendant pleaded the general issue and six special pleas, and, before the commencement of the trial, withdrew the plea of general issue and the last special plea, and thereafter, and before the trial began, claimed the right to open and close the case, and this right was accorded to him by the court, it was held that he could not, after verdict and judgment for the plaintiff, complain that the court instructed the jury that the burden was upon him. *Bemis v. Horner*, 165 Ill. 847, 46 N. E. 277.

In Illinois it has been held that, where the defendant pleads the general issue together with an affirmative plea, and, before the commencement of the trial, withdraws the plea of the general issue, thereby admitting a *prima facie* case in favor of the plaintiff, the burden of proof rests upon him, and he is entitled to open and close.

In *Goetz v. Sona*, 65 Ill. App. 78, it was held that the mere fact that the general issue was not withdrawn until the jury had been chosen would not prevent the party holding the affirmative from opening and closing; that it was within the discretion of the court to permit this whenever during the trial the defendant assumes the affirmative. To the same effect, see *Gardner v. Girtin*, 69 Ill. App. 422, Affirmed in 169 Ill. 40, 48 N. E. 307.

Under the Indiana statute providing that in an action before a justice of the peace the general issue is always presumed in favor of the defendant, if the defendant in such an action pleads only affirmative defenses he may, in writing put upon the record, waive the general denial put in by statute, and is then entitled to open and close the case. *Cross v. Pearson*, 17 Ind. 612; *Blackledge v. Pine*, 28 Ind. 466.

But in an action in the circuit court on the trial of an appeal from a justice's court, the general issue being in by law (in this case there was no waiver of such issue), the right devolves upon the plaintiff to open and close the case on the trial. *Howard v. Cobb*, 6 Ind. 5; *Howard v. Kising*, 15 Ind. 83.

To the same effect where the answer was payment. *Wright v. Abbott*, 85 Ind. 154.

It had been previously held in an action upon a promissory note commenced in a justice's court, in which the plaintiff had judg-

ment against the defendant, on appeal to the circuit court, that the defendant, having admitted the execution of the note, was entitled to open and conclude the cause. *Kimble v. Adair*, 2 Blackf. 320.

After the jury has been sworn it is not a matter of right for the defendant to withdraw the general issue and assume the burden of proof, with the open and close of the evidence and argument. It is within the sound legal discretion of the court to permit or refuse this, and any action by the court in such matter will not be error in an ordinary case. And this although, if the application had been made before the jury was sworn, it could have been demanded as a matter of right, and it would have been error for the court to refuse it. *Mason v. Seltz*, 36 Ind. 516.

In an action against stakeholders for money deposited with them upon the result of an election, where the first paragraph in the complaint was for money had and received, and the second set out facts of the wager between the plaintiff and the other party to it, the deposit of the money with the defendants, the notice not to pay over, and the demand; and the answer professed to traverse and deny every part of the complaint not therein confessed and avoided, and did not confess or avoid the allegation in the complaint of notice, it was error to permit the defendant to withdraw the first paragraph of the answer, which was a general denial, and thereupon to open and close, as, the notice being denied, it was incumbent upon the plaintiff to prove it, and the right to open and close was with him. *Burroughs v. Hunt*, 13 Ind. 178.

In an action against a life insurance company where the defendant pleaded *non assumpsit* and several special pleas, alleging fraud and misrepresentation, breach of warranty and concealment, he cannot, by withdrawing the plea of the general issue at that stage of the trial, entitle himself to the opening and conclusion. *Valley Mut. Life Asso. v. Teewait*, 79 Va. 421. See *McDougall v. Walling*, 19 Wash. 80, 52 Pac. 530, *infra*, V. b. 2.

d. Other admissions.

Both in England and the United States the courts seem to be divided on the proposition that the admission on the trial of the facts necessary for the plaintiff to establish in order to succeed will operate to shift the burden of proof, and give the defendant the right to open and close, the same as if such admission were contained in the pleadings, or otherwise made upon the record.

The following are cases relating to this particular subject:

In an action brought on an insurance policy issued by the defendant, in favor of the plaintiff, defendant on the trial admitted the *prima facie* case of plaintiff, and on such admission was given the opening. *Merchants' Life Asso. v. Treat*, 98 Ill. App. 59. No question of the correctness of this decision by the trial court seems to have been made by the plaintiff.

Upon the trial of a proceeding upon a petition for dower by a widow, in the lands of her deceased husband, it is not sufficient, to change the relation of the parties, that the defendant in the course of the trial offers in evidence a release, and assumes the burden of proving its validity. *Kendrick v. Ravens*, 47 Ga. 612.

Upon the trial of an action against a railroad company for killing a mule belonging to plaintiff, where the defendant, before the introduction of any evidence, admitted the killing of the mule at the time and place alleged in the declaration, and that the mule was of the

value alleged, and then assumed the burden of proof, to which no objection was made by the plaintiff, the latter will not, after the close of the evidence, be entitled to the opening and conclusion of the argument before the jury. *Willingham v. Macon & B. R. Co.* 118 Ga. 374, 38 S. E. 843.

Defendants, after a plea of not guilty in an action of ejectment, where the plaintiffs claimed under a title from the state, will not, by admitting on the trial that the land in question had been forfeited to the state for taxes, and that plaintiffs had purchased from the state, and announcing their intention and ability to show that they had redeemed the land within the time prescribed by law, be entitled to the right to open and conclude the argument. *Porter v. Still*, 63 Miss. 357.

When a defendant admits, either by his pleading, or admissions, made before the introduction of evidence by the plaintiff, that the material allegations of the complaint are true, thus obviating the necessity of making any proof to sustain the complaint, he takes upon himself the burden of the issue, and is entitled to open and close. *Aurora v. Cobb*, 21 Ind. 492; *McCloskey v. Davis*, 8 Ind. App. 190, 35 N. E. 187.

In an action of assumpsit for goods sold and delivered and plea of coverture, if the plaintiff elects to begin, he must go into his whole case; but, if the defendant admits the whole debt, she is entitled to begin. *Lacon v. Higgins*, 8 Starkie, 178. The question in this case arose at the beginning of the trial, and the court intimated that, as the plaintiff had to prove the amount of the damages, his counsel was, if he elected to do so, entitled to begin. The defendant then agreed to admit that the goods had been delivered to the amount claimed, and was then permitted to open the case on his part. So it would seem that the holding in this case was that an admission in open court gave the defendant the right to begin, though upon the pleadings she was not entitled to it.

In an action of ejectment where the lessor of the plaintiff claimed as the heir at law, and the defendant as the devisee, of the person last seised, at the outset of the cause a question arose as to who was entitled to the general reply; and the court decided that, if the plaintiff proved his pedigree, and stopped, and the defendant set up a new case, which the plaintiff answered by evidence, which ultimately went to the jury, the defendant should have the general reply. The plaintiff then stated his pedigree, which was admitted. *Goodtitle ex dem. Revett v. Braham*, 4 T. R. 497. While the court held in this case that the plaintiff might prove his pedigree and stop, and the defendant would then be entitled to the general reply, yet the right to reply by the defendant would seem to have depended on the general admission, that, but for the will, the plaintiff would be entitled to recover.

In *Morris v. Lotan*, 1 Moody & R. 233, after the court had decided that the plaintiff should begin unless the damages were admitted, the counsel for the defendant then admitted the damages, and began for the defendant. This would indicate that an admission at the trial outside of the pleadings would change the right to begin.

Doe ex dem. Smith v. Smart, 1 Moody & R. 476, was the trial of an action of ejectment at nisi prius. The defendant claimed the right to begin. He stated that he claimed the property in question under the will of a woman, and he admitted that the lessor of the plaintiff was the heir of the same woman, and that she died seised. This was resisted on the ground that, as to part of the property, the plaintiff claimed

as assignee of an outstanding term, and that he was prepared to prove the assignment which formed the plaintiff's title to that part of the property independent of the will. Gurney, B., after consulting with Patteson, J., held that the defendant was entitled to begin.

In trespass for taking goods the defendant, without pleading the general issue, pleaded that the goods were taken by him as a constable of a parish in which the house of the plaintiff was, as a distress for parochial rates assessed on the plaintiff in respect of that house as being within the parish, and the reply was that the house was not within the parish. The plaintiff claimed the right to begin because by a certain statute, if the defendant is a constable, it is imperative on the plaintiff to make a demand of a copy of the warrant, and he must prove such demand. Upon the defendant offering to admit the demand, the court allowed the defendant to begin. *Burrell v. Nicholson*, 6 Car. & P. 202, 1 Moody & R. 304. This case was decided just before the announcement of the rule of the fifteen judges in *Carter v. Jones*, 6 Car. & P. 64, 1 Moody & R. 281, *supra*, III. b.

In an action of covenant to pay a sum certain and the premiums on certain policies assigned as security, where the defendant pleaded that the deed containing the covenant was a mortgage, and that part of the consideration was money lost by the defendant to the plaintiff on horse racing, and the defendant offered to admit the amount of the plaintiff's claim, he was entitled to begin. *Hill v. Fox*, 1 Fost. & F. 136.

In an action of ejectment by an heir at law against a devisee, the question being as to the sanity of the testator, the defendant admitted the heirship and began. *Martin v. Johnson*, 1 Fost. & F. 122.

See *Smart v. Rayner*, 6 Car. & P. 721, *infra*, V. b. 3.

In an action of ejectment, where the petition was in the statutory form, and the answer a general denial, the defendant, upon admitting at the commencement of the trial that the plaintiff held the record title to the premises, was not thereby entitled to open and close, notwithstanding the plaintiff's counsel had stated that he did not care to insist upon a judgment for damages for the unlawful holding of the premises, but would be satisfied with a judgment for possession. *Zweibel v. Myers* (Neb.) 95 N. W. 597.

e. Several defendants, and admission not made by all.

It sometimes happens, where there are two or more defendants, that some of them either expressly or impliedly admit the plaintiff's case, so that if they, alone, were defendants they would be entitled to open and close; but one or more codefendants deny some portion of the plaintiff's case, so as to entitle the latter, as to them, to open and close. The general rule is that in such case the plaintiff is entitled to open and close as against all the defendants.

In an action against two defendants where they appear and answer separately, one by a general denial and the other by a plea in confession and avoidance, the open and close belong to the party which must offer evidence in order to prevail, and the plaintiff has that right, as proof is necessary to be made on his part in reference to an issue joined upon his complaint, or in reference to the amount of his recovery. *Kirkpatrick v. Armstrong*, 79 Ind. 384.

Where there are two defendants, one of whom pleads the general denial, and the other only a confession and avoidance, the plaintiff has the open and close. *Clodfelter v. Hulett*, 92 Ind. 426.

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Where several persons were sued as partners, and some of them did not deny the allegations of the complaint, but one in his answer denied that he was a partner, it was held that the burden was upon the plaintiffs, and that they were entitled to the concluding argument. *Lieb v. Craddock*, 87 Ky. 525, 9 S. W. 838.

In *Simons v. Pearson*, 22 Ky. L. Rep. 1707, 61 S. W. 259, which was an action for libel for the publication of an article reflecting on the official conduct of the plaintiff, in which one defendant admitted the publication and averred its truth as justification, and the other denied having published the article, or being in any way connected with it, the only error complained of was in refusing to award the defendant, who admitted the publication as justified, the burden of proof and the closing argument to the jury. It was held that, under the peculiar circumstances of the two pleas, the regulation of the burden rested in the sound discretion of the court. Inasmuch as nearly all of the authorities hold that, where there is anything for the plaintiff to prove on the trial of an action, he retains the burden of proof, and therefore the right to open and close, there is some doubt whether the court had any more discretion than in a case where all the defendants denied some allegation of the declaration or complaint. Plaintiff was obliged in this case to prove the publication as to the one defendant, and without such proof the judgment must have gone against him, and under the test so frequently mentioned, that would cause the burden of proof to rest upon him and give him the right to begin.

In an action upon a promissory note against a number of defendants, where several filed separate answers denying various allegations of the complaint, and another defendant, by an amended answer, made the same denials, and then alleged a purely affirmative defense, and afterward offered to withdraw that part of his answer containing the denials, so that he might have the opening and conclusion before the jury, he is not entitled to such, as the separate answers of the other defendants, containing the denials, gave the plaintiff the right to open and conclude. *Boatmen's Sav. Inst. v. Forbes*, 52 Mo. 201.

Where, in an equity action brought against four defendants, there was no demurrer for misjoinder and the defendants elected to go to trial as joint debtors and jointly resist the plaintiff's recovery, and one of the defendants on the trial did not introduce any evidence, this would not entitle him to open and conclude; the other defendants having introduced evidence, plaintiff had that right. *King v. King*, 37 Ga. 205.

f. When defendant introduces no evidence.

In England and some of the states the rule provides that, where the defendant introduces no evidence, that fact will operate to give him the right to open and close. None of the cases give, in terms, a reason for this; but it would seem that it must be upon the principle that, by not offering evidence, the defendant virtually admits the plaintiff's case.

In an action of debt on a statute against bribery at elections, the defendant called no witnesses, but had put in a record of conviction of one of the plaintiff's witnesses for perjury and the counsel for the plaintiff claimed that that introduced new matter of fact into the cause, requiring an answer and observations of counsel; but the court held that the discussion of the competency of the witnesses introduced by the production of the record was merely collateral to the issue between the parties, which

terminated on the court's having overruled the objection, and that the plaintiff was not entitled to the reply. *Dover v. Maester*, 5 Esp. 92.

Defendant's counsel having opened the facts, to prove which no witness was called, plaintiff's counsel insisted on the right of reply. It was held that if the defendant's counsel refused to call a witness to establish the facts which he had undertaken to establish, the judge might, in his discretion, permit a reply, but, as to the strict right, the practice was clearly against it. *Crerar v. Sodo, Moody & M.* 85, 8 Car. & P. 10.

In an action for taking excessive distress, at the close of the plaintiff's case the defendant's counsel addressed the jury, but introduced no evidence. It was held that the plaintiff was not entitled to reply. *Harvey v. Mitchell*, 2 Moody & R. 368.

In *Moore v. Carey* (Ga.) 42 S. E. 258, the court said that it had been the practice for more than forty years, in Georgia, for the defendant to take the opening and conclusion of the argument when he introduced no evidence, and the legality of this practice had never before been brought in question. And that, this being so, without reference to what was the origin of the practice, or whether the practice was founded upon sound reasons or not, the court would not now disturb that which had been uniform practice for more than half a century, which had been expressly recognized by the general assembly more than fifty years ago, and which had been allowed to prevail, both by the bench and bar, during that period of time.

In *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778, which was an action against the defendant for the assaulting and insulting of plaintiff while a passenger, by the conductor of the defendant, defendant's counsel, before offering the conductor as a witness, asked the court to rule whether such witness would be permitted to testify to certain facts, as counsel did not wish to lose the conclusion in the argument by offering him as a witness unless the testimony would be permitted. The court refused to rule on the question till the witness was introduced and sworn, stating that, if the questions were not allowed, the defendant's counsel would be entitled to the conclusion. The questions were propounded to him when the court repelled the testimony sought to be elicited, as stated. The defendant then proposed to withdraw the witness and his testimony, and claimed the conclusion; but, upon motion of plaintiff, the court refused to allow this, for the reason that the witness had testified, in answer to the question of defendant's counsel, "if plaintiff did not hand him his fare in a contemptuous manner," that "he did, and he caught his eyes, and that he saw a sneer on his face." The judgment was affirmed.

Where, in an action of assumpsit with the plea of general issue, the defendants, in order to prove part payment, relied upon the particulars of demand, which had been given under a judge's order, and in which the plaintiff had given the defendants credit for certain sums paid, such admission on the part of the plaintiff necessitates proof of the handwriting of the plaintiff's attorney, as it is an admission requiring proof, as other admissions do, and the plaintiff's counsel is entitled to reply. *Rymer v. Cook, Moody & M.* 86, note.

g. Time for making admission or request to open and close.

Where an offer to the effect that, if the plaintiff should recover judgment on the note in suit, he should be entitled to recover the amount of the attorney's fees demanded in the complaint, 61 L. R. A.

is not made until the trial has commenced, it will not operate to change the burden of proof so as to deprive the plaintiff of the right to open and close. *Boyd v. Smith*, 15 Ind. App. 324, 43 N. E. 1056.

In order to entitle the defendant in a civil action, arising *ex contractu*, to the opening and conclusion of the argument before the jury by virtue of an admission that the plaintiff has a prima facie right to recover, the defendant must, before the introduction of any evidence, admit facts authorizing, without further proof, a verdict in the plaintiff's favor for the amount claimed in the declaration. It is too late after the plaintiff has made out a prima facie case for the defendant to make any admission which will deprive the plaintiff of the right to open and conclude. The general rule is that the order of argument follows the burden of proof; and whoever opens the case with the evidence, if he has the right so to open, has the same right in the argument. *Abel v. Jarratt & Co.*, 100 Ga. 732, 28 S. E. 453, Citing *McKibbin v. Folds*, 88 Ga. 236; and *Distinguishing McCalla v. American Freehold Land Mortg. Co.* 90 Ga. 113, 15 S. E. 687.

To the same effect, *Massengale v. Pounds*, 100 Ga. 770, 28 S. E. 510; *Cook v. Coffey*, 103 Ga. 384, 30 S. E. 27; *Central R. Co. v. Morgan*, 110 Ga. 103, 35 S. E. 345.

Even if an answer to a petition admits sufficient facts to entitle the plaintiff prima facie to a recovery, it is not erroneous to refuse to allow the defendant to open and conclude the argument, when no request to do so is presented until after the testimony on both sides has been closed. *Southern L. Co. v. Gresham*, 114 Ga. 183, 30 S. E. 883.

V. Extent and character of admission.

In nearly every action or proceeding in which the subject under consideration is discussed the question arises, as to whether the admission, the effect of which is claimed to shift the burden of proof and the incident right to open and close, is sufficient, in form and substance, to accomplish what is sought in making it. What will bring it about in a given case generally depends upon the particular circumstances of that case; and, while there are a few cases which are in the main identical, as to these, it will be found that in most instances each individual case stands on its own feet. And the matter is not rendered less complicated by the injection of local rules and statutes.

a. When admission expressly made.

1. Assumpsit generally.

In an action of attachment against the defendant on the ground that he had disposed of his property with the fraudulent intent to cheat, hinder, and delay his creditors, where a third party interpleads claiming the goods by purchase from the defendant, and the plaintiff files an answer to the interplea admitting the sale by defendant to interpleader, and the delivery to the latter of the possession of the goods sold, as alleged in the interplea previous to the issuance of the writ of attachment; and that the property was so in the possession of the interpleader when the writ of attachment was served by the sheriff; but alleging that said sale and transfer was without consideration and for the purpose of cheating and defrauding the defendant's creditors, and of hindering and delaying them in the collection of their debts,—the plaintiff is entitled to assume the burden of proof, and to open and conclude the argument. *Mansur & T. Implement Co. v. Davis*, 61 Ark. 627, 33 S. W. 1074.

The defendant is entitled to open and conclude his case in an action of *assumpsit*, where he admits the account of the plaintiff, and pleads payment. *Huddle v. Martin*, 54 Ill. 258.

In an action for medical attendance to the slaves of the defendant, the answer admitted that the services were rendered as stated in the petition, and that the charges were the usual charges for such services; but alleged that, by reason of the unskilful and negligent treatment of the plaintiff said slaves had died, and prayed judgment against the plaintiff for their value. Upon the trial defendant claimed the right to open and conclude the case, but his claim was overruled. It was held that the admission of the defendant was so qualified as to avoid admitting the plaintiff's cause of action as set out in the petition, and that, without that, he could not rightfully claim the opening and conclusion. *Graham v. Gautier*, 21 Tex. 112.

This is all that is said by the court in deciding this question, the report dealing mainly with the merits of the affirmative defense. It is a little difficult to understand how, when the answer admitted the services, and that the charges for the same were correct as stated in the petition, the refusal to allow the defendant to open and conclude the case was sustained. The whole issue was upon the unskilful and negligent treatment of the slaves by the plaintiff, and, had that defense not been interposed, there is no question but what the plaintiff would have been entitled to recover, and recover the amount that he claimed in his petition, without any evidence being given on either side; and it seems a little singular for the court to dispose of the question with the remark that the admission of defendant was so qualified as to avoid admitting the plaintiff's cause of action as set out in the petition.

Plaintiff brought an action upon an account, and issued and levied an attachment therein. The defendant pleaded reconvention, and asked and obtained a verdict for both actual and exemplary damages. In his plea he had admitted the action set out by the plaintiff, and relied upon his affirmative plea of reconvention. It was held that the action of the trial court in allowing him the opening and conclusion in the introduction of evidence and in argument upon his cross action was correct. *Parks v. Young*, 75 Tex. 278, 12 S. W. 986.

The defendant is entitled to open and close the case in an action before a justice of the peace, where there was an oral complaint for the amount of the plaintiff's claim, which by an amended answer the defendant admitted at that amount without any allegation as to the interest, and then set forth two counterclaims, an admission of the interest not being necessary, as the failure to deny the allegation of the complaint operated as an admission; and, although § 2891 of the Code provides that, if the defendant fails to appear and answer in a justice's court, the plaintiff cannot recover without proving his case, this provision does not apply where the defendant does appear and answer. *Harley v. Fitzgerald*, 84 Hun, 305, 32 N. Y. Supp. 414.

In an action brought to recover for architect's fees and the superintending of a building for the defendant, the rendition of the services and the amount of the plaintiff's claim were admitted by the defendant, who, however, set up by way of defense two items of indebtedness existing in favor of another person against the plaintiff, which, prior to the commencement of the action, had been assigned to the defendant. It was held that the trial court properly ruled that the defendant held the affirmative of the issue. *Bodine v. Andrews*, 47 App. Div. 495, 62 N. Y. Supp. 385. The judgment of the trial court was affirmed. *Id.*

ment, however, was reversed on another ground by a divided court.

In an action of *indebitatus assumpsit* for goods sold and delivered, and on an account stated, there was a plea in abatement that the promises were made by the defendant and another, jointly, and not by the defendant alone. The defendant, upon admitting that, unless he established his plea, the plaintiff was entitled to a verdict for the amount of all the goods mentioned in the particulars, was allowed to begin, and, upon the case being moved in the following term, the court approved the decision. *Bonfield v. Smith*, 2 Moody & R. 519.

In an action upon a judgment where the judgment is admitted to have been rendered, but the defense is that the court in which it was made had no jurisdiction to render it, the burden of proof is on the defendant, and he is required first to produce his evidence; and he also holds the affirmative in the argument. This is because, if no evidence had been offered, plaintiff would have been entitled to judgment upon the pleading. *Lowe v. Lowe*, 40 Iowa, 222. See *Oxtoby v. Henley*, 112 Iowa, 697, 84 N. W. 942, *infra*, V. b. 1.

2. *Assumpsit on notes, bills of exchange, etc.*

In an action on a bill or note and a common money count, special pleas to the one, and never indebted to the other, if the plaintiff does not undertake to prove a different transaction on the latter count, the defendant is entitled to begin. *Oakeley v. Ooddeen*, 2 Fost. & F. 656.

In an action upon promissory notes, where the defendant, while admitting the execution of the notes and alleging an affirmative defense of the same, also denied that there was any consideration for the notes, and the plaintiff, as a consideration, attempted to show advances, the defendant is not entitled to the privilege of opening and closing the case, as the plaintiff's case is not admitted in its entirety. *Filby v. Turner*, 9 Colo. App. 202, 47 Pac. 1087.

Where suit was brought by the holder of a promissory note payable to the order of a named person and indorsed by the payee in blank, and the defendant in his plea admits the execution of the note and the ownership of it by the plaintiff, a prima facie case for the latter is made out. The burden of proof to establish his defense is upon the defendant, and consequently he is entitled to open and conclude. *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59. Followed in *Levens v. Smith*, 102 Ga. 480, 31 S. E. 104; *Southern Mut. Bldg. & L. Assn. v. Perry*, 108 Ga. 800, 30 S. E. 658; *Dorough v. Johnson*, 108 Ga. 812, 34 S. E. 168.

In an action by the plaintiffs upon a promissory note, as bearers of the same, against three persons as joint makers, only one of whom made defense, his admission that he had executed the note did not deprive the plaintiffs of their right to open and conclude the argument. In order to make out a prima facie case for them, there should at least have been a further admission that they were the owners of the note. *Dodd v. Norman*, 99 Ga. 319, 25 S. E. 650.

In a suit upon a note, where the answer admitted the execution of the note and the assignment thereof to the plaintiff, and alleged that it was assigned to the plaintiff without consideration, and that he had no title or interest in the note, and another party was the real party in interest; that the sole consideration of the note was land, to which the party had not, and never had, title, and which was subject to a lien for the purchase money,—the defendant is entitled to open and close; as in such case the state of the pleadings does not require the plaintiff, in the first instance, to produce his note in evidence. *Shank v. Fleming*, 9 Ind.

189. See under Indiana statute, *supra*, III. a, 2.

In an action upon a promissory note containing a stipulation for a reasonable attorney's fee, wherein the complaint demanded a certain sum alleged to be reasonable, an admission by the defendant, for the purpose of obtaining the right to open and close the cause, that the plaintiff was entitled to recover as an attorney's fee a sum bearing the same proportion to the amount otherwise recovered as the sum demanded bore to the total amount of the note on its face at the commencement of the action, is insufficient to give him that right. *Hyatt v. Clements*, 65 Ind. 12. The court cited with approval, and claimed to follow, *Camp v. Brown*, 48 Ind. 573.

In an action against an administrator on two notes secured by chattel mortgages which provided for reasonable attorneys' fees an admission by the defendant of the correctness of the amount of the attorneys' fees demanded in the claim filed against the estate is not sufficient to give him the right to open and close, since what fees are reasonable depends upon the services rendered, and a demand which would be reasonable when made on filing the claim against the estate would not be sufficient in the event the claim was not allowed and its collection litigated, and, therefore, plaintiff is entitled to make proof of the attorneys' fees which he should recover in the case, and, until defendant made an admission sufficiently broad to cover such attorneys' fees, he could not be entitled to the open and close. And, an admission of the execution of the notes is not broad enough to relieve plaintiff from introducing in evidence the chattel mortgages given to secure the notes. *McCloskey v. Davis*, 8 Ind. App. 190, 85 N. E. 187.

But in an action upon two promissory notes where the answer admitted the execution of the notes, and then alleged that they were executed with another note which defendant had paid, the whole three having been given in payment of a harvester and twine binder, and alleged a breach of warranty in regard to the same, the defendant is entitled to open and close. And this right is not affected by the fact that the notes in suit provided for the payment of attorneys' fees, inasmuch as such provision was for the payment of 10 per cent, and no evidence, therefore, was necessary to determine the amount the plaintiff would be entitled to recover. *McCormick Harvesting Mach. Co. v. Gray*, 100 Ind. 285. See *infra*, V. a, 4.

In an action upon promissory notes the complaint alleged that the notes were stolen by some person unknown to plaintiff and came into possession of defendant, the principal on the notes, who mutilated them by tearing therefrom his name for the fraudulent purpose of defeating the collection of the same. Defendant answered, admitting the execution of the notes, denied that the same were stolen, and alleged that after the notes became due he paid the same to plaintiff's attorney, who surrendered the notes to him. It was held that, under the pleadings, the plaintiff was required to show ownership; that the wrongful possession of the notes by the defendant was a material averment of the complaint, and the burden of showing this was upon the plaintiff, and he, therefore, had the right to open and close. *Myers v. Binkley*, 26 Ind. App. 208, 59 N. E. 333.

In *Goodpaster v. Voris*, 8 Iowa, 334, 74 Am. Dec. 313, an action upon a promissory note, the defendants answered the petition admitting the giving of the note, and also the assignment of it, to the plaintiff after maturity and dishonor, and then pleaded a set-off of a claim for damages for nonperformance of a contract to furnish and set up a circular saw in the steam

mill of the defendants. It was held that the answer did not present a defense, nor yet an avoidance, but pleaded a set-off, which is in the nature of a cross action. It was held, further, that this, standing alone, would give them the right they claimed to open and close, but that they did not clearly admit the plaintiff's cause.

Defendants gave their promissory note to plaintiff's intestate, and this action was brought by the plaintiff as administrator. The defendants' answer admitted the execution of the note, but claimed an accord and satisfaction by the said administrator agreeing to receive in payment of said note a certain note given by the deceased to a third party and by him assigned to one of the defendants; that said administrator agreed to accept said note, and had received the same with the difference in money paid by the other defendant, but had never given up the note sued on as he had promised to do; and claimed that they were entitled to have the amount of the note thus assigned set off against the note in the hands of the plaintiff. It would appear from what the court said on appeal that the trial court had given to the defendants the opening and closing argument, but it is not shown in the case. The supreme court said: "We are not prepared to hold that there was error in the ruling of the court in giving to the defendants the opening and closing argument." *Woodward v. Laverty*, 14 Iowa, 351.

In an action on a note for the purchase money for a hotel business,—that is to say, an interest in the firm engaged in that business,—in which the execution of the note was admitted by the defendant, and false representations as to the amount of indebtedness of the firm was relied upon as a defense, it was held that defendant, holding the burden of proof, was entitled to make the closing argument to the jury, and that it was error to deny him this right. *Fitch v. Parker*, 20 Ky. L. Rep. 842, 47 S. W. 627.

In an action upon promissory notes the defendant's answer admitted the execution of the notes, and also admitted that his name was signed to a paper which the court held prevented the running of the statute of limitations against the notes, but alleged that each and every allegation and averment in the petition contained, not expressly admitted to be true, was untrue; and he denied the same and each and every of them. It was held that this was evidently done to place the burden of proof upon the plaintiff in the matter of the allegations thus denied, and that the ruling of the court that the defendant was not entitled to the opening and closing of the case on the trial was right. *Rolfe v. Pilloud*, 16 Neb. 21, 19 N. W. 615, 970.

In *Osborne v. Kline*, 18 Neb. 344, 25 N. W. 360, which was an action upon a promissory note, the defendant pleaded a state of facts which the court held to be a plea of payment, and, the subject being considered, the court said: "Doubtless that party against whom judgment would be rendered if no evidence were introduced on either side had the right, and it was his duty, to open the testimony, and I think there can be no doubt of the rule that the party entitled to open the testimony has also the right to open and close the argument. Now, in the case at bar, the defendant by his answer admitted everything that was alleged by the plaintiffs in their petition, but pleaded payment. Accordingly it was altogether unnecessary on the part of the plaintiffs to introduce the notes sued on in evidence, and their doing so could not change the status or rights of the parties in court."

The inference is fair that, had it been neces-

sary for the plaintiff to introduce the notes sued on in evidence, the burden would have been with them, and they would have had the right to open and close the argument; and the case would seem to be opposed in its reasoning and result to that of *Grant Quarry Co. v. Lyons Constr. Co.* 72 Mo. App. 530, *infra*, V. b. 2.

Where a petition alleges a note bearing 12 per cent interest on its face, and further alleges that the note was an Oklahoma contract, and that the laws of that territory at that date made it a legal rate by special contract, and the defendants admit the making and delivery of the note, but deny the allegation as to its being an Oklahoma contract, and that the laws of that territory of that date made 12 per cent a legal rate of interest,—it is not error to refuse the defendant the right to open and close, as the denial of this paragraph of the petition renders proof necessary to establish plaintiff's cause of action on the note. *Hewitt v. Bank of Indian Territory* (Neb.) 90 N. W. 250.

The defendants are entitled to open and close in an action upon a promissory note against them as maker and indorsers, where the answer admits the making and indorsing of the note, and sets up the defense of usury. (In New York a successful defense of usury is a complete bar to a recovery.) *Huntington v. Conkey*, 33 Barb. 218. The opinion in this case is an exhaustive review of the subject under consideration, and cites copiously from American and English authorities. To the same effect, see *Ayrault v. Chamberlain*, 33 Barb. 229.

And so the defendant is entitled to open and close the case in an action to recover the amount of a check given by him, where the answer admitted the giving of the check, and then set up several affirmative defenses. *Elwell v. Chamberlin*, 31 N. Y. 611. In this case the court, after citing and speaking at length on the two cases of *Huntington v. Conkey*, 33 Barb. 218, and *Ayrault v. Chamberlain*, 33 Barb. 229, *supra*, concluded with a general approval of both cases.

Where the complaint in an action sets up *in hæc verba* a promissory note, and alleges that it was given by the defendant to the plaintiff as evidence of an indebtedness from the former to the latter, and follows with an allegation of the circumstances under which such indebtedness arose; and the defendant in his answer admits the making of the note, and alleges certain facts tending to show that nothing was due thereon; and the counsel for the plaintiff, upon the opening of the case at the trial, states that he relies solely upon the note set forth in the complaint, the making of which is not denied by the answer,—the defendant then has the affirmative of the issue, and should be allowed to open and close the proof. *Plenty v. Rendle*, 43 Hun, 568. See remarks on this case in *supra*, IV. a, 1.

Where a complaint alleged the making and delivery to plaintiff, by defendant, of a certain promissory note, the due presentation of the same for payment, and its nonpayment; and the answer specifically admitted the making of the note, and did not deny any of the allegations of the complaint, and then alleged affirmatively that the note was given without consideration under an agreement with plaintiff that the same was to be paid only out of the profits of a certain business that had realized no profits,—the defendant had the affirmative, and the right to open and close to the jury. *Brown v. Tausick*, 1 Misc. 16, 20 N. Y. Supp. 369.

In a civil action to foreclose a mortgage given to secure the payment of a promissory note, where the defendant in his answer admitted the making of the note and the execution of the 61 L. R. A.

mortgage and the advertisement of sale, for the expense of which the plaintiff claimed to recover, but insisted that the debt secured in the mortgage had been paid, the only issue to be submitted to the jury was the payment of the note, and on that issue the defendant was the affirmant, and would have the right to open and conclude, as the payment of the note was the only allegation in the case to be proved, and if such allegation were stricken out the defendant would fall in his defense. *Love v. Dickerson*, 85 N. C. 5.

Where, in an action upon a promissory note, the answer admitted the execution and delivery of the note, but alleged that its consideration was goods which proved to be utterly worthless and without mercantile value; and further set up false representations and a breach of warranty,—the right to open and conclude the argument was with the defendant, as the admissions of the answer established a *prima facie* case for the plaintiff. And tested by any rule, whether by looking to see which party should succeed if no evidence was given on either side, or, on the other hand, which party would fail in case every allegation necessary to be proved was stricken from the record, the onus rested on the defendant. *Stronach v. Bledsoe*, 85 N. C. 473, *Approved and Followed in Carrington v. Allen*, 87 N. C. 354.

In an action upon a single bill of the defendant given to the plaintiff, where the defendant pleaded his discharge as a bankrupt and payment, with *non solvit* as a replication to the plea of payment, and there was no replication to the bankruptcy plea, the defendant had the right to open and close. *Richards v. Nixon*, 20 Pa. 19.

Under the 49th rule of the circuit court, which entitles the defendant to open and reply when he admits the plaintiff's whole case, such admission must be so full that upon it alone, in the absence of other defense, the plaintiff would be entitled to judgment. And where, in an action upon a note, the defendants admitted the execution thereof, but insisted that the plaintiff was a lunatic, and therefore incompetent to sue; and also averred that the note, being joint, could not be sued as to the surety, he being dead; and relied on the lapse of time as evidence of payment,—the admission was not of the full character required by the rule, as it denied the right of the plaintiff to sue because a lunatic, and averred that the surety's estate could not be sued. *Boyce v. Lake*, 17 S. C. 481, 43 Am. Rep. 618.

In *Milburn Wagon Co. v. Kennedy*, 75 Tex. 212, 13 S. W. 28, which was an action upon promissory notes, plaintiff sued out an attachment and levied the same upon the property which the defendant claimed to occupy as a homestead. The defendant, having admitted the plaintiff's entire claim, and by his answer simply set up the affirmative defense that his homestead was exempt, was held to be entitled to open and close.

3. Insurance.

In *Young v. Newark F. Ins. Co.* 59 Conn. 41, 22 Atl. 32, the complaint alleged the plaintiff's ownership; the execution of the policy by the defendant in consideration of a premium paid; a fire; filing of proof of loss; and a failure of defendant to pay; and the answer admitted all the allegations contained in the plaintiff's complaint and then alleged that the policy was delivered to the plaintiff upon the condition that it would not become effective and in force until it was approved by the proper officers of the company at the home office, and that thereafter the said officers at the home office refused to

approve said issue of said policy, and the agent of the defendant so notified the plaintiff and notified him that said policy was null and void, and demanded the return of the same, which was refused. It was held that the defendant had the right to begin, and to open and close the argument.

Why this allegation was anything more than an argumentative denial of the affirmative averment of the complaint, as to the execution of the policy by the defendant, is not clear; and if that is the case it amounts to nothing more than a general denial of that averment, which would operate to throw the burden of proving it upon the plaintiff, and give him the right to open and close. See cases in *infra*, c.

In an action against an insurance company for loss under a policy, where the plaintiff claimed to recover, not only the face of the policy and interest, but damages for the failure to pay the claim within the time stipulated in the policy, and alleged that the refusal to pay was in bad faith, and the amended plea of defendant admitted sufficient to make a prima facie case for the plaintiff to recover the face of the policy and interest, but alleged that its defense was in good faith, this does not entitle the defendant to open and close, as, in order to recover what was claimed in the petition, it was essential for the plaintiff to prove defendant's bad faith, which had been expressly denied in the answer. *Phoenix Ins. Co. v. Gray*, 113 Ga. 424, 38 S. E. 992.

Upon the trial of an action upon a policy of insurance where the defense was that one of the terms of the policy had been violated, and the defendant company at the conclusion of the evidence, in answer to questions by the court, stated that it raised no question as to the issuance of the policy sued upon, and did not dispute the ownership of the property destroyed, nor raise any issue as to the value of the property being the full amount mentioned in the policy, these answers of defendant are admissions that the plaintiff had proven his case, and it only remains to be seen if defendant had established any of its defenses, and on these issues it had the burden and was entitled to the opening and conclusion to the jury. *Names v. Dwelling House Ins. Co.* 95 Iowa, 642, 64 N. W. 628. This is under Iowa Code, *supra*, III. a, 2, by which, as stated in *Schoonover v. Osborne* (Iowa) 90 N. W. 844, *supra*, III. a, 2, the right to open and close is to be settled at the conclusion of the evidence, and not before the trial begins.

In an action upon a policy of insurance upon the life of plaintiff's husband, the defendant filed in writing an admission of the plaintiff's cause of action, except in so far as defeated by its special answer, but by the answer it denied the right of the plaintiff to recover the damages and attorneys' fee claimed, in any event, and especially put in issue the amount of the attorneys' fee, alleging a certain amount to be reasonable. Upon the admission made, the defendant at the beginning of the trial claimed the right to open and close the argument, which was denied by the court. It was held that the ruling was correct; that the admission conceded the right to recover, except as it was defeated by the answer, and the answer denied one of the facts that, without it, the admission would have covered. *Mutual L. Ins. Co. v. Simpson* (Tex. Civ. App.) 28 S. W. 837. This is under rule 31, *supra*, III. a, 1.

The defendant is entitled to open and close in an action upon a fire insurance policy, where, for the purpose of obtaining that right, it filed a written admission, in the language of rule 31, that plaintiff had a good cause of action as set forth in his petition, except so far as it

might be defeated in whole or in part by the facts of the answer constituting a good defense, which might be established on the trial. *Joy v. Liverpool, L. & G. Ins. Co.* (Tex. Civ. App.) 74 S. W. 822.

4. Lease.

Where, in an action on a lease providing for attorneys' fees for its enforcement, the defendant admits that if the plaintiffs recover a judgment they can recover attorneys' fees for the amount alleged in the complaint, the plaintiffs are not entitled to open and close, as, under such admissions, the plaintiffs have nothing to prove in the opening of the case. *Donahoe v. Rich*, 2 Ind. App. 540, 28 N. E. 1001. See *supra*, V. a, 2.

In an action to recover rent of certain premises leased by the plaintiffs to defendants, where the defendants by their answer admit all the allegations of the complaint that it is necessary to prove in order to recover, and then allege certain affirmative defenses, they are entitled to the affirmative, and to the right to open and close. *Hurliman v. Seckendorf*, 9 Misc. 264, 29 N. Y. Supp. 740; *Lewis v. Donohue*, 27 Misc. 514, 58 N. Y. Supp. 319.

5. Libel.

In an action of libel, an answer admitting the publication of the article alleged to be libelous, but justifying the publication on the ground that the facts therein contained were true, was held to place the burden of the issue on the defendant, and to entitle him to open and close the evidence and argument on the trial of the case. *Palmer v. Adams*, 137 Ind. 72, 36 N. E. 695.

Where in an action for libel defendant admitted the publication, which was libelous *per se*, the burden of proof was on him, and he was entitled to the concluding argument to the jury. *Blackwell v. Johnston*, 21 Ky. L. Rep. 1720, 56 S. W. 12.

Both these cases are opposed to the common-law rule, and are founded upon the statutory provisions of Indiana and Kentucky. See *supra*, III. a, 2.

In an action for libel in which the words published, if false, were libelous *per se*, defendant has the burden of proof and the right to conclude the argument to the jury, where he admits the publication and alleges its truth, although he also denies malice, since, the words being libelous *per se*, the question of malice is immaterial. *Louisville Courier-Journal Co. v. Weaver*, 13 Ky. L. Rep. 599, 17 S. W. 1018. See Ky. Code, *supra*, III. a, 2.

6. Negligence.

In an action by a wife against a railroad company for the homicide of her husband, the plea admitted the killing, but nothing more on which the plaintiff could recover without more; it did not admit, either that her husband was not at fault, or that the company was, so as to take any burden off the shoulders of the plaintiff, who, being an employee's wife, must show either the one or the other before any recovery can be had or any presumption be made against the company. The court was unanimous in the opinion that the presiding judge did not err in overruling the plea of justification, so as to deny the defendant the right to open and conclude. *Central R. Co. v. Crosby*, 74 Ga. 738, 58 Am. Rep. 463.

In an action against a railroad company for the negligent killing of an animal, where the defendant admitted the killing but denied that the animal was worth the amount claimed by

the plaintiff, or any other large sum, and denied that the killing was due to any fault or negligence on the part of the defendant or its servants, the admission is not sufficient to give the defendant the opening and conclusion, as, to entitle the plaintiff to recover, he must have shown the killing and the value. *Western & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130.

7. Trespass and replevin.

In an action of trespass for entering upon the plaintiff's land then in his possession and cutting and carrying away his wood and timber, where the defendant in his answer admits that he had entered upon the land described in the plaintiff's petition and cut and carried off wood and timber as alleged, but averred that the land belonged to him and he had a right to do it, the defendant has the affirmative, and is entitled first to produce his evidence and conclude the argument before the jury. *Caskey v. Lewis*, 15 B. Mon. 27.

In this case it will be seen that the defendant did not admit the amount of the plaintiff's damages, and being, like *BRUNSWICK & W. R. Co. v. WIGGINS*, an action *ex delicto*, the decision seems to be opposed to the doctrine there laid down.

Where, in an action originally in trespass to try title to real property, but which was changed into a foreclosure suit, the amended petition sought to recover the premises or the amount of certain vendor's lien notes also sued on, with a prayer for the foreclosure of the lien, and further sought additional relief in the alternative by praying for subrogation by reason of notes previously given which were secured by a deed of trust; and the defendant admitted that plaintiff had a good cause of action to recover the premises sued for, or to recover the vendor's lien notes with foreclosure,—there was no error in refusing to permit the defendant to open and conclude the argument, as the amended petition asserted, not only a cause of action on the vendor's lien notes, but, in the alternative, on the notes previously given; and consequently the admission was not sufficient. *Clarkson v. Graham*, 21 Tex. Civ. App. 355, 52 S. W. 269.

In an action to recover specific personal property, where the plaintiff claimed to have purchased the property of a person, and the defendants pleaded that such purchase and sale were made to hinder and delay the creditors of that person, and therefore were fraudulent; and the defendants before trial filed another pleading admitting that the plaintiff was in possession of the property, was rightfully entitled to such possession, that the detention of the goods was wrongful, and that the plaintiff was damaged in the sum claimed, unless his purchase from his assignor was fraudulent, and withdrew all other defenses,—defendants were entitled to open and close, as, under the issue, the plaintiff was not required to introduce any evidence, and was entitled to judgment for all he claimed, if the defendants failed to establish the fraudulent character of the sale as originally pleaded, and withdrew all other defenses. *Bixby v. Carskaddon*, 70 Iowa, 726, 29 N. W. 628. See Iowa Code, and cases under *supra*, III. a, 2.

8. Assault.

In an action for assault and battery if the defendant admits the assault, and pleads *son assault demeune*, the burden of proof is on him, and he is entitled to the concluding argument to the jury. *Walls v. Robb*, 15 Ky. L. Rep. 159; *Phillips v. Mann*, 19 Ky. L. Rep. 1705, 44 S. W. 379; *Givens v. Berkley*, 21 Ky. L. Rep. 1653, 56 S. W. 158.
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These cases are opposed to the doctrine laid down in all the English, and most American cases decided since the adoption of the rule in *Carter v. Jones*, that the plaintiff has the right to begin in all actions for personal injuries, although the affirmative is with the defendant. See *supra*, III. b. And this is because of the provision of the Code of Kentucky, *supra*, III. a, 2. Under the common-law rule mentioned, in an action for assault the plea of *son assault demeune* alone, will not give the defendant the right to open and close, unless it is accompanied by an admission of everything claimed by the plaintiff, even to the amount of his unliquidated damages.

And in *M'Kenzie v. Milligan*, 1 Bay, 248, where, in an action for an assault, the plea was justification *son assault demeune*, the decision was to the same effect, under the rule in South Carolina, *supra*, III. a, 1.

In an action against a police officer for assault and battery, for alleged unnecessary and cruel beating of the plaintiff by the defendant, where defendant admits striking plaintiff, but alleges it was done in self defense while plaintiff was resisting arrest, and denies that the beating was cruel or unnecessary, the burden of establishing the allegations of the complaint was held to be upon the plaintiff in the action, and he was entitled to the close, the rule being that "the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." *Finnell v. Bohannon*, 19 Ky. L. Rep. 1587, 44 S. W. 94. See Kentucky Code, *supra*, III. a, 2.

9. Other cases.

Where the complaint alleged that 27 bales of cotton mentioned in an account were the common property of the plaintiff and defendant, and that the same had been shipped and sold by the defendant and the proceeds received by him, and the defendant's answer admitted that the cotton was the common property of the plaintiff and defendant, and that it had been shipped by himself, and 26 bales had been sold; and alleged affirmative matters; as defendant did not admit that all the cotton, but only 26 bales, had been sold, it devolved upon the plaintiff to prove a conversion by the defendant for the plaintiff's part of the proceeds of the cotton coming lawfully into his hands, and that entitled him to open and conclude his argument. *Bertrand v. Taylor*, 32 Ark. 470.

In an action against a sheriff for attaching a stock of goods, where it appeared that the defendant in the attachment had made an assignment for an expressed valuable consideration to his wife—the plaintiff in the present action—of his entire stock of goods and merchandise, and the defendant admitted the taking of the goods, but denied that plaintiff was the owner, and alleged the invalidity of the sale to her, the burden of proof was held to be on the defendant, the bill of sale upon its face vesting the legal title in the plaintiff, and the question of its validity being the principal issue in the case. And it was also held that, under the circumstances of the case, the order of argument rested largely in the discretion of the court, and that a grant of the right to open and close the argument to the defendant would not justify a reversal. *Van Horn v. Smith*, 59 Iowa, 142, 12 N. W. 789.

Where a claim is made by one of the executors of an estate, in his account against the estate, which claim is resisted by the coexecutor and also by legatees, the proceedings on the objection of both being consolidated, the claimant must commence, unless the objectors begin by admitting the *prima facie* proof of the demand, by reading the account and affidavit and

its passage by the orphan's court, and then assume the burden of disproving it. *Xingling v. Hesson*, 16 Md. 112. To the same effect. *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 660; *Townshend v. Townshend*, 7 Gill, 26; *Stocksdale v. Cullison*, 35 Md. 324.

A plaintiff in an attachment suit, whose answer to an interplea admits an assignment under which the interpleader claims, but alleges it to be fraudulent, is entitled to open and close the case, both in the introduction of evidence, and in the argument. *Hazell v. Bank of Tip-ton*, 95 Mo. 60, 8 S. W. 173.

In an action between partners, where the prima facie case of the plaintiff is admitted, and the burden of proof is thus properly thrown on the defendant by the instructions, he is entitled to make the opening and closing argument to the jury. *McHale v. Oertel*, 15 Mo. App. 583.

In proceedings to establish a will, the contestant by admitting in his pleadings all the requisites of the statutory will, and contesting only on the ground of undue influence, assumes the burden of proof, and is entitled to open and close. *Patten v. Cilley*, 46 Fed. 892.

A landlord having obtained a verdict in ejectment, on a forfeiture of a lease, the tenant brought a cross ejectment; the defendant, admitting the lease, began by proving acts of forfeiture, and the court held his counsel to be entitled to the general reply. *Doe ex dem. Chamberlayne v. Lloyd*, Cited in *Peakes on Evidence*, 8.

In an action of ejectment where the plaintiff claims the property as lessee of the heir of the former owner, and the defendant, the widow of such owner, claims the same as being devised to her by his will, and also that a part of the lands were limited to her by a marriage settlement on her marriage with such former owner, an admission by the defendant of the pedigree of the lessor of the plaintiff, and of the defendant's possession, is not sufficient to give to the defendant the right to begin, the reason being that the defendant relies on some other title besides the will. *Doe ex dem. Lewis v. Lewis*, 1 Car. & K. 122.

In an action of ejectment where the lessor of the plaintiff claimed as devisee under a will, and at the trial the defendants offered to admit that the testator died seised, and the due execution of his will, and that it would entitle the plaintiff to recover, unless the defendants could displace it by a subsequent testamentary disposition of a later date, the defendants have the right to begin. *Doe ex dem. Bather v. Brayne*, 5 C. B. 655, 17 L. J. C. P. N. S. 127.

b. *Affirmative defense without formal admission.*

In other cases the admission is not made in express terms, but by implication or inference, from the nature and character of an affirmative plea or answer which does not deny the allegations of the plaintiff's pleadings, but confesses and avoids them. And the following are instances of such.

1. *Assumpsit generally.*

In an action for money had and received, where the defendant pleaded payment and set-off, with leave to give special matter in evidence, but had forced the district attorney to prove his whole case at the outset as fully as if the plea had been *non assumpsit*, and the evidence of the defendant, except as to the set-off, had been confined to disproving the district attorney's allegation, the plaintiff had the right to conclude. But the court said if the case had gone on merely on the pleadings 61 L. R. A.

it would have been a different matter. *United States v. Ingersoll, Crabbe*, 135, Fed. Cas. No. 15,440.

In an action to recover an alleged balance of account to which there was a defense of payment, which was the only issue between the parties, the defendant, having the affirmative of the evidence, is strictly entitled to close the arguments to the jury. *Gran v. Spangenberg*, 53 Minn. 42, 54 N. W. 933; *Mann v. Scott*, 32 Ark. 593; *Richardson v. Fell*, 4 Dowl. P. C. 10.

The defendant is entitled to open and close the case to the jury where, in an action in assumpsit for money had and received, he pleads, first, payment, and, second, set-off, to which pleas a general replication is filed. *Williams v. Shup*, 12 Ill. App. 454; *Truesdale Mfg. Co. v. Hoyle*, 39 Ill. App. 532.

In an action of assumpsit for wrongfully dismissing a teacher before the expiration of the term for which he was employed, the defendant pleaded a justification for the dismissal, and it was held that he was entitled to begin. *Harnett v. Johnson*, 9 Car. & P. 206.

In an action upon a contract, where the paragraphs of the defendant's answer were, severally, counterclaims, alleging a cause of action against the plaintiff and seeking affirmative relief, and there was no general denial of the complaint, the defendant was entitled to open and close as the conclusion followed that all the averments in the complaint were admitted and the burden of proving his counterclaim was upon the defendant, and, if there were averments in the counterclaim denying an allegation in the complaint, they went for naught, and the counterclaim must be treated as a pleading setting up new matter only, and, hence, not as traversing any averment in the complaint. *Indiana State Bd. of Agri. v. Gray*, 54 Ind. 91.

In an action brought to recover the amount of a judgment alleged to have been recovered by the plaintiff against the defendant in another state, where the defendant filed an answer of four paragraphs: 1st, general denial; 2d, payment; 3d and 4th, set-off, to which a reply in denial with some special paragraphs was filed; and subsequently the general denial was withdrawn,—the defendant was entitled to open and close the argument to the jury; for, while the several paragraphs of the answer did not expressly admit the averments of the complaint, nor controvert any of its allegations, they were affirmative in their nature, and, under these issues the burden was upon the defendant. *Bannister v. Jett*, 83 Ind. 129.

In an action upon a judgment of another state where the defendant defended on the ground that the court of the latter state was without jurisdiction as to her, the defendant has the right to open and close to the jury, as she did not put in issue the fact of the rendition of the judgment, her sole defense being that the court was without jurisdiction. *Oxtoby v. Henley*, 112 Iowa, 697, 84 N. W. 942. See *Lowe v. Lowe*, 40 Iowa, 222, *supra*, V. a, 1.

In *Rea v. Bishop*, 41 Neb. 202, 59 N. W. 555, the petition alleged the payment by the plaintiff to a third person of specific sums of money for the benefit and at the request of the defendant. The answer made no denial of the allegations of the petition, but pleaded the insanity of the defendant as a defense. It was held that under this state of the issue the defendant was required first to introduce testimony, and was entitled to the opening and close of the case.

Where the complaint in an action alleged an agreement between the plaintiffs and defendant by which the plaintiffs were to sell to defendant a shed, which the defendant was to

take down and remove, for \$460, and the answer alleged that, after the agreement of purchase had been made, the defendant sold the plaintiffs some iron trusses used on the shed for the sum of \$100, and alleged that the plaintiffs, in addition to the iron trusses, had taken yellow pine timber to which they were attached, and which was not included in the sale of the trusses, and the plaintiffs claimed that the defendant not only sold the iron trusses, but the yellow pine timber attached thereto, for \$100, the defendant should be allowed to make the closing argument to the jury, as the only legal effect of the answer was to admit the agreement of, and transaction between, the parties by which the defendant purchased the shed from the plaintiffs. *Staats v. Hausling*, 22 Misc. 526, 50 N. Y. Supp. 222.

In *Chicago Cottage Organ Co. v. Biggs*, 22 Ohio C. C. 392, the petition alleged the sale of a piano by a company (to whose rights the plaintiffs had succeeded) to the defendant, and that the balance unpaid was agreed to be paid in instalments for which notes were given, secured by chattel mortgage on the piano. The defendant filed an answer and cross petition which did not deny the sale and the giving of the mortgage, and set up an affirmative defense. The trial court ruled that the defendant had the opening and closing on the issue raised by the answer and cross petition, and this ruling was approved, although the judgment was reversed for another reason.

In an action to recover the amount of an account for goods sold by the plaintiff to the defendant, where the answer contained no denial of any of the material allegations of the complaint, but was solely a counterclaim for damages for the breach of an alleged warranty, the issue is made upon the counterclaim of the defendant, and is entirely independent of the cause of action stated in the complaint, and the affirmative of such issue is with the defendant, and he should be allowed to open and close the argument to the jury. *Bonnell v. Jacobs*, 36 Wis. 59.

The defendant in an action of assumpsit pleaded payment as to a parcel of the plaintiff's demand, and as to the residue a set-off. It was held that the defendant must begin. *Coxhead v. Hulsh*, 7 Car. & P. 63.

If in an action of assumpsit the defendant pleads his discharge under the insolvent debtor's act, and without any other plea, which is denied by the plaintiff in his replication, the defendant must begin. *Lambert v. Hale*, 9 Car. & P. 506.

In assumpsit for goods sold and delivered, plea as to all but a certain amount *non assumpsit*, and, as to that amount, that the defendant gave the plaintiff, and the plaintiff received on account of that sum, a bill of exchange, which was not due at the time of the commencement of the action, with therely that the plaintiff did not receive the bill of exchange on account of that portion of the plaintiff's demand, and by a bill of particulars the plaintiff limited his demand to the amount stated in the plea as the sum for which the bill of exchange was given,—it was held that, as the plaintiff only demanded the amount stated in the plea on the pleadings, he would be entitled to recover that sum, unless the defendant made out his defense; and that, therefore, the latter was entitled to begin. *Edge v. Hillary*, 3 Car. & K. 43.

In an action for the nonperformance of contracts, by which the defendant undertook to deliver certain goods within certain specified times, the pleas were, first, that the contracts were entered into by the defendants by means of the fraud, covin, and misrepresentation of the plaintiff, and second, that he had always been,

and was, willing to deliver the goods within the time, but was hindered and prevented, by the fraud and covin of the plaintiff, from doing so. The reply traversed the fact stated in the plea. It was held that the defendant was entitled to begin. *Steinkiller v. Newton*, 9 Car. & P. 313.

In an action of assumpsit upon a charter party for not loading a sufficient cargo on board of a ship, where the first plea was that the defendant did load a complete cargo and issue thereon, the second that the defendant loaded part of the cargo and was ready to have loaded the residue, whereof the plaintiff's agent had notice, and that they refused to receive the same, with a reply *de injuria*, the plaintiff was entitled to begin, as the affirmative in substance lay with the latter, it being a necessary part of plaintiff's case that the defendant would not supply a sufficient cargo. *Ridgway v. Ewbank*, 2 Moody & R. 217.

2. Assumpsit on notes.

In an action of assumpsit, on a promissory note, the defendant pleaded infancy only, upon which the issue was joined. The court was of opinion that the plaintiff was not obliged to produce the promissory note mentioned in the declaration, but that the defendant held the affirmative of the issue, and had a right to begin and close the argument. *Davidson v. Henop*, 1 Cranch C. C. 280, Fed. Cas. No. 3,605.

In an action upon promissory notes where the issue was payment of the notes, and under it the plaintiff was not required to prove anything; the plea of payment admitted the execution of the notes, and the onus was on the defendant; and consequently he had the right to open and conclude. *Kent v. Mason*, 79 Ill. 540.

In a suit brought upon a promissory note given for a printing press, where the only defense set up in the answer was a failure of consideration, the burden of proof in the whole action rested upon the defendants, and they should first produce their evidence. *Pierce v. Lyman*, 28 Ark. 550. This was said by the court to be under clause 3, § 349, of the Arkansas Civil Code.

In an action upon promissory notes, where the defendant pleaded a breach of warranty whereby the consideration of the notes had failed, the defendant is entitled to open and close the evidence and argument at the trial. *Fairbanks v. Irwin*, 15 Colo. 366, 25 Pac. 701.

In an action of assumpsit on a promissory note the pleas being, first, *non assumpsit*, second, usury, with a replication in denial of the second plea, plaintiff is entitled to begin. *Jackson v. Pittsford*, 8 Blackf. 194.

Where the complaint in an action contained a paragraph upon a note made by the defendants to the payee and by him indorsed to the plaintiff, and another paragraph in the nature of the common counts for money had and received, etc., and the defendants answered the second paragraph by a general denial, and to the first paragraph pleaded an affirmative defense of fraud, plaintiff was entitled to open and close. *Zehner v. Kepler*, 16 Ind. 290. See *supra*, II.

In an action on a promissory note, where the answer alleged that the note was given for the purchase of a horse, and then alleged a warranty and breach, and a copy of the note expressly providing for the unconditional payment of attorneys' fees was incorporated in the complaint, the plaintiffs had the right to open and close, as they were required to prove their attorneys' fees. *Starnes v. Schofield*, 5 Ind. App. 4, 31 N. E. 480.

In a complaint upon a promissory note, where the second paragraph was for money loaned

by the payee to the defendant, and the answer was payment to both paragraphs of the complaint, want of consideration to the first paragraph, and a general denial to the second paragraph, the defendant is not entitled to open and close the argument. *Williams v. Allen*, 40 Ind. 295. See *supra*, II.

In an action upon a promissory note the defense was, first, that the note was executed for part of the price of two slaves; that the sale had been made with a warranty of title, and that the plaintiff had no title to the slaves at the time of the sale; second, that the plaintiff had made the sale with a warranty that the slaves were sound, when in fact they were unsound, diseased, and of no value at the time of the sale. The latter defense assumed the form of a counterclaim, and was attempted to be sustained as such. It was held that the burden of proof was upon the defendant in both the issues, and consequently he had a right to the conclusion of the argument before the jury. *Tipton v. Triplett*, 1 Met. (Ky.) 570.

In an action against an indorser of a promissory note, where there was a denial of notice in the answer and a plea that the indorsement had been procured through the false and fraudulent misrepresentations of the plaintiff; as the defendant had entered the affirmative on one of the issues joined, and as the burden of proof as to notice of the protest was thrown upon the plaintiff,—the rule that whenever the plaintiff has the affirmative in any one of the issues which the pleadings present he has the right to open and close the argument is operative; and the plaintiff should be allowed to open and close the argument. *Abat v. Sigura*, 5 Mart. N. S. 73. See *supra*, II.

In an action upon a promissory note the execution of which was denied under oath, this denial being joined with several affirmative answers, the burden of proving the execution of the note rested on plaintiffs, and entitled them to open and close the argument. *Bates v. Forcht*, 39 Mo. 121, 1 S. W. 120.

In an action upon a promissory note defendant filed an answer in which it denied each and every allegation contained in plaintiff's petition, and alleged that the note sued on was given without consideration, and not for value received, and further set up a counterclaim for breach of contract to deliver stone. One of the assignments of error was that the defendant had the right to open and close, and the court said that must be decided by ascertaining upon which of the parties rested the burden of proof; that the execution of the note was not denied; that the plaintiff's *prima facie* case was made out by reading the note to the jury; that no evidence was offered to impeach its consideration; that all the evidence and all the instructions of the court were directed to the defendant's counterclaim; that it held the affirmative to establish the only issue of fact in dispute, defendant's counterclaim, and the burden of proof rested upon it, and it had the right to open and close the argument. *Grant Quarry Co. v. Lyons Constr. Co.* 72 Mo. App. 530. The defendant in this case having, in his answer, denied each and every allegation contained in the plaintiff's complaint, it is not easy to perceive how the burden of proof and the consequent right to open and close lay with it. It would seem to be a rather strenuous exercise of the doctrine that the substance must be considered instead of the form, for certainly the reading of the note to the jury, which the court by inference admits was necessary, was the giving of evidence to the jury, making proof of the allegation that such a note existed, and its ownership by the plaintiff, and without which the verdict and judgment must have gone against the plaintiff.

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See *Osborne v. Kline*, 18 Neb. 344, 25 N. W. 360, *supra*, V. a, 2, and cases in *supra*, II. in which a contrary reasoning and doctrine seem to be had and asserted.

In assumption upon two promissory notes alleged to have been given for the purchase price of a farm, where defendant, after the action has been referred, on his motion, to commissioners, elects to try the case by jury, and files a statement, which, under the statute, is to be regarded as a plea, denying the plaintiff's allegations, asserting that neither of the notes was given as a consideration for the farm, but without any good or legal consideration whatever, and that nothing was due upon either of them when the action was commenced, the plaintiff has the right to open and close, since this plea of defendant amounts, in effect, to nothing more than the general issue, and the affirmative is upon plaintiff to sustain the validity of the notes by showing that they were given, as alleged, in consideration for the conveyance of the farm. *Chesley v. Chesley*, 37 N. H. 220.

In an action upon a promissory note the answer, as amended upon the trial, entitled the plaintiff to the direction of a verdict for the amount of the promissory note sued upon, unless the defendant established at least one of the two affirmative defenses pleaded, *vis.*, duress and no consideration. Upon this issue the trial judge properly held that the defendant had the affirmative, and that he was entitled to open the case. *Heaton v. Tracy*, 24 Jones & S. 327, 3 N. Y. Supp. 824.

In an action upon a promissory note there was a general denial, but, after the trial of the cause, the verdict was set aside and the cause again noticed for trial, at which time the defendant obtained leave to serve a supplemental answer which alleged that, after the commencement of the action, plaintiff commenced another action against the defendant for the same claim, etc. It was held that the burden remained with the plaintiff, and he should open the case, inasmuch as the answer put in issue the making of the note and its delivery and transfer; and that the general rule that the plea *puls daretin* was a waiver of all former pleas had been abrogated by the legislature in allowing supplemental complaints and answers. *Slauason v. Englehart*, 34 Barb. 198.

In an action on a promissory note, where the plaintiff, after setting out the note, alleged the transfer of it by the payee to the plaintiff; and that he was the owner of it, and none of the material allegations were denied by the answer, which set up affirmative defenses, and also that the plaintiff was not the owner of the note, the defendant was properly allowed to open and close, as the only issues between the parties were raised by the allegations of the answer, which, requiring no reply, were to be deemed denied by the plaintiff. *Hoxie v. Greene*, 37 Ill. Pr. 97. The court said that the averment in the complaint that the note had been transferred to the plaintiff was not denied, even by inference, except the conclusion, and that the transfer thereof to the plaintiff stood admitted; and further, that the answer that the plaintiff was not the owner was an affirmative defense raising the issue that the plaintiff had, since such transfer, ceased to be the owner and holder of the note, of which the defendant had the affirmative.

In an action on a promissory note alleged to have been made and delivered to the plaintiff by the defendant, where the answer averred that the note was obtained by the plaintiff as payment for work which he falsely represented himself to have done for defendant, and ended by denying each and every allegation of the complaint except in the answer admitted, the

plaintiff retains the affirmative, as such a denial puts in issue the fact of the making and delivery of the note, and the answer contained no admission of that fact except as a part of the defense of fraud and failure of consideration, and the plaintiff was not entitled to avail himself of that admission without admitting the defense of which it formed a part. *Redmond v. Tone*, 32 N. Y. S. R. 260, 10 N. Y. Supp. 506.

In an action against a maker and indorser, where the maker answered separately, and alleged, first, that the note described in the complaint was not delivered by him to the payee or any other person, nor did he ever receive any value therefor, of all of which the plaintiff had notice; and second, that the plaintiff did not purchase the note in good faith, or part with value therefor,—the affirmative is with the defendant, and he has the right to open and close. *Auerbach v. Leetsch*, 44 N. Y. S. R. 493, 18 N. Y. Supp. 452.

Where an action was brought upon a promissory note, alleged to have been made by the defendant to his own order, and indorsed and delivered by him, and transferred before maturity to the plaintiff for a valuable consideration, and the answer, after denying all the allegations of the complaint not specifically admitted, alleged that the note was made and indorsed at the request and for the accommodation of a third party to whom it was delivered, without consideration, and that these facts were known to the plaintiff at the time he received the note; and alleged further that certain other third parties were the legal owners and holders of the note, or had an interest therein,—the defendant was entitled to the affirmative of the issue, and it was error sufficient to reverse the judgment for the court to refuse him the opening and the close at the trial. *Oppen v. Caillon*, 9 Daly, 157.

In an action originally brought by the receivers of a firm to recover upon two promissory notes made by defendant and payable to the order of the receivers, where the notes were subsequently assigned by the receivers to the executors of one of the partners, who were thereafter substituted as plaintiffs, but the complaint was not amended to show these facts, and the answer contained no denial of any of the allegations of the complaint, but set up a defense and counterclaim consisting entirely of new matter, upon the pleadings as they stood at the opening of the case the defendant clearly held the affirmative, and was entitled to open and close. *Woodruff v. Hunter*, 65 App. Div. 404, 73 N. Y. Supp. 210.

In an action brought upon a promissory note made to plaintiff by defendant's testator, where the answer alleged, first, want of consideration, second, the short statute of limitations, third, unsoundness of mind of the testator at the time of signing the note, the defendant had the right to make the closing address to the jury. *DeGraff v. Carmichael*, 13 Hun, 129.

Where to a cause of action against the defendant as indorser of a promissory note the answer denied none of the plaintiffs' allegations, but set up affirmatively that the defendant was an accommodation indorser, and that the note was in fact paid out of moneys in the hands of the plaintiffs' testator, applicable thereto; and contained an averment, upon information and belief, "that the said plaintiffs are not the lawful owners and holders of said note, and that he is not indebted to them thereupon in any sum whatever,"—the defendant held the affirmative, and had the right to open and close the evidence, as the clause above quoted was not a denial of any averment, since neither of the facts so controverted was alleged in the 61 L. R. A.

complaint, and, as it might have been omitted as wholly unnecessary, it put in issue no part of the plaintiffs' case. *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489.

In an action upon a note where the defendants had introduced the defense of failure of consideration of the note and had, in effect, admitted the plaintiff's cause of action, except in so far as it might be defeated by the defense interposed, the defendants were entitled to open and close. *Blackwell v. Coleman County* (Tex. Civ. App.) 60 S. W. 572.

In an action by administrators upon promissory notes a denial that plaintiffs or their intestate ever owned the notes, or that the holders of the notes had the right to sue upon them, puts them upon proof, and that necessarily entitles them to the opening and conclusion of the argument before the jury. *Loggins v. Buck*, 33 Tex. 113. In addition to the denial, defendant alleged that the notes were still the property of the payee, who had transferred them to plaintiffs' intestate for the purpose of evading offsets and other defenses available against her.

In an action upon a promissory note which contained a promise to pay a sum for attorneys' fees, where defendant denied the contract for attorneys' fees, but set up an affirmative defense that he signed the note as surety with the other maker, and that he had been released by an extension granted to the principal maker, to which there was a reply denying the affirmative defense; and, on the trial, the defendant obtained leave to amend his answer before trial by striking out the denial of the contract to pay attorneys' fees, and the court then allowed him the opening and closing of the case,—it was held that the ruling was correct. *McDougall v. Walling*, 19 Wash. 80, 52 Pac. 530. See *supra*, IV. c.

In an action upon a promissory note, against the payee thereof on his indorsement, where the complaint contained the usual averments of protest, nonpayment, and ownership of the note by the plaintiff, and the defendants in their answers did not deny any of the material allegations of the complaint, but alleged that the payee was an accommodation indorser; and that, before the note came into the possession of the plaintiff, it was discounted by a firm at a usurious rate of interest, and by that firm afterwards transferred to the plaintiff,—the defendants were clearly entitled first to introduce their proofs, and to open and close the argument. *Second Ward Sav. Bank v. Shaskan*, 30 Wis. 333.

Where, in an action upon a promissory note, the answer put in issue the ownership of the note by the plaintiff, and the plaintiff proved such ownership by assignment, an exception to the refusal of the court to allow the defendant's right to open and close the case because the defendant had the affirmative of the issue was untenable. *Parker v. Kelly*, 61 Wis. 552, 21 N. W. 539.

In an action of assumpsit by the plaintiffs as payees against the defendant as maker of three promissory notes, where the plea was that at the time of the making of each of the notes by the defendant she was a married woman, and that her husband was still alive, and a replication taking issue on the plea, the defendant was entitled to begin. *Cannan v. Farmer*, 2 Car. & K. 746, 3 Exch. 698.

In an action on a note for £100, pleas, first, as to £50, that the note was made for £100 instead of £50 by mistake; second, that, as to the £50 parcel the note was made for the accommodation of the plaintiff; third, that, as to the same sum, the note was procured by the fraud, covin, etc., of the plaintiff; fourth, as to £40, parcel of another sum of £50, payment; lastly, payment into court, and that the defendant was

not indebted in a greater amount, which last allegation was traversed by the replication, and issues were taken and joined on all the pleas,—it was held that the plaintiff was entitled to begin. *Dooth v. Mills*, 15 Mees. & W. 669, 4 Dowl. & L. 52, 15 L. J. Exch. N. S. 354.

In an action of assumpsit on a promissory note by the indorsee against the defendant as the maker, the plea was that the indorsement by the payee was in blank, and that after that indorsement, and before the delivery of the note to the plaintiff, it came into the hands of a person who was the lawful holder thereof at the time of the making of an order of nisi prius, whereby it was ordered, with the consent of the then holder, that the note and all the claim of the then holder in respect thereof should be and was referred to an arbitrator, and that the note was delivered to the plaintiff after the making of the order before any award was made by the arbitrator in violation of good faith, and in fraud and contempt, of the order, and that the plaintiff took and received the promissory note with full knowledge of the premises. Replication, that the plaintiff had no knowledge of the premises. It was held that the defendant was entitled to begin. *Smith v. Martin*, Car. & M. 58, 9 Mees. & W. 304, 1 Dowl. P. C. N. S. 418.

In an action of assumpsit on a promissory note made by the defendant with a second count for an account stated, the plea was that the note was given for one half of a sloop, and was to be paid as the sloop earned it by carrying goods for the payee at reasonable freight, and averred the willingness of the defendant to carry, and a plea of want of consideration or value for the indorsement, with a replication that the plaintiff had the note for a good and sufficient consideration; and as to the residue of the first count, and the whole of the second count a *nolle prosequi*. It was held that the defendant must begin. *Edwards v. Jones*, 7 Car. & P. 638.

3. Assumpsit on bills of exchange.

In an action upon a bill of exchange against the maker and acceptor, where the answer of the maker was, first, that the bill was made by him, without consideration; second, that the bill was made by him and indorsed by the plaintiffs for the accommodation of the acceptor, with the mutual agreement that as between themselves they were to be co-sureties of the acceptor, and that the defendant had fully paid his equal part thereof, and the reply was general denial and a special paragraph amounting to a denial,—the defendant has the right to open and close the argument. *List v. Kortepeter*, 26 Ind. 27.

In an action of assumpsit on bills of exchange and an account stated, the defendant pleaded payment to the counts of the bills, and *non assumpsit* to the account stated. The plaintiff disavowed any intention of making proof on the account stated. Under these circumstances the court held that the defendant should begin. *Smart v. Rayner*, 6 Car. & P. 721.

In an action of assumpsit by the indorsee against the acceptor of a bill of exchange, with a second count on an account stated, where the defendant pleaded affirmative defenses which would have been perfect against the drawer of the bill, but not against the plaintiff unless he had notice, and alleged such notice; and to the second count pleaded *non assumpsit*; and the replication averred that the plaintiff, at the time when the bill was indorsed, did not have the notice in the plea mentioned,—the burden

of the proof lies with the defendant to prove the notice, and he must begin. *Warner v. Haines*, 6 Car. & P. 666.

In an action of assumpsit the declaration stated that the defendant made his draft or order called a banker's check on the bank of England, which he delivered to the plaintiff, and averred presentment, and that the drawee did not pay. Second count on an account stated. Plea, that the draft or order was made without consideration, and, as to the second count, *non assumpsit*. Replication that there was a good consideration concluding to the country. It was held that the defendant was entitled to begin. *Mills v. Oddy*, 6 Car. & P. 728.

There is no statement in either of these two cases that there was no attempt made to prove the account stated, but it must be that the decision must have been for the same reason as that given in *Smart v. Rayner*, 6 Car. & P. 721, *supra*.

Where, in an action of assumpsit against the defendant as the maker of a promissory note, there were also two counts for money lent and on an account stated, and the plea was, first, that the defendant had not any consideration or value for making the note; and, second, to the other counts *non assumpsit*, with a replication that the defendant had value, it was held that the defendant should begin. *Homan v. Thompson*, 6 Car. & P. 717.

And the same may be said of this case as to the counts for money lent and accounts stated.

Where the first count in a declaration was upon a check, the second for money lent, and the third on an account stated, and the plea was, first, that the account stated was concerning the same amount which was mentioned in the first count, and that the check was given to a person for the nominal value of counters used in gambling, and that the plaintiff had full knowledge of the fact before such person delivered the check to him, and the second plea was that the check was transferred to the plaintiff without consideration and for the mere purpose of enabling the plaintiff to sue on it for the benefit of the person to whom it was given, with a replication to the first plea that the plaintiff had no notice of the premises in that plea mentioned, and to the second plea that the check was transferred to the plaintiff for a good consideration,—the defendant must begin. *Bingham v. Stanley*, 9 Car. & P. 374.

In an action of assumpsit on a bill of exchange by the indorsee against the acceptor,—plea, that the bill had been altered after acceptance,—defendant claimed the right to begin. Plaintiff contended that he was entitled to begin as the bill must be put in by the plaintiff. It was held that the defendant was to begin. *Barker v. Malcolm*, 7 Car. & P. 101.

In an action of assumpsit on a bill of exchange by the holder against the acceptor, the declaration stated that the drawer indorsed to the plaintiff, and the defendant pleaded that the bill was drawn and accepted for the defendant's accommodation, and handed to the drawer to procure it to be discounted, and that the drawer indorsed it in blank and delivered it to a third person to get it discounted, who, against good faith, delivered it to the plaintiff, and that the plaintiff had notice of the facts. The reply was *de injuria*, and it was held that the defendant must begin. *Lees v. Hoffstadt*, 9 Car. & P. 599.

In an action on a bill of exchange by the indorsee against the acceptor, the defendant pleaded that it was an accommodation bill, and that a blank acceptance had been filled up and applied in discharge of this and other bills. The plaintiff replied that the defendant broke his promise without such case as in that plea al-

leged. It was held that on these pleadings the defendant was entitled to begin. *Faith v. McIntyre*, 7 Car. & P. 44.

4. Debt.

In an action of debt for the penalty of an agreement, the defendants pleaded a tender of a deed of assignment. The court was of opinion, *sem. con.* that the defendants held the affirmative issue, and had the right to open and close the cause. *Auld v. Hepburn*, 1 Cranch C. C. 122, Fed. Cas. No. 650.

In an action of debt against an administrator, where the pleas are, no goods of the deceased in the defendant's hands, and *plene administravit*, the affirmative of the issues is on the plaintiff, and he has, therefore, the right to begin. *Marquis v. Rogers*, 8 Blackf. 118.

In an action of debt upon a single bill for \$30 the declaration set forth the date, amount, and other usual descriptions of the obligation; to which the defendant pleaded payment, and also a set-off or discount. It was held error to refuse to permit his counsel to open and conclude the cause. *Churchill v. Rogers*, Hardin (Ky.) 182.

In an action of debt against the administrator of a deceased person, where the pleas are a general plea of payment, and that defendant was never executor, etc.; to each of which there is a general replication and issue,—the plaintiff on this state of the pleadings is entitled to open and conclude the argument of the case. *Clay v. Robinson*, 7 W. Va. 350.

In an action of debt on a bond the defendant pleaded *solvit ad diem* without the general issue or any other plea. It was held that the defendant should begin. *Sandford v. Hunt*, 1 Car. & P. 118.

A declaration in debt stated that the defendant was indebted to the plaintiff, for work and labor, a certain amount, and the same amount on an account stated. There was a general plea of payment to the whole declaration. It was held that the defendant must begin. *Birt v. Leigh*, 1 Car. & K. 611.

In an action of debt, for goods sold, the defendant pleaded her coverture, which was denied in the reply, and it was held that the defendant must begin. *Woodgate v. Potts*, 2 Car. & K. 457.

5. Insurance.

In an action upon a policy of accident insurance only one of two defenses, *vis.*, a denial that the accident causing the death happened as alleged by the plaintiff, was sustained by the proof; and the denial that the accident was caused as alleged was the only issue of fact that the plaintiff was required to establish. It was held that the burden was upon the plaintiff, and that she was entitled to the concluding argument to the jury. *American Acci. Co. v. Rigart*, 94 Ky. 547, 21 L. R. A. 651, 23 S. W. 191.

In an action upon a policy of insurance which is defended on the ground of nonpayment of premiums and consequent forfeiture of the policy plaintiff has the right, under a plea of performance of the conditions of the policy as to the payment of premiums within the prescribed time, to prove a waiver of the conditions, and, as the burden of establishing such waiver is upon him, he has the right to open and close the case. *James v. Mutual Reserve Fund Life Assn.* 148 Mo. 1, 49 S. W. 978.

In an action on a beneficiary certificate where the defense was based on a by-law of the defendant incorporated in and forming a part of the policy by its terms, which in effect provided that it should not be liable for death losses arising

from certain causes, among which was where the death was caused, or superinduced, by the use of intoxicating liquors, and it was alleged in the answer, and there was evidence tending to support the allegation that the death of the assured was so caused or superinduced, the defendant was entitled to open and close the argument to the jury. *Beller v. Supreme Lodge, K. of P.* 66 Mo. App. 449.

In an action of covenant on a policy of insurance the plea to the suit was, covenants performed. It was held that the plea was affirmative, and, as it rested on the defendants, there was no doubt but that they should begin and conclude. *Norris v. Insurance Co. of N. A.* 3 Yeates, 84. 2 Am. Dec. 360.

In an action upon a policy of life insurance where the declaration stated that the assured had caused to be delivered into the office of the society his statement in writing setting forth the past and present state of his health and other circumstances touching his habits and life, and then averred that in the statement so delivered there was no untruth or fraudulent allegation; and one of the pleas was that in and by said statement in writing it was alleged by the assured that his habits were and had been sober and temperate, which allegation was untrue, to which there was a reply that the habits of the assured were and had been sober and temperate,—the defendant was entitled to begin for the reason that the plaintiff, in his declaration, did not show what were the statements made by the assured in the declaration which he caused to be delivered, but they were set out in the plea, and consequently must be proved by the defendant, and second, that the allegations in the plea were those of falsehood amounting to fraud, of which there could be no presumption, and the burden is on the defendant to prove them. *Leete v. Gresham L. Ins. Soc.* 15 Jur. 1161, 7 Eng. L. & Eq. 578.

In *Stormont v. Waterloo Life & C. Assur. Co.* 1 Fost. & F. 22, the declaration was upon a life policy, to be, in case of suicide, canceled by return of premiums, with general averment that all things had happened to entitle the plaintiff. The plea was that the assured did commit suicide, and an averment of readiness to return the premiums, which were paid into court; the replication, that the assured did not commit suicide. The defendants were allowed to begin because the burden was on them.

In an action of covenant on a policy of insurance on the life of a person the plea was that, at the time of the making of the declaration as to the state of health of the assured, and at the time of the making of the policy, the habits of the assured were immoderate and intemperate, and that the assured was addicted to excessive drinking, concluding with a verification. Replication, that, at the time, etc., the habits of the assured were moderate and temperate; and that the habits of the assured were not immoderate and intemperate; nor was he addicted to intemperate drinking, concluding to the contrary. The defendants submitted that they had the right to begin. The court held that there was an affirmative on both sides, and that on these pleadings the plaintiff should begin. *Craig v. Fenn*, Car. & M. 43. See *supra*, II.

In an action on a policy of insurance, where there was a plea that a certain thing alleged by the assured in the declaration made by him at the time of effecting the insurance was untrue, in that he was not then in good health as stated, the plaintiffs were entitled to begin, not only on that issue, but on all the issues upon the pleas denying the truth of the statement of the assured set out in the declaration, for the truth of that statement was a necessary aver-

ment in the declaration, and the several parts of it were denied by the pleas. *Geach v. Ingall*, 14 Mees. & W. 95, 9 Jur. 691, 15 L. J. Exch. N. S. 37.

And in an action on a policy of life insurance the declaration stated that the policy was made on the basis of a certain declaration of the plaintiffs which was set out, stating, among other things, the usual particulars as to the constitution and habits of the assured, and that the said assured was at the time in good health; and it was then averred that the said declaration was in all respects true. There were several pleas and issues joined thereon, in which the affirmative was on the defendant, and his counsel claimed the right to begin. It was held that it lay on the plaintiffs to establish that which was the very condition of the insurance, namely, that the party whose life was insured was in good health. And that the plaintiffs, therefore, were entitled to begin. *Rawlins v. Desborough*, 2 Moody & R. 70.

But in an action by executors on a policy of insurance effected on the life of the testator, where the usual averment was made of the truth of a declaration as to the physical condition of assured, made by him in compliance with the requirement of the policy, with pleas, first, that the said declaration or statement was untrue, alleging in what particulars, and second, that the policy was obtained by fraud, covin, and misrepresentation, and the plaintiff replied *de injuria* to the first and traversed the second, and issues thereon,—the defendants had the right to begin. *Ashby v. Bates*, 15 Mees. & W. 589, 15 L. J. Exch. N. S. 37, 9 Jur. 691.

And so, in an action upon a life insurance policy alleged to have been effected in pursuance of a declaration subscribed by the plaintiff which contained a statement made by the assured; with an averment that the policy contained a stipulation that the same should be void if obtained by any misrepresentation as to, etc., and that the insurance was not obtained through any misrepresentation, etc., and the plea was that the policy was effected on the basis of the declaration and averred facts tending to show that the statement of the plaintiff was untrue and a misrepresentation, the defendant should begin. *Pole v. Rogers*, 2 Moody & R. 287.

These last four cases would seem to be based upon facts substantially identical, and yet it would seem to be difficult to reconcile the last two cases with the two immediately preceding.

6. Replevin.

In an action of replevin, against a landlord and his bailiff, for goods distrained for rent, if all the pleas in the case are withdrawn except the avowry and conuance admitting the taking of the goods by them, under the distress, the defendant will be entitled to the opening and closing in the trial of the case. *Jackson v. Delaplaine*, 6 Houst. (Del.) 358.

In replevin for a horse, where the plea was that the horse was the property of another, and not of the plaintiff, and the replication that the horse was not the property of the other person, but of the plaintiff, the defendant has the right to begin. *Colstone v. Hiscolbe*, 1 Moody & R. 301.

In replevin with an avowry for rent in arrear and plea nothing in arrear, counsel for the defendant stated that he apprehended that the verdict would be in his favor if no evidence were given on either side. The court said that was so, and that the plaintiff should begin. *Cooper v. Eglington*, 8 Car. & P. 748.

Where, in replevin, there was cognizance by defendants, as bailiffs, for arrears of a rent charged upon certain lands held in fee, which 61 L. R. A.

rent had been granted to certain parties, from whom title was deduced to the person for whom the defendants acted as bailiffs through a person who had died seised as in fee of the rent, and the material question was whether the distress in the name of the person whose bailiffs defendants claimed to be was made within twenty years next after the time at which the person who died seised as in fee of the rent had the right to make such distress,—the right to begin was in the defendants, as it lay with them to show that the distress was so made. *Collier v. Clarke*, 5 Q. B. 467, 9 Jur. 158.

In an action in replevin for property levied upon by an officer, under execution, as belonging to the defendant in the execution, where the defendant pleaded facts to estop the plaintiff from claiming the property or denying that it belonged to the defendant in the execution, which facts were denied in reply by the plaintiff, the defendant had the right to open and close the case. *Colwell v. Brower*, 75 Ill. 516.

In an action of replevin for a quantity of merchandise, where the defendant answered in avoidance, setting up, in substance, that he was entitled to a lien on the goods for the freight on their transportation, and that plaintiffs were not entitled to the possession of the goods, and there was a replication in denial, the affirmative was on the defendant, and therefore he was entitled to the opening and close. *McLees v. Felt*, 11 Ind. 218.

In an action to recover possession of personal property, where the defendant alleged that he was trustee in bankruptcy of a bankrupt, and that the claim of the plaintiff to the property was in fraud of his right as such, the burden being upon plaintiff to show ownership, or, at least, some right to the possession of the goods,—the plaintiff has the burden of proof, and is, therefore, entitled to the concluding argument. *Rudy v. Katz*, 23 Ky. L. Rep. 1697, 66 S. W. 18.

In an action of replevin, where the defendant pleads property, he does not thereby obtain the right to open and close, as the plaintiff must, notwithstanding, first prove that he has a right to maintain his writ of replevin, by showing that he has either an absolute or a special property in himself. And in this respect the action of replevin is different from trespass, which may be supported against any person who has no right by one who has the possession. *Marsh v. Pier*, 4 Rawle, 273.

In an action of replevin there was a cognizance for rent in arrear. Plea, that an agreement had been entered into between the landlord and tenant, and that the tenant was subsequently induced by the landlord to enter into another agreement, which second agreement was the demise mentioned in the cognizance; and that the latter agreement had been abandoned by the consent of parties before any rent became due. Another plea was similar to the first, except that it was alleged that the tenant was induced to enter into the second agreement by fraud. A replication denied the abandonment and the fraud. It was held that on these pleadings the plaintiff was entitled to begin. *Williams v. Thomas*, 4 Car. & P. 234. Defendant contended that he should begin, because, though the affirmative of the issue was in point of form upon the plaintiff, yet, as these pleas amounted in substance to no more than a plea of *non tenuit*, it lay upon him to prove the tenancy. But the court held that, while the pleas did amount very nearly to *non tenuit*, nevertheless, since in point of form the affirmative was upon the plaintiff, he ought to begin.

In an action of replevin, where the defendant did not plead the general issue, but took the

affirmative on himself by pleading *liberum tenementum*, he was entitled to the general reply. *Buiford v. Croke*, Cited in *Peake on Evidence*, 8. (This is all there is said of the case; but what place a plea of *liberum tenementum* has in an action of replevin anyone may guess out who can.)

7. Trespass.

The object of a statute providing that "every person owning, having, or keeping any dog shall be liable to the party injured for all damages done by such dog. But no recovery shall be had in case the person injured is, at the time, upon the premises of the owner of the dog after night, or engaged in some unlawful act in the daytime,"—is to relieve the plaintiff in an action for injury done by a dog of the common-law rule as to proving a *scienter*, and in such an action, an allegation as to the exception being unnecessary in the plaintiff's petition, he could not make it, and thereby control the action of the court in determining who had the burden of proof, so as to obtain the closing argument to the jury; and, the real issue in the case arising upon the defendant's plea of contributory negligence, of which the plaintiff was alleged to have been guilty in teasing the dog, the burden of proof was placed on the defendant, and entitled him to the closing argument. *Bush v. Wathen*, 104 Ky. 548, 47 S. W. 599.

In an action of trespass for taking and carrying away the plaintiff's cow, where the defendant pleaded the general issue and filed a brief statement justifying as collector of the town, and it was admitted that the cow was taken and sold by him and the balance of the price exceeding the plaintiff's tax tendered him, the plaintiff is entitled to open and close. *Lunt v. Wormell*, 19 Me. 100, *supra*, II.

Under a statute giving liberty to plead the general issue and give the special matter in evidence in certain cases, in an appeal brought into the supreme court from a judgment of the common pleas, where the defendants, after entering a plea of not guilty as required by the statute mentioned, alleged that at the time of the trespass said to have been committed they were parish assessors, and levied a tax in a legal and proper manner, and issued legally their warrant for its collection, under which the collector took and sold the articles mentioned in the writ, the defendant had the right to open and close. *Bangs v. Snow*, 1 Mass. 181.

In an action of trespass *quare clausum fregit* the plea was soil and freehold in the defendant. Replication, that the soil and freehold were not in the defendant, and issue joined. It was held that, on the plea of soil and freehold tendered by the defendant, on which issue was joined and on which the trial was held, there being no other plea or issue, the right of opening and closing the argument belonged to the defendant; as, by such plea, he admitted the act complained of as a trespass, and undertook to prove the property of the soil in himself, and he therefore had the affirmative, and, if he failed to make it out, the verdict must be against him. *Davis v. Mason*, 4 Pick. 156.

These decisions were made previous to the adoption by the supreme judicial court (1836) of the uniform rule of giving the right of opening and closing in all cases to the plaintiff. And this rule has since obtained in Massachusetts, and is adhered to in that state with such rigidity that that court has held that, where the defendant admits the plaintiff's cause of action, and the only issue for the jury is on the defendant's declaration in set-off, the plaintiff is still entitled to open and close. *Dorr* 61 L. R. A.

v. Tremont Nat. Bank, 128 Mass. 349. See *supra*, III. a. 1.

These two cases also indicate that, before the adoption of that arbitrary rule, the doctrine was the same there as elsewhere, on the subject being considered, and that, but for it, it would still be so.

In an action against a sheriff for taking and converting a stock of goods, property of the plaintiff, where the defendant justified alleging that he took the goods upon an attachment against another person, and that they were the property of such other person, and the plaintiff replied that the goods were the property of the plaintiff, and not of the attachment debtor, on the issue thus joined the defendant had the right to open the case, the affirmative being upon him. *Seavy v. Dearborn*, 19 N. H. 351.

In an action of trespass *quare clausum fregit*, where the defendants pleaded *liberum tenementum*, and the plaintiff replied *de injuria sua propria absque tali causa*; and issue was joined thereon,—the counsel for the defendant was entitled to the reply in the argument, as his plea admitted the possession, and the trespass charged in the plaintiff's pleadings, and tendered a new issue; and this, according to the general practice, and according to the 63d rule of court (1 Const. Rep. XXI.), entitled him to the reply. *Singleton v. Millet*, 1 Nott & M'C. 355.

In trespass for shooting a dog the general issue was not pleaded, but there were special pleas justifying on the ground that the dog was accustomed to bite. It was held that the defendant should begin. *Fish v. Travers*, 3 Car. & P. 578.

8. Slander and Libel.

In an action for slander in charging the plaintiff with larceny, where the answer was, (1) an admission of the speaking of the words, and justification, (2) matter in mitigation of damages, with a reply denying the mitigating facts generally, the defendant's counsel has the right to begin and conclude the argument to the jury; as, until the defendant has offered evidence to sustain the affirmations in the answer, there is no necessity for the plaintiff to produce any testimony. *Gaul v. Fleming*, 10 Ind. 253.

In an action for slander, by words charging the plaintiff with perjury, where the defendant justified the speaking of the words as charged, he had the burden of the issue, and this entitled him to open and close. *Tull v. David*, 27 Ind. 377.

In an action for slander, where the defendant only pleads facts and circumstances in mitigation without the general issue or justification, the defendant is entitled to begin. *McCoy v. McCoy*, 106 Ind. 492, 7 N. E. 188.

These cases are under the Indiana statute (see *supra*, III. a. 2), which changed the English rule stated in *supra*, III. b.

Where the truth of the words is pleaded in justification, it is a complete defense in a civil action for libel, and the burden of the issue is on the defendant. *McIntyre v. Bransford*, 13 Ky. L. Rep. 454, 17 S. W. 359. The court stated that on the hearing of the appeal complaint was made (by the plaintiff) of the ruling below that the burden was on the defendant, and that the plaintiff claimed it. The only apparent reason why the plaintiff should want to assume the burden would seem to be that it would give him the right to open and close.

This decision is under the Code of Kentucky, *supra*, III. a. 2, and is contrary to the common-law rule. See *supra*, III. b.

In an action for libel the defendants pleaded a justification. This entitled them to open and close the case to the jury. *Hall v. Elgin Dairy Co.* 15 Wash. 542, 46 Pac. 1049.

And this is under the Code of Washington, *supra*, III. a, 2, and, as stated of like cases, is opposed to the common-law rule set out in *supra*, III. b.

In an action upon a bond conditioned to prove the plaintiff a bankrupt with plea of condition performed, the plaintiff has a right to open the cause, even though the defendant holds the affirmative of the issue; as malice may be given in evidence in aggravation of damages in such an action. *Sutton v. Mandeville*, 1 Cranch C. C. 187, Fed. Cas. No. 13,851. The action, of course, is kindred to an action for slander of trade or business.

9. Assault.

In an action for assault and battery, plea *son assault demene*, replication, *de injuria*, etc., the defendant on the trial has the right to begin and close the evidence and argument to the jury. *Downey v. Day*, 4 Ind. 531. Under statute *supra*, III. a, 2.

In an action by a woman and her two infant children against the defendant, seeking to recover damages from him for the killing of the husband and father of the plaintiffs, where the plea was self defense, the burden of the proof is on the plaintiffs, and they should be awarded the closing argument. *McClurg v. Igleheart*, 17 Ky. L. Rep. 913, 33 S. W. 80.

Why a plea of self defense is not as complete a defense in a case like the foregoing as the plea of the truth of the words in justification in an action for libel is difficult to discover. And yet, as has been seen, in *McIntyre v. Bransford*, 13 Ky. L. Rep. 454, 17 S. W. 359, *supra*, V. b, 8, it was held that the burden of the issue was on the defendant.

Where, in an action for assault and battery, the plea did not admit all the allegations of the plaintiff, but only a little bit of the beating, and one blow with an ax heve, and justified that, it was held not to be a good plea of justification, and that the plaintiff was entitled to open and close. *Seymour v. Bailey*, 76 Ga. 338.

In an action of trespass for personal injury, where the defendant filed a plea of not guilty, and also two special pleas justifying the assault, upon all of which issue was joined, and, before the trial, the plea of not guilty was withdrawn, and a trial was had on the issues joined on the special pleas, the court said that, while a ruling that the plaintiff is entitled to the opening and conclusion of the argument to the jury may be regarded as a departure from what is understood to be the better and correct practice, as, under the issues thus formed, the burden of proof rested upon the defendant, yet, as the trial court had allowed the defendant first to offer his evidence to maintain his pleas, which entitled him to give any proper rebutting evidence to that offered by the plaintiff, the error in denying the defendant the privilege of opening and closing the argument to the jury was so slight that it ought not to be a ground for a reversal. *Kells v. Davis*, 57 Ill. 261.

In an action for an assault and battery the only plea was *son assault demene*, to which the plaintiff replied *de injuria*, and issue was joined thereon. Both parties claimed the right to begin, and the trial court decided that the defendant had the right to open and begin. It was held that, according to the well-settled English practice, the party who substantially asserts the affirmative of the issue has generally the right to begin; and, if the record con-

tains several issues, and the plaintiff holds the affirmative in any one of them, he is entitled to begin. The court then held that the circuit court had erred in denying the right to begin to the plaintiff, and in doing so went over the English cases on the subject of the right to begin in actions where the damages are unliquidated, and approved thoroughly the doctrine laid down in *Carter v. Jones*, 1 Moody & R. 281, 6 Car. & P. 64, *supra*, III. b, and more thoroughly set forth by Lord Denman in *Mercer v. Whall*, 5 Q. B. 447, 14 L. J. Q. B. N. S. 267, 9 Jur. 578, *supra*, III. b, and disparaged, for the reasons there laid down, the case of *Cooper v. Wakley*, 3 Car. & P. 474, Moody & M. 248, *supra*, III. b, and the cases immediately preceding it, and in doing so, among other things, said: "We have stated thus fully the views of Chief Justice Denman in the case of *Mercer v. Whall*, because they are very able and are strikingly appropriate to the case under consideration. That case has firmly established the rule of practice in England, and, being well sustained by reason and authority, we consider it a rule of our practice also. It is very important that a uniform rule of practice on the subject should exist, and we know of none which would be more convenient, simple, and just than the one just mentioned." *Young v. Highland*, 9 Gratt. 16.

10. Pleas in abatement.

In an action upon an agreement to lay out money paid into the hands of the defendant by the plaintiff for the purchase of an annuity, and allegation of the breach, the defendant had pleaded in abatement that the promises had been made jointly by himself and another. It was held that the counsel for the plaintiff should begin. *Robey v. Howard*, 2 Starkie, 555.

In an action of assumpsit with a plea in abatement that the promises were made jointly with another, and replication that they were not so made, on the trial of the issue the defendant begins. *Fowler v. Coster*, 3 Car. & P. 463, Moody & M. 241.

In an action of assumpsit, with a plea in abatement, that the one who jointly promises was not joined, it would seem that the plaintiff, after proof of the order and delivery of the goods, may reserve his evidence as to the plea, in reply to the defendant's case. *Stansfeld v. Levy*, 3 Starkie, 8.

In an action of assumpsit for work and labor the plea was that the promise was made to the plaintiff and another, and not to the plaintiff alone. Replication, that the promise was made to the plaintiff alone, and not to the plaintiff and another. It was held that the plaintiff should begin. *Davies v. Evans*, 6 Car. & P. 619. See *Bonfield v. Smith*, 2 Moody & R. 519, *supra*, V. a, 1.

11. Other cases.

In an action on a delivery bond, the defense being that a delivery to the sheriff had been made by the defendant, the *onus probandi* was upon the defendant, and he was entitled to begin. *Pogue v. Joyner*, 7 Ark. 462.

In an action of *scire facias* on a judgment, when the only plea is payment, the defendant is entitled to the opening and conclusion. *Saulsbury v. Ford*, 5 Houst. (Del.) 575.

After the levy of an execution upon a stock of goods, fixtures, etc., of a judgment debtor the latter made an assignment by an order of the court by consent of the parties. The property was turned over to the assignee, who sold the stock and had the proceeds. The judgment creditor then filed a petition to have himself

declared a preferred creditor by reason of the lien of his execution. In answer to this, the assignee alleged that the note upon which the judgment was rendered and the execution issued was fraudulent and void. It was claimed on appeal that the court below erred in allowing the assignee to make the opening and closing arguments. It was held that the objection was not well taken. *Chronister v. Anderson*, 73 Ill. App. 524.

In an action to recover damages for the breach of a contract, where the answer was that the contract was obtained by fraud, and the reply was a denial, the defendant had the right to the opening and close of the case, as the burden of the issue was upon him. *Patton v. Hamilton*, 12 Ind. 256.

When none of the defendant's pleas are of a negative character, and the attitude of the pleadings admits the plaintiff's cause of action to have existed, and requires the defendant to establish his defense to defeat it, as, where plaintiff, having been established as an apprentice to the defendant, brought suit, after the expiration of his term of service, for a breach of the stipulations contained in the indenture, and the defendant filed several pleas, all of which were affirmative, and placed the burden of proof on him, and he introduced some evidence conducing to sustain one of his pleas only,—he has a right, upon sustaining his defense to any extent by the introduction of evidence in support of any one of his pleas, to open and conclude the argument before the jury. *Page v. Carter*, 8 B. Mon. 192.

In an action upon a bond given to a sheriff to indemnify him against any loss or damages which he might sustain by reason of a levy and sale which he had made, where the defense was that one of the defendants was induced to execute the bond by false and fraudulent representations made to him, the plaintiff was held to have the burden of proof and the affirmative of the issue, as, to recover, he was required to produce the bond and to establish its delivery by the defendant. It was held that defendant's answer did not admit the delivery of the bond, and that it was, therefore, incumbent upon the plaintiff to give such proof as would warrant a finding of the fact that it was delivered to the plaintiff. *Benedict v. Penfield*, 42 Hun, 176. To the same effect, *Stillwell v. Archer*, 64 Hun, 169, 18 N. Y. Supp. 888.

In an action to recover rent reserved in a written lease made by the plaintiff to the defendant, where the complaint alleged the execution of the lease, the defendant's entry into possession of the demised premises, the performance by the plaintiff of all the conditions of the lease, and the defendant's breach by refusing to pay the rent, and alleged that there was then due and owing to the plaintiff therefor the sum of \$625, with interest; and the answer denied these averments, except the first two, and set up a constructive eviction by reason of the plaintiff's failure to supply steam heat and steam power covenanted for by the lease,—the plaintiff had the right to open and close the case. *Trenkman v. Schneider*, 23 Misc. 336, 51 N. Y. Supp. 232.

Where, in a proceeding to enforce a mechanic's lien, the parties had agreed that the defendant should file a plea of payment, and that the case should be tried on that plea with the same effect, as to determining whether any and what amount was due and unpaid, as though scire facias had been issued, and the testimony of the defendant tended to prove that the plaintiff had wantonly and maliciously delayed the work to the damage of the defendant, and the plaintiff's testimony tended to prove that said work had been diligently done and without unnecessary delay,—the defendant

was held not to be entitled to conclude the summing up to the jury. Although the record showed only the plea of payment, and upon the letter of the rule of court the defendant was entitled to begin and conclude, still, as, under his plea, the defendant might have been confined to a proof of matters tending to show actual payment; whereas the real contest was about a matter only admissible by treating the plea as accompanied with notice, and the evidence was offered and admitted without regard to the form of the plea,—it was held that the court rightly observed the spirit of its rule of practice in giving the right to open and conclude the argument to the plaintiff. *Smaits v. Ryan*, 112 Pa. 423, 3 Atl. 772.

This would indicate that there is a rule of court on the subject in Pennsylvania, although no other Pennsylvania case alludes to it; and whether it exists, and what it is, cannot be ascertained.

In a suit brought by a bank against a hardware company as maker, and a leather company as indorser, of a promissory note, the hardware company pleaded that it was accommodation maker only, and prayed that it have protection as such, while the leather company pleaded that the hardware company was the maker of the note for value, *vs.*, for shares of the capital stock of the leather company, and that the latter was the indorser and only so liable. The hardware company admitted the holding of the shares of stock, but alleged that it was held by it as a collateral security for its liability on the note. It was held that the two companies stood as if the leather company were suing the hardware company on the note and the hardware company defending on the ground that it was without consideration, and that the court did not err in giving the hardware company the opening and closing on the trial. *Lone Star Leather Co. v. City Nat. Bank*, 12 Tex. Civ. App. 128, 34 S. W. 297.

In an action upon a bond where the only pleas were payment and usury, the defendants clearly had the right to open and conclude the argument to the jury. And, in answer to the claim that the defendants had waived the right, the court said: "They claimed it before the bond was read to the jury. This certainly did not amount to a waiver. After the evidence was in, they still had the right to open and conclude to the jury in argument." *Sammons v. Hawvers*, 25 W. Va. 678.

In a petition for restoration of conjugal rights at the suit of the husband against the wife she pleaded cruelty. It was held that, as she did not mean by her answer to deny that she withdrew at all, but denied that she withdrew without reasonable cause, and specified that cause, which she was bound to prove, her counsel had a right to begin. *Cherry v. Cherry*, 1 Swabey & T. 319, 28 L. J. Mat. N. S. 36.

In an action on a covenant that the defendant would at the end of a certain term demise to the plaintiff repurchase the stock, etc., on the premises, and the plea was that the plaintiff had fraudulently removed all the valuable part of the stock, and left nothing but worthless goods, it was held that the defendant was entitled to begin. *Wooton v. Barton*, 1 Moody & R. 518.

In an action of covenant, where the deed declared on contained covenants, first, that the defendants would assign a lease to the plaintiff, and secondly, that they would also make over to him the fixtures of the premises purchased, and the declaration alleged breaches of each covenant, and the plea was that the deed was obtained by the plaintiff from the defendants by fraud and covin, and there was a replication traversing that allegation and issue there-

on, the defendants were entitled to begin, the affirmative lying on them. *Beeve v. Underhill*, 6 Car. & P. 773, 1 Moody & R. 440.

In an action for selling hair oil in bottles with envelopes resembling those sold by the plaintiff, the answer was that the plaintiff, while representing to sell a superior oil, in reality was selling oil of an inferior quality, and was perpetrating a fraud on all who bought it, and the reply was *de injuria*. It was held that the defendant was entitled to begin. *Rowland v. Bernes*, 1 Car. & K. 46.

In an issue directed under the interpleader act, on an application made by the sheriff, who had seized certain goods, the title to which was disputed, the declaration stated that the plaintiffs had laid a wager that certain goods therein described were not on the day mentioned the property of them, or either of them, averring that the goods were not the goods of the plaintiffs, or either of them. The plea was that on the day mentioned the goods were the property of the plaintiffs, or one of them. It was held that the affirmative lay with the defendant, and he was entitled to begin, as, if no evidence were to be given on either side, the plaintiffs would be entitled to a verdict. *Hudson v. Brown*, 8 Car. & P. 774.

Where a person arrested by virtue of a ca. sa. had applied to the inferior court to take the benefit of the act for the relief of honest debtors, and the application was resisted by creditors on the ground of fraud in the schedule filed by the applicant, the creditors are entitled to open and conclude. *Johnson v. Martin*, 25 Ga. 268. The allegation of fraud would seem to admit that, but for it, the applicant would have been entitled to his discharge, as it tacitly admitted all the statements made by the debtor in order to obtain his discharge.

c. Averment affirmative in form, but negative in substance.

Where the averment in a pleading does not in terms or form deny the allegations in the former pleading, but alleges facts which simply controvert the averments of the former pleading, such allegations do not amount to a confession and avoidance or justification, and will not operate to shift the burden of proof, and give to the party making them the right to open and close.

As, in an action for removing a fence situated on the line dividing the lands occupied by the parties, where the answer set up, among other things, that the said partition fence at the time of its removal belonged to the defendant, etc., this answer could not operate to give defendant the right to open and close, it being a more argumentative denial that the fence was a partition fence, as it could not be the separate property of the defendant, and yet belong jointly to plaintiff and defendant. *Haines v. Kent*, 11 Ind. 126.

And in an action for slander, where the complaint alleged that the defendant had falsely, etc., spoken to certain named persons of and concerning the plaintiff certain false, malicious, and slanderous words, setting them out, and the answer contained a single paragraph, apparently, for the purpose of enabling the defendant to obtain the opening and closing of the case to the jury, which, after admitting that he had spoken substantially the same words stated in the complaint, setting them out and giving at great length his version of the circumstances under which the words were spoken, proceeded as follows: "The defendant avers that all statements made by him alleged in the complaint of the plaintiff were of and concerning such plaintiff, but without malice," the plaintiff was entitled to open and close, as this did 61 L. R. A.

not confess and avoid the cause of action stated in the plaintiff's complaint, but, on the contrary, affirmed facts which were utterly inconsistent with the truth of facts entering into and constituting a material element in plaintiff's cause of action. *Shulze v. McWilliams*, 104 Ind. 512, 3 N. E. 248.

And in an action upon a contract whereby the plaintiff sold defendant a quantity of corn which he alleged defendant refused to take and accept, and the defendant answered, admitting the purchase of the corn, but alleging a compliance on his part and a willingness to accept it, and the failure of the plaintiff to deliver the quality of corn mentioned in the contract, and that plaintiff undertook to deliver corn a large portion of which was unsound and differing from that called for by the contract, as this only denied the averment of the complaint as to the compliance with the contract on the part of the plaintiff, and did not make such an admission of the facts alleged in the complaint as that the plaintiff would not be required to introduce evidence in the first instance to entitle him to judgment. *Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141.

And in an action for the partition of real estate, where the complaint alleged title in a certain party deceased, and that the plaintiff and defendants were her heirs at law, and two of the defendants answered that they were absolute owners of the land in question, having acquired a title through their former original deceased owner named in the complaint, before her death; as the answer was, in effect, a denial, leaving the burden of proof, so far as the complaint was concerned, upon the plaintiff. *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. 660.

And in an action where the complaint alleged that the plaintiff sold a parcel of land to defendant, and took back the latter's promissory notes secured by mortgage on the lot, and that the defendant fraudulently asserted to the plaintiff that there were certain liens and charges upon said land, which the plaintiff allowed, and the answer of the defendant consisted of a single special or affirmative paragraph in which there was no direct denial of any allegation of the complaint, but which did not confess and avoid the plaintiff's cause of action, but did allege facts utterly inconsistent with the truth of the material facts alleged in the complaint. *Kinney v. Dodge*, 101 Ind. 573.

It is held in all these cases that the answer amounts only to an argumentative denial of the allegation of the complaint. To the same effect, *Bothrock v. Perkinson*, 61 Ind. 39; *Samples v. Carnahan*, 21 Ind. App. 55, 51 N. E. 425; *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429.

Where plaintiff, as a commission merchant, complained for commissions and advances made in the purchase of wheat for the defendant, and the answer was that no wheat was actually purchased, but that the transaction was simply a gaming contract and a wager upon the future price of wheat, to which answer there was a reply of a general denial, the plaintiff had the right to open and close. *Whitesides v. Hunt*, 37 Ind. 191, 49 Am. Rep. 441.

In *Florence Oil & Ref. Co. v. Farrar*, 48 C. C. A. 345, 109 Fed. 254, the court said that the pleadings disclosed that the admission of the sale and delivery of the engines and boiler in question was rather argumentative in its character, and that the answer contained at least a denial that the engines and boiler delivered were the ones which were ordered. And that from these circumstances it appears that there was no abuse of discretion in according

to the plaintiffs the right to open and close the case.

And in *Denny v. Booker*, 2 Bibb, 427, which was an action of detinue for a slave, and the plea was that the slave was in the possession of, and belonged to, the intestate of the defendant, at the time of his death, and that the defendant had taken out letters of administration of the estate, and held the negro by virtue thereof, it was held that plaintiff had the right to open and close; as such plea was in reality nothing more than the general issue of *non detinet*, and did not release the plaintiff from proving title to the slave, nor was the burden on the defendant thereby increased.

To constitute a plea of justification, the facts alleged must be such as are not admissible under a plea of the general issue. And so, in an action to recover damages for injuries caused by the negligence of defendant's servants in not locking or securing a turntable, an answer which admits that the plaintiff was hurt by a turntable belonging to and used by the defendant at the time and place alleged and set forth in the plaintiff's declaration, and alleges that defendant was not at fault or negligent, is not a plea of justification such as would give the defendant the right to open and conclude the case to the jury. *Chapman v. Atlanta & W. P. R. Co.* 74 Ga. 547.

And so, in an action against a railroad company for injury to the plaintiff, where the plea of the defendant admitted that the plaintiff was injured by a train of the defendant, but denied that it was guilty of negligence, and asserted that it used all ordinary care and reasonable diligence, but the negligence of plaintiff caused the injury, it is not error to deny the company the right to open and conclude the case. *Georgia R. Co. v. Williams*, 74 Ga. 723.

And in an action for injury to a daughter of the plaintiff by the negligence of the defendant, a plea admitting that the daughter was employed by defendant in its spinning room, and while so employed was injured, which then avers that she was not in the discharge and performance of her lawful duty and due service, but acting in violation of instructions received from immediate superiors, and engaged in doing an act positively prohibited which caused her injury; and denying that defendant had ever employed or continued in charge an incompetent servant with knowledge of his incompetency, or that at the time of the injury its servants were incompetent or neglectful; and then averring that the actions of the servants upon the day and at the time of the injury save the individual act of plaintiff's daughter, were right and proper,—is not in confession and avoidance, and does not amount to a special plea of justification, such as entitles the defendant to open and conclude the argument to the jury. *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838.

Where, to a suit to recover damages for the wrongful and malicious suing out and levying of a distress warrant, and the procuring of a warrant to dispossess plaintiff of certain premises, and actually dispossessing him thereunder, the defendant filed a plea in the following words: "And now comes the defendant . . . and for further plea in this behalf says that he was authorized by law to have the distress warrant and dispossessory warrant set out by plaintiff's declaration issued and put into effect or executed, and that the defendant was justified in taking out the same, and that he did so in the utmost good faith and without malice; and of this he puts himself upon the country,"—this was only a plea of the general issue, putting in issue the main allegations in the declaration, and was not such a plea of justification as gave the defendant the right to open and conclude. *Phelps v. Thurman*, 74 Ga. 837.

In an action by a United States marshal upon a bond of a deputy and sureties to recover for the negligent act of the deputy, where one of the breaches assigned was that the replevin bail for the taking of which the negligence was attributed was insolvent, and one of the pleas set up that such bail was a good and sufficient freeholder, and a good, able, and responsible surety, for the payment of the amount demanded, etc., concluding with a verification, with replication, concluding to the country,—the burden of proving this issue lay upon the plaintiff, who, thus having the initiative in the evidence, was entitled to the opening and close. *Hand v. Taylor*, 4 Ind. 409.

Where, in an action for a tract of land, the defendant filed an equitable plea wherein she alleged that plaintiff's grantor held the land for her in trust, which was known to the plaintiff at the time of his purchase, and that she had gone into possession and made improvements, the plaintiff had the burden on him to establish his right to recover the land; and, whenever the burden is upon the plaintiff, he has a right to open and conclude, although the defendant in his plea may take the affirmative upon certain issues. *Ryals v. Powell*, 83 Ga. 278, 9 S. E. 613. See *supra*, II.

In *Brown v. Morris*, 3 Bush, 81, an action for malicious prosecution, it was decided that the issue of probable cause, or of malice without probable cause, imposed the burden of proof, in the first instance, on the defendant, who thereby assumed the affirmative. And that such an issue, by the Kentucky Code of Practice, confirming the common law, entitles the defendant in the action to the conclusion of the argument. That this is not now the rule in Kentucky, see the next case.

In an action for malicious prosecution the burden cannot be shifted from the plaintiff to the defendant by a general traverse, or by a special plea denying malice and averring probable cause, as such a plea only puts in issue the truth of the facts alleged in the petition. *Lucas v. Hunt*, 91 Ky. 279, 15 S. W. 781, Overruling *Brown v. Morris*, 3 Bush, 81.

In an action to recover possession of a quantity of logs, where the plaintiffs alleged that they were the owners, as an answer affirmatively alleging that the land from which the logs were cut belonged to the defendant, and that the logs were his property, is simply a denial of the plaintiff's title, the right to the concluding argument belongs to the plaintiffs. *Barker Cedar Co. v. Roberts*, 23 Ky. L. Rep. 1845, 65 S. W. 123.

In *Chambers v. Hunt*, 18 N. J. L. 339, two of the judges held that the rule that the party holding the affirmative of the issue must begin the proof, and is entitled to the opening and reply, is the same in replevin as in other actions; and that a plea in replevin of property in the defendant, or in a third person, and not in the plaintiff, is not an affirmative plea, as it admits nothing, not even the taking. That such a plea is wholly negative in its character; that it denies the plaintiff's title and takes away his right to a deliverance, and necessarily compels the plaintiff to reaffirm his title and consequently to prove it on the trial; and that it is not a special plea in bar; and that, under such circumstances, the plaintiff had the right to begin. The court, however, was equally divided on the subject, as the remaining two judges held that it was a special plea in bar.

In *Gilland v. Lawrence*, 13 N. Y. Week. Dig. 372, the complaint alleged a sale of whisky at so much per gallon. The answer was, first, an admission of the cause of action, and then,

as a defense, an allegation that plaintiff had agreed at the time of the sale to take his pay in lumber at so much per thousand; that defendant had always been ready to deliver said lumber, but plaintiff had neglected and refused to take his pay in lumber. It was held that, taking the whole answer together, the plaintiff's cause was not admitted, and that, therefore, defendant was not entitled to open and close; that by alleging the sale of so much whisky at \$2.50 per gallon, the complaint, in substance, alleged that the price was to be paid in money; while the answer, in effect, denied that the price was to be paid in money, and alleged that it was to be paid in timber; hence, the answer denied a material allegation of the complaint. That the question must be decided on the whole answer taken together, and that the fact that this defense was set up affirmatively after what purported to be a general admission is not controlling. This may be so, but one may be pardoned for having the idea that an answer which sets up that payment is to be made *in specie*, instead of money, does allege an affirmative defense.

In an action in which the complaint alleged the making of two separate contracts, the first, to make and deliver to the defendant a certain machine, and by the second contract two sets of dies and punches; and the answer admitted making the contracts, but raised an issue as to whether the plaintiff ever delivered machines, pursuant to the contract, which conformed to the requirements thereof,—the defendant is not entitled, upon the trial, to open and close the proof, and to reply in summing up to the jury, as the answer cast on the plaintiff the burden of proving that he had performed his contract as a condition precedent to a recovery, and he therefore held the affirmative. *Howard v. Hayes*, 15 Jones & S. 89.

In an action for the price of putting on a roof, where the petition alleged that the agreement was for a certain amount a square, and that the work done and materials furnished were according to the agreement, and the answer was that, in addition to the price per square, it was provided by the agreement that the roof should be constructed in a certain manner, the plaintiff, upon the trial, is entitled to open and close, as the effect of pleading a different contract was to deny that the contract was as alleged in the petition. *Fiedeldey v. Reis*, 12 Ohio L. J. 77.

In an action to recover the value of goods seized by the defendant and the sheriff, where the plaintiff in his petition claimed title in the goods, and the only defense set up in the answer was fraud in the assignment under which plaintiff claimed, such an answer does not admit that the plaintiff ever had title to the goods, and is, in effect, only a special denial of such title, as, before the plaintiff would be entitled to recover at all, he would have to show a title in himself; and a ruling of the court giving the plaintiff the opening and closing of the cause in giving testimony and in the argument to the jury is correct. *Beatty v. Hatcher*, 13 Ohio St. 115.

In an action of covenant where the defendants pleaded covenant performed *absque hoc*, and payment with leave, etc., such plea is a negative plea, in part at least, and introduces a negation after an affirmative inducement. It therefore contains an averment that the defendants had performed the covenants into which the plaintiff declared that they had entered, and it contains also a denial that the plaintiff had kept the covenants to be performed by him, and the plaintiff is entitled to conclude to the jury. *Smith v. Frazier*, 53 Pa. 226.

In an action of ejectment the plaintiff at the

trial showed a good title in himself. The defendant claimed that the plaintiff held the legal title by parol trust for another and his heirs, etc., through whom the defendant claimed, and thereupon moved the court for permission on his part to open and close the case to the jury, upon the ground that the affirmative of the issue was on him. The court denied the motion, and this, on appeal, was held to be correct. *Van Storch v. Van Storch*, 196 Pa. 545, 46 Atl. 1062.

Where the plaintiff, in his complaint, stated as his cause of action a certain contract in writing containing certain terms and stipulations, while the defendant, in his answer, in effect denied that the contract was properly described in the complaint, and, on the contrary, alleged that the contract really contained other terms and stipulations, it could not, therefore be said that the defendant admitted the plaintiff's cause of action, as stated in the complaint, and hence, under the rule, he was not entitled to open and reply. *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845.

For rule, see *supra*, III. a, 1.

In an action upon a written agreement whereby the assignors of the plaintiff let to the defendant certain premises, which the defendant undertook to put in habitable repair within a reasonable time, and deliver up the same, etc., at the expiration of the term in such state of repair, where plaintiff alleged a breach *in hæc verba*, and the plea alleged performance of the agreement in regard to repairs and the condition of repair mentioned in the agreement at the time the possession was recovered, the plaintiff had the right to begin. *Belcher v. M'Intosh*, 8 Car. & P. 720. To the same effect, *Doe ex dem. Schools & Almshouse v. Rowlands*, 9 Car. & P. 734, 5 Jur. 177.

In an action on a policy of insurance effected by the plaintiff on the life of his wife, where the first count set out the policy, containing the declaration made by the plaintiff at the time of effecting the policy, part of which was that the wife was not afflicted with any disorder which tended to shorten life, and that she had led, and continued to lead, a temperate life, and that the said declaration was in all respects true; and the defendant pleaded that, before the making of the policy, and on divers times after, the wife had been, and was, afflicted with certain disorders,—the plaintiff had the right to begin. *Huckman v. Fernie*, 3 Mees. & W. 505, 2 Jur. 444, 1 Horn. & H. 149.

A declaration in assumpsit stated that the defendant had agreed to deliver to the plaintiffs a quantity of hay of good quality, such as no reasonable person would object to, at a price per ton by a certain day, and alleged that, although the defendant had delivered a part of the hay, and plaintiffs were willing to pay for the same and receive the residue, yet the defendant did not, nor would, deliver the residue, and refused to deliver any other than hay of bad quality, and such as any reasonable person would object to. Plea, that the defendant was able and willing to deliver the residue of the hay according to his promise, although the day for such delivery had not elapsed, and, although defendant tendered a load of hay the day before such day of delivery of good quality, and such as no reasonable person would object to, yet the plaintiffs refused to receive it, etc. The defendant's counsel having submitted that he ought to begin, the court held that the issues were on the plaintiffs, as the plea was a traverse of the allegation and declaration. *Crowley v. Page*, 7 Car. & P. 789.

In an action of assumpsit the declaration stated that the defendant agreed to build houses according to certain specifications, and

alleged for a breach that he did not so build them. The defendant pleaded that he built the houses according to the specifications. It was held that the plaintiff must begin. *Smith v. Davies*, 7 Car. & P. 307.

In an action of assumpsit on a warranty of a horse, where the declaration stated the warranty to be that the horse was sound, except crib-biting, and averred that it was not sound, except crib-biting; and the only plea was that the horse was sound according to the warranty, on which issue was joined,—it was held that plaintiff was entitled to begin. *Osborn v. Thompson*, 9 Car. & P. 337, 2 Moody & R. 256.

Amos v. Hughes, 1 Moody & R. 464, was an action in assumpsit for breach of a contract to emboss calico in a workmanlike manner. The breach was that the defendant did not emboss the calico in a workmanlike manner, but, on the contrary, embossed it in a bad and unworkmanlike manner. The plea was that the defendant did emboss the calico in a workmanlike manner, and issue thereon. It was held that the plaintiff was entitled to begin.

In an action for trespass for breaking and entering the close of the plaintiff, the defendant pleaded, first, *liberum tenementum*, then several other pleas, in which he claimed a right of way over the *locus in quo*. The pleas were severally traversed and issues joined thereon, and there was no general issue. The defendant having claimed the right to begin, it was contended on the part of the plaintiff that the plea of *liberum tenementum* was, in effect, a denial that the *locus in quo* was the close of the plaintiff. The court held that the defendant must confine his proof to the particular close in the declaration, but that, the language of the defendant's plea being in the affirmative, he might prove the close mentioned in the declaration to be his property, and he was therefore entitled to begin. *Pearson v. Coles*, 1 Moody & R. 208.

In an action of replevin, the defendant avowed the taking as a distress for an annuity, to which there was a plea that no memorial of the annuity was enrolled, and there was a reply that there was a memorial enrolled, and a rejoinder that the memorial did not truly state the names of the persons by whom the annuity was to be received, and the considerations, but was untrue. Sur-rejoinder that the memorial did truly state the names of the persons by whom the annuity was to be beneficially received, and the considerations. On these pleadings, it was held that the defendant should begin. *Hogarth v. Penny*, 1 Car. & K. 608, 14 Mees. & W. 494, 14 L. J. Exch. N. S. 345.

See *Soward v. Leggatt*, 7 Car. & P. 618, *supra*, III. b.

d. Denial or failure to admit unnecessary averment or conclusion.

Where a plaintiff inserts in his declaration or complaint an allegation wholly unnecessary to sustain his cause of action, and the defendant either denies or omits to admit the same,—such denial or failure to admit should not be taken into consideration in determining which party has the right to open and close.

And the same may be said of a conclusion improperly incorporated in the plaintiff's pleading.

An allegation in a complaint upon a promissory note, in addition to the necessary averments to render the complaint sufficient, that the plaintiff purchased the note for a valuable consideration before maturity, without any notice or knowledge of any defense to the same, will not avail to give the plaintiff the right to open and close, if the answer, after alleging

facts founded upon a breach of warranty sufficient to constitute a defense, avers, in substance, that the plaintiff had full notice of said facts at the time he purchased the note, and the reply is practically a reiteration of the allegation of the complaint as to the purchase of the note and the consideration thereof before maturity, without notice or knowledge of any defense. *Steele v. Hinshaw*, 14 Ind. App. 384, 42 N. E. 1034.

Plaintiffs alleged in their petition that defendant was indebted to them for money advanced to buy wool, and that an amount was due them therefor with interest. Defendant, by his answer, admitted all the facts as pleaded by the plaintiffs, but denied that he was indebted to them in the sum claimed by them, and also set up a counterclaim. The trial court gave to defendant the opening and closing of the case. It was held that in this there was neither error nor an abuse of sound judicial discretion. *Hallowell v. Fawcett*, 30 Iowa, 491.

Where a complaint alleges facts not essential for the plaintiff to prove, and the same are denied by the answer, such a denial does not deprive a defendant who sets up an affirmative defense of the right to open and close. *Lewis v. Donohue*, 27 Misc. 514, 58 N. Y. Supp. 319.

In an action on a promissory note, if the defendant has made such an admission as will give him the right to open and close, such right is not lost by denying or failing to admit an allegation in the complaint that the note was given for value received, as it was not necessary for the plaintiff either to state a consideration in his complaint, or prove one on the trial. *Hoxie v. Greene*, 37 How. Pr. 97.

The right to assume the affirmative and open and close, which inheres in a defendant, is not changed or affected by the fact that the defendant had denied each and every allegation in the complaint contained not specifically admitted, where in reality such denial is to certain conclusions of law, or allegations that the plaintiff was not bound to prove in order to recover. *Hurliman v. Seckendorf*, 9 Misc. 284, 29 N. Y. Supp. 740.

For the same reason, it is error to deny the defendant the right of opening and closing to the jury in an action on a promissory note, where the answer denied each and every allegation in the complaint contained, except as thereafter admitted, and then attacked the consideration of the note and pleaded other affirmative facts in defense of it, and the complaint alleged that the plaintiffs were the owners of the note, and the answer did not specifically admit it. *McShane v. Braender*, 66 How. Pr. 294.

In an action to recover rent, where the answer interposed by the defendant did not put at issue any material allegation of the complaint, but merely denied the legal conclusion from the facts which were well pleaded by the plaintiff, and set up an affirmative defense, a refusal to allow the defendant to assume the affirmative is error. *Merrill v. Calcagnino*, 8 N. Y. Week. Dig. 487. But, as the trial court had directed a verdict for the plaintiff, which action of the court was acquiesced in by the defendant at the time, the court held the error mentioned to be no ground for reversal.

In an action upon a policy of life insurance which contained a provision that, if the person whose life was thereby insured should die in, or in consequence of, a duel, or the violation of the laws of any nation, state, or province, then, and in every such case, the policy should be null and void; and the complaint alleged, among other things, that the death of the insured was not caused by the breaking of any of the conditions and agreements in the

policy; and the answer of the defendant denied this allegation, admitted the death, and set up that the insured died in consequence of a violation of the laws of New York, and admitted that the defendant insured the life by the policy of insurance and referred to the copy annexed to the complaint,—the defendant held the affirmative of the issue upon the trial, and it was error to refuse to allow it to open and close the case; as the insertion of an unnecessary allegation in the complaint, which the plaintiff was not required to aver or prove in order to establish his case, could not, and did not, deprive the defendant of the right to the affirmative, where such right actually existed and this was not changed by the denial of this unnecessary allegation. *Murray v. New York L. Ins. Co.* 85 N. Y. 236.

In an action upon promissory notes, where the defendants admit the making, indorsement, transfer, and delivery of the notes, and deny the other allegations in the complaint, and then proceed to set forth an affirmative defense, the defendant is entitled to open and close the case. *Linsley v. European Petroleum Co.* 3 Lans. 176, 41 How. Pr. 56. The counsel for the defendant in the argument urged that the denial was manifestly intended merely to dispute the lawfulness of the claim, and nothing more; and it would seem that the court took that view, as they simply reversed the judgment because the defendant had not been allowed to open and close the case. It is nowhere stated in the case what the "other allegations" were.

In an action brought to recover an account for goods sold and delivered, where the plaintiffs alleged in their complaint that they were copartners, and one defendant alone appeared and answered denying the allegation as to the partnership of plaintiffs and admitting the partnership of the defendants, and the purchase, by the firm, of plaintiffs, of the goods stated in the complaint, and for a further answer alleged the dissolution of the defendants' partnership, the other defendant buying out the stock and continuing the business, and agreeing to assume and pay all the partnership debts including the plaintiffs', and that afterwards plaintiffs, with knowledge of these facts, agreed with said other defendant to accept, and did accept, a sum of money, and the individual promissory note of such other defendant to the amount of the balance, in discharge of their indebtedness,—the defendant was entitled to open and close, as the admission in the answer that the defendants purchased the goods of the plaintiffs as alleged in the complaint, and became thereby indebted to them therefor, as alleged, rendered the question whether the plaintiffs were, at the time of such sale, copartners wholly immaterial, and there was no occasion to prove that fact. *Millard v. Thorn*, 58 N. Y. 402.

In an action on a promissory note alleged to have been given for the purchase price of goods, where defendants admitted the sale and delivery of the goods and then set up as a separate defense that they were sold on a credit of four months, which term had not expired at the time the action was commenced, following with a denial of each and every allegation in the complaint not specifically admitted, the plaintiffs were entitled to open and close the case, since the averment that the goods were sold on credit does not constitute a substantive defense, but is in effect a denial that the defendants promised to pay at a time prior to the commencement of the action and that the debt was due, this being an essential fact which the plaintiffs were required to maintain, either by the admissions of the defendants, or by proof, though there was no averment in the complaint that defendants promised to pay, or

as to the time of payment. *Claffin v. Baere*, 28 Hun, 204. It would seem that no such specific averment was necessary in the complaint, as, upon the allegation of a sale and delivery of the goods, a promise to pay for them immediately would be presumed; and, the defendants having admitted every allegation of the complaint, their answer that the goods were sold on a credit would appear to have been essential to repel that presumption, and therefore to have been both substantive and affirmative.

In an action brought to recover the purchase price of certain diamonds, where the complaint alleged the sale thereof to defendant and non-payment and that the amount was due and payable, and the answer denied that the sum specified in the complaint, or any part thereof, was then due and payable, and alleged that the goods were sold and delivered by the plaintiff to the defendant upon a term of credit which had not expired at the time of the commencement of the action, the defendant has the affirmative, on the single issue raised by his answers, namely that of the plea of an unexpired term of credit, as the allegation of the complaint that the sum claimed is due and payable, and the denial thereof in the answer, add nothing to the issue. *Heilbron v. Herzog*, 165 N. Y. 98, 58 N. E. 759.

While *Claffin v. Baere*, 28 Hun, 204, is not mentioned in the opinion, that case is effectually overruled, and for the same reasons stated in the remarks upon it *supra*, the court in the last case, among other things, saying: "In the absence of any allegation in the complaint as to the time when payment is to be made, the law implies, not only the promise, but the duty, to pay on the delivery of the goods. Defendant's plea of an unexpired term of credit, which is relied on to defeat plaintiffs' recovery, is in the nature of an affirmative defense, which must be supported by evidence before the defendant can succeed. Like the defense of payment, it must not only be pleaded, but proved."

In *Fewster v. Goddard*, 25 Ohio St. 276, which was an action upon a promissory note, the petition set forth a copy of the note and alleged the whole amount thereof was due from the defendant to the plaintiff, and the defendant, by his answer, denied that anything was due on the note, and alleged that he had paid it in full, and there was no replication. It was held that the defendant was entitled to open and close.

In an action by an executor upon a note given to his testator, the complaint, after stating the death of the testator and alleging that letters testamentary had been granted to the plaintiff, alleged that no part of said note had been paid except \$174 to the plaintiff, wherefore the plaintiff demanded judgment for a certain amount. The defendant answered, admitting all the allegations of the complaint, except that as to the amount stated to have been paid, and then alleged that in certain ways he had paid the note in full, and for a second defense he alleged a counterclaim. The trial court denied the defendant the right to open and close, and this was sustained on appeal. *Sanders v. Sanders*, 30 S. C. 207, 9 S. E. 94. The only reason given by the judge who wrote the opinion in this case for holding that the plaintiff was entitled, under these pleadings, to begin, was that the complaint alleged that only a part of the note had been paid, leaving unpaid and still due a balance, and that this allegation was not admitted, but, on the contrary, the answer denied expressly that it was due and owing, and insisted that it had been paid in full; and that in this state of the pleadings, if the case had gone to the jury without

evidence on either side, the plaintiff would not have been entitled to a verdict. It is difficult to see why the allegation in the complaint that only so much had been paid was not entirely unnecessary, as the presumption was that nothing had been paid, and the allegation that so much was still unpaid and due was plainly a conclusion which, as has been frequently held, should not be taken into consideration, as the allegation of a fact in considering which party has the right to begin. See cases in this subdivision, *infra*. The case is only mentioned once, and that is, as will be seen, in *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305, *infra*, where the same court, in attempting to distinguish it, practically overruled it, and in which case the judge who wrote in *Sanders v. Sanders* took the very consistent position that the cases were identical.

In *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305, the facts were substantially similar to those in *Sanders v. Sanders*, 30 S. C. 207, 9 S. E. 94, *supra*; that is, it was an action upon a note in which, after alleging the execution and delivery by the defendant, the plaintiff further alleged that no part thereof had been paid, and there was still due and owing thereon the amount mentioned in the note, with interest. The defenses were, first, no consideration, the same having been given by mistake, and, second, what was practically an allegation of payment. The judge denied the defendant's right to open and reply, and for this error the judgment was reversed. The case is quite valuable as a review of the cases in South Carolina in which this question has been considered, up to the time of the decision. See *supra*, III. a. 1. Its chief element of weakness is the lame attempt to distinguish *Sanders v. Sanders*, as a reading of the two cases will exhibit the correctness of Justice McGowan's position in his dissenting opinion when he says: "It is difficult to distinguish the case from *Sanders v. Sanders*." The court said that the allegation that no part of the note had been paid, if regarded as material, was not denied by the answers, and would, therefore, under the Code, be deemed to be admitted; and that the allegation that the whole amount was still due was more of a statement of a conclusion of law than an allegation of a fact.

In an action upon a judgment in which it is alleged in the complaint that defendant recently promised to pay the sum alleged to be due, where the only plea is payment, and the defendant admits the decree, but denies indebtedness or promise to pay, and alleges full payment on the day named, the defendant is entitled to the opening and reply. *Pinson v. Puckett*, 35 S. C. 178, 14 S. E. 393. The court said that the defendant admitted the facts from which his indebtedness to the plaintiff followed as a legal conclusion, and the presumption was that no part thereof had been paid; and that the plea of payment did not rebut this presumption; that to do so required evidence; that whether the allegation in the complaint that the defendant promised to pay the sum alleged to be due were true or false in no way affected the right to recover or the amount of the recovery; and that such allegation and its denial were immaterial.

Martin v. Suber, 39 S. C. 525, 18 S. E. 125, is, if possible, a more complete overruling of *Sanders v. Sanders*, 30 S. C. 207, 9 S. E. 94, *supra*, than *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305, *supra*. The complaint in this case alleged that the defendant was indebted to the plaintiff in a sum, mentioning it, with interest, which said sum of money the defendant, by her promissory note, undertook and promised to pay
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to plaintiff and then set forth a copy of the note. The defendant answered, saying first, that she emphatically denies that she is or was indebted to the plaintiff in the sum named in the complaint, or in any sum whatever, and then admitting that she signed a note similar to the one mentioned in the complaint, but denying that it represented any debt of hers, or in any sense bound her. She then alleged a long affirmative defense, and, last, her coverture. It was held that, since the case of *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305, it must be regarded that the rule is well settled that where the plaintiff's whole cause of action is admitted by the pleadings, and the defendant relies solely upon an affirmative defense, which, of course, he is bound to establish, the burden of proof is upon the defendant, and he is entitled to open and reply. That, applying the test who would be entitled to the verdict if the case was submitted to the jury simply upon the pleadings without evidence to the case under consideration, it was clear that the defendant had a right to begin, as, when the execution of the note was admitted in defendant's answer, there was nothing left for the plaintiff to prove; and under such admission he would unquestionably have been entitled to recover. This is all that was decided in terms; but, in order to arrive at its conclusions, it would seem that the court must have held, further,—by implication at least,—that both the allegations in the complaint, that the defendant was indebted to the plaintiff in a sum, mentioning it, and the denial thereof in the answer, were immaterial.

e. Necessity of admitting quantum of damages.

Whenever the damages claimed by the plaintiff are ascertainable by computation an admission of the cause of action by the defendant, coupled with an affirmative defense thereto, will suffice to give the defendant the burden of proof and the consequent right to open and close.

1. Liquidated damages and damages ascertainable by computation.

Where the case stated in the complaint upon a money demand on contract is admitted, and nothing is left for a complete judgment in the plaintiff's favor, but a mere computation of interest on the demand for the period claimed, the defendants, upon an affirmative defense set up in their answer, had the right of opening the case to the jury. *Brennan v. Security L. Ins. & Annuity Co.* 4 Daly, 296.

2. Unliquidated damages.

But the cases which have given rise to the greatest discussion on the subject-matter under consideration are those in which the damages claimed are unliquidated.

(a) In general.

By a reference to the English cases in *supra*, III. b, it will be seen that the courts and judges there have by no means been of one mind and judgment on the subject of the right to open and close, or, as they term it there, the right to begin, in cases where the defendant admitted all the allegations of the plaintiff except the amount of the damages claimed by the plaintiff. Such differences of opinion were supposed to be

settled by the rule adopted by the fifteen judges, and announced in *Carter v. Jones*, 6 Car. & P. 64, 1 Moody & R. 281, *supra*, III. b; but soon after its announcement discussions arose among the judges upon the hearing and determination of several cases as to whether that rule,—whatever it was,—but which certainly gave the plaintiff the right to open and close in certain cases although the affirmative was on the defendant, applied only to cases of personal injuries, libel and slander, or to all actions sounding in tort where the damages were unliquidated. Some of the judges at nisi pruis held that it had no application in actions on contract where the damages were unliquidated (see cases in *supra*, III. b). But in 1845 the King's bench decided that, in an action of covenant by an attorney's clerk for improperly dismissing him, a plea that he was guilty of misconduct in the service did not give to the defendant the right to open and close. *Mercer v. Whall*, 5 Q. B. 447, 14 L. J. Q. B. N. S. 267, 9 Jur. 576, *supra*, III. b.

The cases in this division indicate that the doctrine laid down in *Mercer v. Whall*, prevails in all of the states in which the common-law rule has not been interfered with by court rule or statute.

In an action of assumpsit for goods sold and delivered there was a plea in abatement, the nonjoinder of several other joint contractors, and issue thereon, and the defendant claimed the right to begin, and cited *Cotton v. James*, Moody & M. 273, 8 Car. & P. 505. The trial judge (Lord Denman, Ch. J.) said: "I recollect being in a case subsequent to that before Lord Tenterden [who decided *Cotton v. James*], in which it was decided the plaintiff should begin, unless the damages are admitted. I am aware of the difference in the decisions; but my opinion is that the plaintiff should begin." *Morris v. Lotan*, 1 Moody & R. 233.

(b) Slander and Libel.

In an action of defamation defendant, in pleading, admitted the speaking of the words, and averred that they were true, and did not plead the general issue. He was, thereupon, permitted to open and close in his defense. In reviewing exceptions, and on a motion for a new trial, the court said it was not prepared, however, to have this instance drawn into precedent, so as to become obligatory thereafter. That the rule as indicated by the weight of authority, is apparently simple, and easy of application, and in accordance with sound sense and practical utility, *viz.*, that the plaintiff shall have the opening and closing of his cause whenever the damages are in dispute, unliquidated, and to be ascertained by the jury; and that this is uniformly the case in actions of slander. *Sawyer v. Hopkins*, 22 Me. 276.

In *Elder v. Oliver*, 30 Mo. App. 575, which was an action for slander, Judge Seymour D. Thompson, who delivered the opinion to the effect that the decision of the trial court on this question would not be reviewed, proceeds to discuss in a very able manner the rule already alluded to as laid down in the leading case of *Mercer v. Whall*, 5 Q. B. 447, 14 L. J. Q. B. N. S. 267, 9 Jur. 576, *supra*, III. b, showing conclusively that the rule as stated in that case settled the doctrine in England after a great controversy, and that it was generally followed in this country, *i. e.*, that the right to open and close is with the plaintiff in every case where, in order to recover, he has something to prove, whether to establish his right or to show the extent of his damages, citing decisions copiously both English and American.

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where the complaint set out the publication of the libelous articles, and averred that the one first published was wantonly, wickedly, and maliciously contrived and intended to injure the plaintiff, and that it was wantonly and maliciously false, and, as to the second article, that its statements were deliberately published concerning the plaintiff by the defendant, contriving to injure him in his profession as a physician; and the defendant admitted the publication of the articles, but denied each and every other allegation in the complaint, and then pleaded justification and matter in mitigation; and, upon the opening of the trial, withdrew the general denial, admitted the publication of the article, and claimed to stand upon justification, privilege, and mitigation, and claimed the right to open and close, which was accorded it by the trial court,—such denial of the right to open and close to the plaintiff was held to be error, as, even assuming that the withdrawal of the denials effectively amended the answer, the affirmative was still with the plaintiff, and nothing could change this short of an admission that the plaintiff's damages were fully the amount claimed by him in his complaint, and that the verdict in his favor should be for that precise sum, and the retention in the answer of matter in mitigation, completely negated the oral withdrawal of the denials on this crucial head. *Parrish v. Sun Printing & Pub. Asso.* 6 App. Div. 585, 39 N. Y. Supp. 540.

The above case, in principle, is very similar to *BRUNSWICK & W. R. CO. v. WIGGINS*; that is to say, both are to the effect that, in an action for a wrong where the damages are unliquidated, the defendant, in order to obtain the right to open and close, must admit upon the record that, but for his affirmative defenses, the plaintiff would be entitled to recover all the damages alleged in his complaint or declaration; that, so long as the plaintiff is under an obligation to make proof in order to recover the amount of damages alleged to have been sustained by him, the burden of proof, and consequently the right to open and close, is with him, and to secure the same the defendant must not only admit that the plaintiff is entitled to recover, but that he is entitled to recover the amount that he claims.

And yet if the case had arisen and been decided in Georgia by the court which decided the principal case, the application of § 3891 of the Civil Code, there alluded to, would have been to decide *Parrish v. Sun Printing & Pub. Asso.* precisely the other way.

In an action for slander in charging the plaintiff with corruption as a member of assembly, the defendant claimed the opening. The court said that it did not know that there had been any rule established in the courts of this state, that he was certain that there was not any in the rural districts, but that it seemed to him that *Fry v. Bennett*, 3 Bosw. 200, was very clear authority for the right of the plaintiff to open, and that he should accordingly rule that the plaintiff had the right. *Littlejohn v. Greeley*, 13 Abb. Pr. 41. While the court did not state in terms that the reason for awarding the right to open and close to the plaintiff was that the plaintiff had the right to prove the amount of his damages, which were not admitted, yet, as he said that it seemed to him that *Fry v. Bennett*, 3 Bosw. 200, was very clear authority for the right of the plaintiff to open, and as in *Fry v. Bennett*, the right to open was given the plaintiff because he had the right to prove the amount of his damages,—which were not admitted,—that would also appear to be the reason why it was decided in this case that the plaintiff had the right to open and close.

In *Opdyke v. Weed*, 18 Abb. Pr. 223 note, it was held that where all the allegations in a complaint for libel, except the amount of damages, are admitted by the answer, the plaintiff will still have the right to open, to show malice, and the extent of the injury, even where no special damages have been laid, and malice has not been in terms alleged; that in cases of the description of the one then being tried (where the publication was in the newspaper), especially, the plaintiff should have the right of introducing testimony as to the question of damages, as in no other way can the damages be enhanced or mitigated except by proof; that, although the plaintiff has not stated the extent of the damages in the pleadings, that does not prevent him from putting in evidence the circulation of the defendant's newspaper with the view of getting at the question of damages.

In an action for libel, where the complaint contained an allegation that the publication alleged to be libelous was made by the defendant with actual malice and wantonness, and one of the defenses was that such publication was privileged, it was held that the plaintiff has the right to open the cause to the jury, as the action is one in which punitive damages might be given on proof of facts authorizing it, and that it appeared that the plaintiff, before resting, should not only establish an apparent right to recover some damages, but should give all the evidence on which he relied for the amount of the recovery. *Fry v. Bennett*, 3 Bosw. 200.

In affirming the case the court of appeals, 28 N. Y. 324, said that where the action was one sounding in damages, in which it is proper for the plaintiff to give evidence to enhance the damages, the usual course is to allow the plaintiff to begin and close the trial.

In an action for libel the defendant's answer admitted the publication of the libel as alleged in the complaint, and set up matter in justification. The question having arisen as to the right to begin, the court held that in such a case, where the damages are unliquidated, plaintiff's counsel must be heard as to the amount of damages, although the commission of the act is admitted as alleged in the complaint. *Hecker v. Hopkins*, 16 Abb. Pr. 301, note.

In an action for the publication of a libel in defendant's newspaper, where the admissions in the answer were not such as to enable the jury to give a verdict for the plaintiff for the amount claimed in the complaint, the plaintiff should be allowed to open the case to the jury and reply in summing up, as it is necessary for him to furnish the jury with some testimony upon which a verdict can be based for substantial damages. He has the right to give evidence for the enhancement of the damages beyond such as would be deemed nominal, and for that purpose it is competent to show his general surroundings and his position in society; and it is proper, therefore, to give him the affirmative on the trial. *Tallmadge v. Press Pub. Co.* 39 N. Y. S. R. 29, 14 N. Y. Supp. 331.

In an action for slander the answer admitted the speaking of the words, but alleged that they were true, and also that the defendant had good reason to believe, and did believe, that they were true. The question which arose in the case was as to which of the parties held the affirmative within the meaning of rule 23, mentioned in *Kalme v. Omro*, 49 Wis. 371, 5 N. W. 838, *supra*, III. a, 1. The court stated the old rule in England as laid down in *Cooper v. Wakley*, 3 Car. & P. 474, *Moody & M. 248, supra*, III. b, and the changing it by resolution of the judges in 1833; and, after stating, further, that the practice is different in different

states, some adhering to the old English rule and some to the modern rule established by the resolution of the judges, and that the practice had not been settled by this court which was at liberty to adopt either rule, said: "We think the modern English rule is supported by the better reasons. It is difficult to understand how it can logically be said that the defendant has the affirmative of the issue in a given case, when proof is required of the plaintiff in the first instance to entitle him to the damages which he claims." *Cunningham v. Gallagher*, 61 Wis. 170, 20 N. W. 925. To the same effect, *Wausau Boom Co. v. Dunbar*, 75 Wis. 133, 43 N. W. 739.

In an action for libel there were several special pleas of justification as to certain parts of the libel, but no plea of the general issue, and judgment was suffered by default as to the parts of the libel not covered by the special pleas. It was held that the plaintiff was entitled to begin by showing the amount of the damages he had sustained, and, having the right to begin as to part, he had the general right to do so. *Wood v. Pringle*, 1 *Moody & R. 277*.

These authorities would seem to unite in sustaining the rule enunciated in *Carter v. Jones*, 6 Car. & P. 64, 1 *Moody & R. 281, supra*, III. b, that the plaintiff is entitled to begin in libel and slander, even though the defendant have the affirmative through a plea of justification; the reason being that such a plea does not admit the amount of the plaintiff's (hitherto) unliquidated damages.

And since the adoption of the rule the English courts have been a unit on the particular subject.

It would seem hardly necessary to even suggest that, if the defendant should, in addition to his justification, admit in his plea or answer that but for it the plaintiff would be entitled to recover the full amount of the damages claimed or demanded by him in his declaration or complaint, the effect would be to shift the right to open and close to the defendant, as the plaintiff would have nothing to prove to recover his entire claim, and, if no evidence was given, he would recover it.

(c) *Negligence.*

In an action brought against a railroad company for negligently killing the plaintiff's mule and damaging his dray, the answer denied the negligence on the part of the defendant, and charged that plaintiff was guilty of contributory negligence. By § 5131 of *Mansfield's Digest* it is provided that the party having the burden of proof in the whole action has the right to open and conclude the argument; and by § 2871 it is provided that such a burden lies on the party who would be defeated if no evidence were given on either side (*supra*, III. a, 2). The court held that, upon the defendant's admission of the killing only, if the plaintiff could have recovered at all his recovery would have been confined to nominal damages because the defendant specifically denied the extent of his injury. But a recovery of substantial damages, and not of the costs only, was what the plaintiffs sought. And that the burden of proving the extent of his injury remained upon him throughout, and gave him the right to begin and reply. *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136, 20 S. W. 1083.

Where, by statute, the killing or damaging of any horses or other stock by a railroad company is *prima facie* evidence of the negligence of the company, and a railroad company sued for killing a mare of the plaintiff admitted the killing and undertook to justify it by averments

that it was the result of accident and that its agents were not guilty of negligence, but used proper skill, vigilance, and foresight, and by a provision of the Code the party having the burden of proof shall have the conclusion, the burden of proof rests upon the defendant, and it is entitled to open and close; and this notwithstanding the plaintiff might be called upon to prove the value of the animal killed, as, by another provision of the Code, he would be called upon to do so without any denial. *Louisville & N. R. Co. v. Brown*, 13 Bush, 475.

This case would seem to be different from the case of *BRUNSWICK & W. R. Co. v. WIGGINS*, in holding that, in order to change the burden of proof and right to open and close, it was not necessary that the defendant should admit the amount of damages claimed by the plaintiff.

And the reason for it would seem to lie in the Code and statutory provisions alluded to in *supra*, III. a, 2.

The case differs from *Fetters v. Muncie Nat. Bank*, 84 Ind. 251, 7 Am. Rep. 225, *supra*, III. a, 2, as to the effect of the Code provision last mentioned upon the right to open and close.

(d) Assault.

In an action to recover damages for an assault and battery, the defendant, by his answer, justified the battery as committed in self defense. The reply denied the matter set up in justification. It was held that there was no error in the trial court overruling defendant's claim to open the case to the jury. *Dragoo v. Whisman*, 31 Ohio St. 182. Nothing further is said about damages in the case, but, inasmuch as the answer, in effect, admitted all the plaintiff claimed except the amount of damages, it must have been that, because the burden of proving his damages yet remained on the plaintiff, the defendant's motion to be permitted to open and close was overruled.

In an action against a railroad company by a passenger for an assault and battery alleged by him to have been committed by the defendant's conductor while assuming to act in the line of his duty, where there was no general issue or traverse of the declaration filed, but simply pleas of confession and avoidance, the defendant is entitled to hold the affirmative on the trial and argument, as, had the defendant introduced no evidence, the plaintiff would, under the issue, have been entitled to judgment, he being bound to introduce no evidence as to the commission of the act complained of until defendant proved a *prima facie* justification of the act for which it was sued, and, had defendant introduced no evidence, then plaintiff might have introduced evidence to show the nature and extent of the injury, precisely as in case of a default, for the purpose of enabling the jury to estimate the damages. *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill. 126.

This case is somewhat similar to *BRUNSWICK & W. R. Co. v. WIGGINS*, which was an action *ex delicto* against a railroad company, the only difference being that one was an action for negligence and the other for personal injury at the hands of a servant; but the decisions are exactly opposite, as, in the foregoing case, it held that where there is no denial of the complaint, but a plea of justification simply, the defendant holds the affirmative, and therefore the burden of proof, and, so, is entitled to open and close, whereas in the principal case the answer, as sought to be amended, was held not to entitle the defendant there to the right to open and close, inasmuch as it left the plaintiff to prove his damages. It may be said that there is some force

in the reasoning of each side of the general proposition involved in these cases. The principal case certainly following the leading English case of *Mercer v. Whall*, 5 Q. B. 447, 14 L. J. Q. B. N. S. 287, 9 Jur. 576, *supra*, III. b. On the other hand, it must be confessed that there is weight in the argument that, if the defendant makes such an admission in his pleading as that the plaintiff would have nothing to do but simply prove what he would be obliged to in the case of a default, the defendant is entitled to the right to begin.

The proposition that, in case the defendant introduced no evidence to sustain his justification, the plaintiff might then proceed to prove his damages as in case of default, is novel, but by no means devoid of force.

In an action for assault and battery, where the defendant pleaded *son assault domesne*, and plaintiff replied *de injuria*, the plaintiff is entitled to open and close, as the burden is upon him to prove the extent of the damages sustained. *Johnson v. Josephs*, 75 Me. 544. In this case the court said that it is a case of unliquidated damages, and not a case of nominal damages, or of damages to be assessed by computation merely; that the defendant contended that the defendant's plea confessed everything alleged against him, but that it did not, as it did not admit more than a general demurrer, or a default, would admit, and that if, after the pleadings were pleaded, the defendant had rested without any proof whatever, the judgment would go for the plaintiff, no doubt, but it would be for nominal damages only.

This case is exactly in line with *BRUNSWICK & W. R. Co. v. WIGGINS*, and by the same method of reasoning, although one is an action for personal injuries and the other for ordinary negligence.

The remarks subjoined to *supra*, V. e, 2, (a), are applicable here.

See *Dille v. Lovell*, 37 Ohio St. 415, *supra*, III. a, 2.

(e) Other cases.

In an action for a breach of promise of marriage there was no plea of the general issue; but a special plea to the effect that, after the promise, the plaintiff had conducted herself in a lewd, unchaste, and immodest manner, and had been guilty of indecent and immodest conduct, etc. The trial judge, after consulting with Lord Abinger, C. B., decided that the plaintiff was entitled to begin. *Harrison v. Gould*, 7 Car. & P. 580.

This is the case alluded to by Lord Denman in *Mercer v. Whall*, in his argument that, in an action on contract, where the confession and avoidance state the same facts as would be alleged as a justification in an action for defamation, there is the same reason why the right to begin should be awarded to the plaintiff as obtains under a defense justifying a libel or slander. See *supra*, III. b.

But in a note to *Aston v. Perkes*, 9 Car. & P. 231, several authorities are given to the effect that breach of promise is a personal injury, and therefore from its very nature would come under the rule in *Carter v. Jones*. See *supra*, III. b.

But in an action for a breach of promise of marriage the defendant pleaded that, before any breach of the promise, the parties by agreement mutually exonerated each the other from the performance of the contract of marriage, and on these pleadings it was held that the defendant should begin. *Stanton v. Paton*, 1 Car. & K. 148.

In an action of debt for carrying the plain-

tiff to prison within twenty-four hours after her arrest on mesne process, the plea was that she was carried to prison at her own request after being offered to be taken to a convenient house. The replication was that the plaintiff did not consent and agree. It was held that the defendant should begin, as the plaintiff did not go for unliquidated damages. *Silk v. Humphrey*, 7 Car. & P. 14. It would seem that ordinarily this would be a case where the damages were unliquidated, and it nowhere appears why they were not.

In an action of trespass for destroying a dam, the plea was that the dam obstructed and hindered the water from coming to the defendant's mill where it had run and flowed previously without obstruction, and of right should. The plaintiff's counsel claimed the right to begin, whereupon the chief justice asked him whether he would pledge himself to go for a substantial damage, and upon his declining to do so allowed the counsel for the defendant to begin. *Chapman v. Rawson*, 8 Q. B. 673, 15 L. J. Q. B. N. S. 225, 10 Jur. 287.

In an action for goods sold, brought against the one to whom they were sold and his wife and mother-in-law, upon the ground that they were silent partners with the purchaser, or, if not, that they conspired with him to defraud the plaintiff's in the purchase of the goods; in which writs of attachment were issued and levied upon the stock of goods which had been held by the purchaser in trade, and also upon the lot and store buildings used in such trade; and it appeared that, previous to the levy, the purchaser had conveyed the stock to his mother-in-law, and the lot and store building to his wife, and the mother-in-law had conveyed the stock to the wife in exchange for the lot and store buildings, and the mother-in-law and wife denied all liability for the goods purchased and claimed damages for the wrongful issuance and levy of the attachment; and the principal defendant made default, and plaintiffs failed to offer evidence tending to show the alleged liability of the other two defendants,—such defendants had the right to open and close, as there was nothing to try but the question of damages. *Whitney v. Brownwell*, 71 Iowa, 251, 82 N. W. 285.

See Iowa Code, *supra*, III. a. 2.

In an action for the conversion of a cow, the plaintiff is entitled to the opening and closing, if the defendant denies the value of the cow and the conversion, and admits no allegation of the plaintiff except the possession. *Johnson v. Nelson* (Neb.) 91 N. W. 526.

In an action upon a marine policy of insurance, where the declaration stated that the ship was seaworthy, and there were several affirmative pleas, among which was one that the ship was unseaworthy, and it appeared that the damages were unliquidated, it was, for this last reason, held that the plaintiff should begin. *Foley v. Tabor*, 2 Fost. & F. 663.

In *Hoggett v. Exley*, 9 Car. & P. 324, 2 Moody & B. 251, the declaration was on a charter party, by which the defendant undertook to provide a cargo of corn in a ship, and the special plea was to the effect that, after the making of the charter party, and before any breach of the contract, it was agreed between the parties that a cargo of cotton should be substituted for the cargo of corn, and that it was so substituted, etc. Both parties claiming the right, the court said: "I wish there was some rule which was imperative, and excluded all discretion on the subject. But there is not, and it must be left to the judge to decide, in each particular case, whether a substantial question is the assessment of damages, and if it is, the plaintiff ought to begin. And I think in this case that he ought to begin." 61 L. R. A.

VI. Effect of reply to restore right to plaintiff.

In the process of making up the issues in an action or proceeding it not infrequently occurs that the defendant in terms admits the averments of the declaration, petition, or complaint, or, by not denying them, impliedly does so, then alleges affirmative matter as defense, which would, but for the reply, shift the burden of proof and right to open and close to the defendant; that the plaintiff in the reply does not deny the affirmative allegations of the defendant, but, either expressly or impliedly, admits them, and alleges affirmative matter in avoidance of defendant's averments. And in such case the burden and right which would otherwise have shifted to the defendant, are, by effect of the reply, said to be restored to, or remain with, the plaintiff.

Where the defendant pleaded the statute of limitations, and the plaintiff replied that the defendant was beyond the limits of the state, and that the action was brought within the period of limitation after his return to the state, the plaintiff was entitled to the opening and conclusion, as the replication set up new matter in avoidance of the bar of the statute. *Thornton v. West Feliciana R. Co.* 29 Miss. 143.

In an action of replevin, where the plea set up the defense that the property was taken and detained under a chattel mortgage made by plaintiffs to one of the defendants, and the replication averred that the execution of the mortgage was procured by fraud, the onus was upon the plaintiffs, and they had the right to open and close. *Edwards v. Hushing*, 81 Ill. App. 223.

In a suit upon a note, with an answer setting up particular facts tending to show a failure of consideration, reply, avoiding some of those facts by new matter and denying the existence of others, the circuit court gave the opening and close upon the trial to the plaintiff. It was held that this was right, that the new matter in avoidance of the answer gave the plaintiff the affirmative. *French v. Howard*, 10 Ind. 339.

And in an action for money paid to the defendant's use, where the first paragraph of the answer was set-off, to which there was a reply of payment, and the second paragraph was that the money sued for was paid as part of the price of property sold by defendant to plaintiff, the reply to which was a general denial, the plaintiff was entitled to open and close the case, being the party on whom rested the burden of the issues. *Kent v. White*, 27 Ind. 390.

And so, when the answers filed all allege affirmative matter, and admit so much of the complaint as relieves the plaintiff from making any proof to entitle him to recover, the burden shifts to defendant, and he has the open and close, unless the plaintiff, by reply admits the defense pleaded and avoids it by affirmative matter, when the burden would again shift to the plaintiff to prove the matter in avoidance set up in the reply. *McCloskey v. Davis*, 8 Ind. App. 190, 35 N. E. 187.

While these three decisions are in accordance with the common-law rule, it is not easy to reconcile them with the cases in Indiana immediately following.

But where, in an action upon a note, the defendant interposed no general denial to the complaint, but answered by way of set-off, the defendant was entitled to open and close the argument on the trial, as the fact that the plaintiff, in addition to a denial replied affirmatively to the defendant's answer setting up new matter, did not change the rule, because, until the defendant had proved his set-off, the

plaintiff could not be required to prove anything. *Bowen v. Spears*, 20 Ind. 146.

And where no issue is formed on the complaint, and the only issue is upon a counter-claim filed by the defendant, and the reply thereto is in three paragraphs, of which the first is a general denial, the defendant has the burden of proof, and the right to open and close. *Brower v. Neills*, 16 Ind. App. 183, 44 N. E. 939. There is no statement as to the nature of the other two paragraphs, but it is a natural inference that they contained matter in avoidance.

See statute of Indiana on this subject, *supra*, III. a, 2.

In an action against an insurance company, where the answer of the defendant admitted the loss, and set up certain acts of plaintiff in violation of the terms of the policy whereby it became forfeited, which imposed upon defendant the burden of proof with the consequent right of opening and closing at the trial, but the plaintiff filed an admission of the facts stated in the answer, and gave notice that evidence in avoidance of the admitted defenses would be relied on, the plaintiff had the burden of proof and the right to open and close. *Viele v. Germania Ins. Co.* 26 Iowa, 10, 96 Am. Dec. 83.

In an action upon a life insurance policy the defense was that the applicant had made a false statement in his application for the insurance,—a misrepresentation in respect to his occupation, which, by the conditions of the contract, would avoid the policy. To this was replied that the applicant stated the exact truth as to his occupation, but that the defendant's agents wrote the answer in the application differently and in such manner that the company would accept it. In deciding the question as to which party upon the issue thus presented would be entitled to open and close, the court said: "As, by the issue of fact presented in the instruction, the verdict of the jury was made to depend upon the sufficiency of the plea in avoidance of forfeiture of the policy, the onus was upon the plaintiff in the action, and it was error to deny to him the right of concluding the argument." *Wright v. Northwestern Mut. L. Ins. Co.* 91 Ky. 208, 15 S. W. 242.

The burden of proof and right to open and close are with the plaintiff in an action on a promissory note against sureties who allege as a defense an agreement between the plaintiff and the principal to extend to the latter the time of payment without knowledge of the defendants, where the plaintiff by reply alleges that the agreement was signed through a mistake as to its nature, he not being able to read it, and the principal stating to him that it was a receipt for a payment on the note. *Stapp v. Hatcher*, 23 Ky. L. Rep. 2441, 67 S. W. 819.

A rule of the court of common pleas in Massachusetts provided "that the party holding the affirmative shall open and close." It was held that, under this rule, when the defendant in his specification of defense relies on a discharge under the insolvent law, and the plaintiff admits the discharge, but denies its validity, on the ground of fraud committed by the defendant, the plaintiff has the right to open and close. *Robinson v. Hitchcock*, 8 Met. 64.

In an action for money had and received the defense was that the money was received upon a contract between the parties by which the plaintiff agreed to purchase the stock of the defendant, and paid the money as so much of the purchase money under such contract, and that the defendant did and performed all his part of the contract, and was ready to fulfil and by reason of the plaintiff's failure to fulfil he had suffered damage. The defendant
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complained that he was entitled to open and close on the trial of the cause. In this, however, it was held that he was mistaken, as it was necessary for the plaintiff below to offer proof to sustain his action; and that the rule is that, if anything remains for the plaintiff to prove affirmatively, he is entitled to open and close. *Mizer v. Bristol*, 30 Neb. 138, 46 N. W. 293. (For cases under this rule, see *supra*, II.) The only statement in the report in regard to a reply is, "The reply need not be noticed." The evidence tended to show that the defendant had obtained the money as a part payment upon the stock mentioned in his answer by misrepresenting to the plaintiff the value of the stock; and it would seem that the only rational ground for the decision that "it was necessary for the plaintiff below to offer proof to sustain his action," is that the allegation in his reply and the proof under it, of such misrepresentation, was matter in avoidance of the defendant's affirmative defense, which had the effect to restore the right to open and close to the plaintiff.

In an action of trover by the assignees of a bankrupt against a sheriff for goods, where the plea was that the sheriff seized and sold the goods on a writ of *fi. fa.* against the bankrupt, to which no docket had been struck against the latter, neither had the sheriff notice of any act of bankruptcy; and the replication was that the judgment was obtained against the bankrupt by cognovit in an action commenced by collusion, and that a fiat issued within two months after the seizure, and a rejoinder that the action was commenced adversely,—the plaintiff on these pleadings should begin. *Scott v. Lewis*, 7 Car. & P. 347.

In an action upon promissory notes by indorsees against the defendant as maker, where the first plea was payment to the payee to a certain amount, and as to the residue payment into court, and that the plaintiffs had not sustained damages to a greater extent than the amount paid, with a replication to the first plea that the notes were indorsed before the payment, and to the second, that the plaintiffs had sustained damages to a greater amount than the sum paid into court, the plaintiffs were entitled to begin. *Cripps v. Wells*, Car. & M. 489.

In an action of replevin for certain cattle alleged to have been illegally taken and impounded by the defendant, where the latter avowed the taking to have been while the cattle were feeding in his lots, and he impounded them as he might, and concluded by praying judgment for his damages; and the plaintiff replied that the soil and freehold were in another by whose permission the cattle were in the close, and not in the defendants, and tendered an issue to the country, which was joined by the defendant,—the question was upon the soil and freehold of the person in whom it was alleged by the plaintiff to be, and the affirmative of the question was with the plaintiff, as he had tendered the issue, and was bound to make it out, and thus had the right to open and close the case. *Thurston v. Kennett*, 22 N. H. 151.

In an action of trespass for cutting trees, the defendant pleaded *liberum tenementum*; and the plaintiff replied *liberum tenementum suum absque hoc*, etc. A preliminary question arising as to who should open the case, it was decided by the court, after argument, that the proof of the issue lay upon the defendant, and that he, therefore, should begin. *Leech v. Armitage*, 2 Dall. 125, 1 L. ed. 316. The court was composed of the chief justice and another judge, and the chief justice added that in all cases the party first in the affirmative ought regularly to open.

Where the defense to an action on promissory notes was, first, that the plaintiff was not the real party in interest, and, second, that the assignment to him was without consideration and made to avoid the usury laws; and that the notes were given for usurious interest, etc., and the reply alleged that the plaintiff purchased the notes in good faith without notice of any of the alleged defenses, and that prior to the purchase the defendant stated to her, at different times, that the notes were all right, would be paid when due, and, relying upon such statements, she purchased the notes,—the defendants were entitled to the opening and closing; and the fact that the burden was on the plaintiff to establish the estoppel pleaded did not alter the case, as she could not properly have offered evidence until the defendants had made a *prima facie* case. *Seekel v. Norman*, 78 Iowa, 254, 43 N. W. 190.

See Iowa Code, *supra*, III. a. 2.

In *Bonnell v. Jacobs*, 36 Wis. 59, the reply to the counterclaim was, first, a general denial, and, second, that the contract of warranty was afterwards varied, waived, or modified, and a new and different contract, set out in the reply, made by the parties. The court held that the right of the defendant to open and close was not affected by the fact that another issue was made by the reply.

These last three decisions would appear to be out of the general line.

VII. Conditional admission.

In an action of ejectment where each party claimed as heir at law, and the real question was as to the legitimacy of the defendant, who was clearly heir if legitimate, it was held that the question was whether the lessor of the plaintiff was the heir at law, and a proposition by the defendant to admit that, unless the defendant were legitimate, the lessor of the plaintiff was the heir at law, was insufficient to give him the right of beginning, which was held to lie with the lessor of the plaintiff. *Doe ex dem. Warren v. Bray, Moody & M.* 166.

And in ejectment by the heir at law the defendant is not entitled to begin by admitting the heirship and seisin of the ancestor, unless defeated by a conveyance made by the ancestor under which the defendant claims. To entitle the defendant to begin, the plaintiff's whole *prima facie* case must be admitted. *Doe ex dem. Tucker v. Tucker, Moody & M.* 536.

But in an action of ejectment brought to recover property which descended from a testator, it appeared that, after his death, his heiress at law took possession of the property, and had since died leaving a will devising her real property. There were demises in the declaration from the heir at law of the testator and his heiress at law, and also from the devisees of the heiress at law of the testator. The defendant claimed under a will of the testator. Defendant claimed the right to begin, and said he admitted that the testator died seised, and his heiress was such, and had possession of the property from the time of his death. That the plaintiff was heir at law of the two, and that the plaintiff was entitled to the property unless defendant proved the will of the testator. It was held that it was the duty of a judge in cases of this sort to decide the right to begin, as far as can be, on some certain principles; and that on principle the defendant admitted enough to entitle him to begin. *Doe ex dem. Wollaston v. Barnes*, 1 *Moody & R.* 386.

VIII. In equity actions.

The 15th rule in equity, in Georgia, declares
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that, when the parties go to the jury on the bill and answer alone the complainant shall have the conclusion. It was held in *Fall v. Simmons*, 6 Ga. 265, that a hearing in chancery practice on the bill and answer has a definite legal meaning; that it is, when the complainant files no replication to the answer, as in that case the complainant takes the risk of recovering upon his allegations and the defendant's answer; all the statements in the answer being taken as true, whether responsive to the bill or not. In this case there was a general replication filed to the answer, and the complainant opened the case by reading his bill, and the answer of the defendant stated that he would use, also, before the jury the record of the court of ordinary attached to the answer as an exhibit. The defendant making no objection, the complainant closed, and the defendant introduced no evidence and claimed the right to conclude the argument to the jury, which motion the court overruled. It was held that this was error.

Where the defendant to a bill in equity introduced no evidence he is entitled to open and conclude the argument to the jury. *Cade v. Hatcher*, 72 Ga. 359. This is presumably upon the theory that when he introduces no evidence he admits the complainant's case.

The general creditors of an insolvent mercantile firm having filed against it an equitable petition under the insolvent traders' act, by virtue of which a receiver was appointed and the assets of the firm converted into cash; and a mortgage creditor of the firm having filed an intervention praying the equitable foreclosure of the mortgage and its satisfaction out of the fund in the receiver's hands; after which, by an amendment to the original petition, this mortgage was attacked as being fraudulent and void,—in the trial of the issue thus made as to the validity of the mortgage there was no error in allowing the original parties plaintiff to open and conclude. *Fidelity Bkg. & Trust Co. v. Kangara Valley Tea Co.* 95 Ga. 172, 22 S. E. 50. In this case the intervenor was attempting to foreclose his mortgage upon the fund, and the plaintiffs defended against that by not denying the mortgage, but setting up in their amended petition an affirmative averment of fraud. This was practically an admission of the execution of the mortgage, and that it would be a valid lien upon the fund but for their allegations of fraud.

In *Pusey v. Wright*, 31 Pa. 887, it is said that there is no difference in respect to the burden of proof in proceedings at law or in equity; that in both the party maintaining the affirmative of the issue has such burden cast upon him. This was an equity action in which the plaintiff set up a contract with the defendants, by which permission was given to construct a road in dispute, and in which it was averred that the defendants undertook to do certain things which they did not do, and for a violation of which contract a bill was brought. The defendants admitted the contract for permission to construct a road, but denied the conditions and stipulations alleged by plaintiff, nonperformance of which constituted their ground of complaint. The burden was held to be upon the plaintiffs, and they were bound to prove their case.

IX. On writ of error and appeal and issue of law.

In *Arden v. Tucker*, 1 *Moody & R.* 191, the defendant opened for a nonsuit, and then called witnesses to establish the facts. Counsel for the plaintiff thereupon replied, contending that the plaintiff was entitled to a verdict, and, upon defendant's counsel rising to answer his

arguments, insisted that he was entitled to the last word, and that, as he had called no evidence in reply, the defendant's counsel could not be again heard. The court ruled that, the defendant having raised the objection, which was one of law, and the plaintiff having answered that objection, the defendant's counsel was entitled to be heard upon the matter of law.

If the plaintiff in a writ of error, to reverse an outlawry, has assigned as error that he was beyond the sea when the exigent was awarded; and the defendant in error pleaded that "he left the realm, of his fraud and covin, and to defeat him of his just debt, and for the purpose of avoiding the outlawry;" and on this plea issue is taken,—at the trial the defendant in error begins. *Bryan v. Wagstaff*, 2 Car. & P. 125, 8 Dowl. & R. 208, 5 Barn. & C. 814, *Ryan & M.* 329.

In a note to *King v. Church Trustees of St. Pancras*, 8 Ad. & El. 535, it is stated that, after making objections to the mandamus, the counsel for the defendant claimed to begin, inasmuch as he had objected to the form of the mandamus, but Lord Denman, Ch. J., said that, if that reason were allowed, everyone who supported a return would take an objection to the mandamus.

Upon a demurrer to an information in the nature of a writ of quo warranto the party interposing the demurrer has the right to begin and conclude the argument upon it. *White v. Clements*, 39 Ga. 232.

It is the uniform practice in the supreme court of South Carolina, where both plaintiff and defendant appeal, to allow the plaintiff to open and reply. *Shand v. Central Nat. Bank*, 33 S. C. 463, 11 S. E. 389.

X. In criminal action.

The general rule in most of the states in criminal trials is believed to be that the prosecution under all circumstances has the burden of proof and right to open and close. But in some jurisdictions an exception would seem to be made in those cases where the defendant introduces no evidence. The following cases illustrate when this will or will not be done. Where it is permitted, it, of course, must be for the reason that by not introducing any evidence the defendant admits the case as made by the prosecution.

By the statute of Florida (*Pamph. Laws 1852-3*, p. 116), it is provided that "in all cases wherein the defendant upon his trial introduces no testimony, he shall, by himself or counsel, be entitled to the concluding argument before the jury, as is now the practice in the trial of civil cases." It was held that the statute was intended to secure to the defendant the right to conclude in criminal cases, where he introduces no testimony; and that the requisition is mandatory. *Heffron v. State*, 8 Fla. 73.

The introduction of testimony by a defendant in a criminal trial to discredit a witness for the state is an introduction of evidence on his part, under the provision of § 1029 of the Penal Code of Georgia (1895), that, "after the testimony is closed on both sides, the state's counsel shall open and conclude the argument to the jury, except that, if the defendant shall introduce no testimony, his counsel shall open and conclude after the testimony on the part of the state is closed;" which will preclude him from the right to open and close. *Hargrove v. State* (Ga.) 45 S. E. 58.

On a trial for murder counsel for the accused filed a special plea admitting the homicide with which he was charged, but denying his 61 L. R. A.

responsibility under the law because of his alleged insanity at the time the deed was committed, and thereupon claimed the right to open and conclude the evidence and the argument. The court struck the plea, and refused to allow this privilege. It was held that both these rulings were correct. *Carr v. State*, 96 Ga. 284, 22 S. E. 570.

In a criminal prosecution for libel the defendant called no witnesses, and counsel for plaintiff offering to reply, Lord Kenyon held that, though the attorney general might be entitled in such a case to reply, it was a privilege he thought no other counsel for the prosecution ought to have. *Rex v. Abington*, 1 Esp. 226, *Peake, N. P. Cas.* pt. 1, p. 236.

Under the 3d rule of practice in North Carolina, providing that in all cases, either civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel, where two were indicted and tried jointly for assault and battery, and one introduced evidence and the other defendant none, and the latter then claimed the right, under the rule, to open and close,—it was held that, where one defendant introduces evidence, that gives the right to begin and conclude the argument to the state. *State v. Robinson*, 124 N. C. 801, 32 S. E. 494. See *supra*, IV. e.

Four prisoners were indicted jointly. One of them called no witnesses. The counsel for the prosecution proposed to reply on the whole case against all the prisoners. *Parke, B.*, after conferring with *Coltman, J.*, stated that the reply must be confined altogether to the case of the prisoners who gave evidence, although he did not wish to lay down a general rule that in no case where several were indicted together would the calling of witnesses by one entitle the prosecutor to reply against all, but that in this case the offenses were distinct, the defendants who had called witnesses being receivers, they might have been indicted separately from the principal. *Reg. v. Hayes*, 2 Moody & R. 155.

A was charged with feloniously carnally knowing and abusing a girl under ten. B was charged with being present, aiding and abetting. A's counsel called no witnesses. B, who had no counsel, called a witness to prove an alibi for A. It was held that this evidence was, in effect, evidence for A, and that in strictness the counsel for the prosecution had a right to reply on the whole case, but that it was *summum jus*, and ought to be exercised with great forbearance. *Reg. v. Jordan*, 9 Car. & P. 118.

In an indictment against three for murder, one of the prisoners called witnesses whose evidence did not in any way affect the other two. It was held that the prosecuting counsel was entitled to reply generally on the whole case as against all the prisoners. *Reg. v. Blackburn*, 3 Car. & K. 830.

A prisoner will be allowed to make his own statement to the jury, but his counsel will not be permitted afterwards to address the jury for him. *Reg. v. Taylor*, 1 Fost. & F. 535. The court stated that it would not admit the right of reply by the prosecution, where no evidence was called for the defense.

On the trial of an indictment against three for burglary no witnesses were called by two, but the other called witnesses to prove an alibi. Counsel for the prosecution claimed the right to a general reply as to all. The court said to the counsel that he had better confine his remarks to the case of the prisoner who had called witnesses. *Reg. v. Burton*, 2 Fost. & F. 788.

Upon the trial of an indictment for felony

the attorney general is entitled to reply, even though the defendant called no witness; and, where the solicitor general represents the attorney general in conducting a prosecution for the postoffice, he is entitled to the privilege. *Reg. v. Toakley*, 10 Cox C. C. 406.

XI. Conclusion.

The result of the investigation would appear to be that, while there is a difference of opinion among the courts of the several jurisdictions, and sometimes apparently in the same jurisdiction, as to the application of the general rule, yet, except where it has been modified or changed by arbitrary court rule or statute, such general rule exists as it did in the beginning, and is as stated in *supra*, II.

That the burden of proof, with its incident right to open and close, naturally and necessarily is, in the first instance, with the plaintiff or party who initiates the action, suit, or proceeding, and remains with such party so long as it continues incumbent on him to make any proof whatever.

That, when the defendant, either by an admission in express and absolute terms, or by refraining from denial of plaintiff's cause of action and alleging affirmative matter in avoidance of it renders it wholly unnecessary for the plaintiff to give any evidence whatever to have a complete recovery of all that he claims,—the burden and right are with the defendant.

That, when the defendant has secured the right to begin by admitting plaintiff's cause of action and alleging affirmative matter in avoidance of it, if the plaintiff, in reply, does not deny the same, but in turn alleges new matter avoiding it, the burden and right is then said to again shift, and return to and remain with the plaintiff.

Courts differ as to when and how such admission should be made. It would look as though the weight of decision favors the doctrine that it must be at the very commencement of the trial and from an inspection of the pleadings alone. But there is a strong array of judges who take an opposite view, and in England, particularly, the admission is often made in open court during the trial, and frequently at the suggestion of the judge. And in Iowa (by Code provision) the right to conclude cannot be determined until after the evidence is in.

Such admissions, and their effect and character, are, as has been said, like many other questions, dependent to a large extent upon the facts and circumstances of the individual case.

In those states where the courts by fixed rule, or the legislature by statute, have located the status of the parties as to the burden and right, the decisions of the courts since the adoption of the rule or statute are of little value, as to what is, and the application of, the general rule,—except when the former practically affirms the latter.

P. H. V.

ARIZONA SUPREME COURT.

James BONTHON et al., Plffs. in Err., v.

PHOENIX LIGHT & FUEL COMPANY.

(.....Ariz.....)

Nonresident aliens may maintain the action, under statutes authorizing actions to recover damages for injuries causing death, for the benefit of certain of the relatives of decedent, to be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all.

(March 20, 1903.)

ERROR to the District Court for Maricopa County to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's child. *Reversed.*

The facts are stated in the opinion.

Mr. J. L. B. Alexander, for plaintiffs in error:

It would be unreasonable to suppose that the legislature, in enacting the law upon which this action is founded, intended to exclude from its benefits alien subjects of Great Britain, a nation which bears extremely friendly relations with our own country, and from whom the very statute upon which this action is brought was borrowed.

Vetaloro v. Perkins, 101 Fed. 393; *Mulhall*

NOTE.—As to right of nonresident alien to maintain statutory action for death of other party, see also, in this series, *Mulhall v. Fallon* (Mass.) 54 L. R. A. 934, and *note*, and *McMillan v. Spider Lake Sawmill & Lumber Co.* (Wis.) 60 L. R. A. 589. 61 L. R. A.

v. Fallon, 176 Mass. 266, 54 L. R. A. 934, 57 N. E. 386; *Luke v. Calhoun County*, 52 Ala. 115; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 413.

Mr. C. F. Ainsworth, for defendant in error:

The plaintiffs in error being nonresident aliens, they were not intended to be included among those who were entitled to the benefits of the provisions of title 36 of Arizona Rev. Stat. 1887.

Brannigan v. Union Gold-Min. Co. 93 Fed. 164; *Deni v. Pennsylvania R. Co.* 181 Pa. 525, 37 Atl. 558.

We do not legislate for men out of our jurisdiction.

Yelverton v. Burton, 26 Pa. 351; *McCarthy's Appeal*, 68 Pa. 217; *Adam v. British & Foreign S. S. Co.* [1898] 2 Q. B. 430, 67 L. J. Q. B. N. S. 844.

Kent, Ch. J., delivered the opinion of the court:

The plaintiffs in error brought an action in the district court to recover damages for the death of their son, caused by the alleged negligence of the defendant company. The complaint alleges that the plaintiffs are residents of the province of Ontario, Dominion of Canada, and that the decedent, their son, was of the age of twenty-five years at the time of his death, and left surviving him his parents, these plaintiffs, but no wife or children; that no administrator has been appointed; and that the plaintiffs, being the only parties entitled to bring the action, bring it jointly for the benefit of each. The

complaint also sets up facts showing the death, and alleged negligence of the defendant. A demurrer to the complaint on the grounds that the complaint does not state facts sufficient to constitute a cause of action, and that the plaintiffs have no legal capacity to sue, being nonresident aliens, was sustained by the lower court, and judgment entered thereon against the plaintiffs, and the judgment so entered is now brought by writ of error to this court for review.

The only question brought to our attention, and to be decided, is whether the statutes of Arizona confer upon nonresident aliens the right to institute and maintain an action for injuries resulting in death caused by wrongful act. The statutes of the territory applicable, in force at the time this action was instituted, are found in title 36 of the Code of 1887:

"Sec. 2145. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: . . ."

"Sec. 2149. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused. . . ."

"Sec. 2150. The action may be brought by all the parties entitled thereto, or by any one or more of them, for the benefit of all."

It is the established rule that an action against a person for damages for injuries causing death cannot be maintained at common law. In 1846 Parliament passed the fatal accidents act, commonly known as "Lord Campbell's act" (9 & 10 Vict. chap. 93). In this country from time to time thereafter the several states passed similar acts, differing generally only in respect to the persons who were entitled to maintain the action, and for whose benefit the same should be prosecuted.

The Supreme Court of the United States has held, under a similar statute as to liability in New Jersey, that the right to recover may be asserted in New York by an administrator appointed in New York, and the court says: "The advocates of this view [that the right of action is limited to an administrator appointed in New Jersey] interpolate into the statute what is not there, by holding that the personal representative must be one residing in the state, or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and the next of kin. Why not add here, also, by construction, 'if they reside in the state of New Jersey'? It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference, it is opposed to it. The 1st section makes the liability of the corporation or person absolute, where the death arises from their negligence. Who shall say that it depends on the appointment of an administrator within the state?" *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439.

As is stated in a note on this question in *Mulhall v. Fallon*, (Mass.) 54 L. R. A. 61 L. R. A.

935: "In regard to the rights of aliens to sue, it is believed that all of the acts passed by the different state legislatures are identical with Lord Campbell's act; that is to say, there is no express provision contained in any of them that the action may be maintained by a nonresident alien." In this country the question whether such action may be so maintained by a nonresident alien has been determined in five instances by the courts; two decisions holding that such action cannot be maintained, and three decisions in favor of its maintenance. The Pennsylvania supreme court in 1897, in the case of *Deni v. Pennsylvania R. Co.* 181 Pa. 525, 37 Atl. 558, held that the statute was not intended to confer upon nonresident aliens rights of action not conceded to them, or to put burdens upon the citizens of that state, to be discharged for their benefit; that it had no extraterritorial force; that the mother of the decedent, a resident of Italy, was not within the purview of it; and that a construction which would include nonresident alien husbands, widows, children, and parents of the decedent was obviously opposed to the spirit and policy of the statute. In this case the court bases its decision partly on the ground that, as no statute of Italy was shown, authorizing the maintenance of a similar action there, a construction should not be given the statute which would confer upon nonresident aliens rights of action not conceded to them or to citizens of this country by the laws of such foreign country.

The Federal circuit court in Colorado, in 1899, in the case of *Brannigan v. Union Gold Min. Co.* 93 Fed. 164, followed the Pennsylvania case, but gave no reasons for its concurrence, except its approval of the reasoning in the Pennsylvania case. In the opinion in each of these cases the statement is made that no case has been brought to the attention of the court in which an English court, in construing the parent act, has held that a nonresident alien is entitled to its benefits; and the lack of such construction by the English courts seems, from the statements in the opinions, to have had much weight in the conclusions reached. At that time, however, there had been several such actions in the English courts, brought by such aliens, where the question had not been raised or decided, and prior to the decision in the Colorado Federal court, though not referred to in that opinion, one case, at least, where, the question having been raised, the court had decided against the right of the alien to maintain it.

In 1875 the supreme court of Alabama, in the case of *Luke v. Calhoun County*, 52 Ala. 115, held that a citizen of Great Britain could maintain a similar action; but the act under which the action was brought was a special act to suppress murder, lynching, etc., by which it was provided that certain persons who were injured by a death caused by riot, etc., could maintain an action against the county; and, though the question involved was substantially the same as here presented, the court based its decision largely upon the purpose intended to be ac-

complished by the statute, to wit, the suppression of murder; holding that the purpose of the act would not be accomplished if a distinction was drawn between residents and aliens.

In April, 1900, the circuit court of the United States for the district of Massachusetts, in the case of *Vetaloro v. Perkins*, 101 Fed. 393, construing the employer's liability act of Massachusetts, giving the widow or next of kin a right of action in certain cases, held in favor of the right of a non-resident alien to maintain the action, disapproving of the decisions in the Pennsylvania and Colorado Federal-court cases above cited. In the course of the opinion, Judge Colt says: "I can find no sound or just reason for holding that the legislature intended to exclude nonresident aliens from the benefits of this section. If statutes of this character have no extraterritorial force, as was held in *Dent v. Pennsylvania R. Co.* 181 Pa. 525, 37 Atl. 558, it is difficult to see why citizens or residents of other states are not excluded as well, in the absence of any constitutional prohibition." In March, 1900, the supreme court of Massachusetts, in the case of *Mulhall v. Fallon*, 176 Mass. 266, 54 L. R. A. 934, 57 N. E. 386, held the right of action existed in a nonresident alien; following the Federal decision in that district. We quote a portion of the opinion of Mr. Chief Justice Holmes: "We come, then, to the more difficult question,—whether the plaintiff can claim the benefit of the act. However this may be decided, it is not to be decided upon any theoretic impossibility of Massachusetts law conferring a right outside her boundary lines. In *Mannville Co. v. Worcester*, 138 Mass. 89, 52 Am. Rep. 261, where a Rhode Island corporation sought to recover for a diversion of waters from its mill in Rhode Island by an act done higher up the stream in Massachusetts, it was held, following earlier decisions, that there was no such impossibility, although the point was strongly urged. It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered. The same principle is recognized, without discussion, in *Lumb v. Jenkins*, 100 Mass. 527, where a nonresident alien was held entitled to take land by descent. So, after discussion, as to a nonresident's right to sue. *Peabody v. Hamilton*, 106 Mass. 217."

In England, in 1898, in the case of *Adam v. British & Foreign S. S. Co.* [1898] 2 Q. B. 430, 67 L. J. Q. B. N. S. 844, the court held that the provisions of Lord Campbell's act do not apply for the benefit of aliens abroad, and therefore the representative of an alien whose death had been caused by the negligence of a British subject outside the jurisdiction of the court could not maintain an action to recover damages in respect of the death; that it is a principle of Eng-

lish law that the acts of Parliament do not apply to aliens unless the language of the statute expressly refers to them; and that, as there is no express intention in the act to give to nonresident aliens the right, such right cannot be inferred from the act.

In 1901, in the King's bench division, the question was presented to the court in the case of *Davidsson v. Hill*, 70 L. J. K. B. N. S. 788; and the court held that the representative of an alien, whose death on the high seas was caused by the negligence of a British subject, can maintain an action for damages under Lord Campbell's act, when such alien was, and his representative is, resident in a foreign country. The court, in the opinions rendered by the two justices, disapproves of the reasoning and the conclusions reached by the court in the case of *Adam v. British & Foreign S. S. Co.* [1898] 2 Q. B. 430, 67 L. J. Q. B. N. S. 844, and considers and distinguishes the cases relied upon by the court in the latter case to support the view taken by it. The court goes on to say (quoting from the opinion of Mr. Justice Kennedy): "It seems to me, under all the circumstances, and looking at the subject-matter, more reasonable to hold that Parliament did intend to confer the benefit of this legislation upon foreigners as well as upon subjects, and certainly that, as against an English wrongdoer, foreigners might maintain an action under the statutes in question. . . . Here the plaintiff seeks to enforce her claim against an English subject, and I cannot see why she should not do so. If she cannot enforce her claim, we should have this anomaly, as it seems to me: If a foreigner and an Englishman serving on the same ship were both drowned on the high seas by the same collision, negligently caused by an English vessel, the widow of the one could, and the other could not, obtain from the owners of the ship in fault that reparation which our legislation in these statutes has declared to be just. Let me add, that the view which I take has the weighty authority of Sir Robert Phillimore in *The Explorer*, L. R. 3 Adm. & Eccl. Rep. 289, after argument. The decision in *The Explorer* was, no doubt, overruled by the court of appeal and the House of Lords in *The Vera Cruz*, L. R. 9 Prob. Div. 96, L. R. 10 App. Cas. 59, but, as I understand the judgment of the House of Lords, on a different point altogether, namely, that the court of admiralty had no jurisdiction to entertain an action in *rem* for loss of life under Lord Campbell's act. And it is not, I think, wholly undeserving of notice that in the case of *The Bernina* (1888) L. R. 13 App. Cas. 1, which was litigated in 1886 and 1887,—that is, two years after the decisions in *The Vera Cruz*,—and was carried up to the House of Lords, one of the two successful claimants of damages under Lord Campbell's act in an action in *personam* against the owners of the wrongdoing ship was, as I have ascertained from the Admiralty Registry of Bagdad, one Habiba Harone Toeg, of Bagdad, the mother (as appears from the statement in the judgment of Lord Esher),

the administratrix of Moses Aaron Toeg, a passenger on a ship from London to Bushire, who lost his life in the collision caused by the negligence of the defendants' servants in the course of the voyage, and who, as I presume from his name and his mother's nationality, was himself a foreigner. No question of her right to recover on the ground of nationality, either of herself or of the deceased, was raised by the defendants, and therefore the case is not in any sense a decision in favor of the right. But in a case contested as persistently as this was, it is difficult to suppose that the question would not have been raised, had it been one in which the point could be rightly and successfully taken. I am of opinion that judgment must be for the plaintiff." And quoting from the opinion of Mr. Justice Phillimore: "I have still to consider the decision and reasoning of my brother Darling in *Adam v. British & Foreign S. S. Co.* That decision is in point, and, if we decide now in favor of the plaintiff, we must disagree with it. It rests mainly, I think, upon the principle that acts of Parliament are to be deemed not to apply to nonresident aliens unless the court is compelled so to apply them. There are a number of decisions upon the construction of the merchant shipping act, 1854, which set forth this principle as applicable to the construction of statutes imposing a burden upon a foreigner. Perhaps the strongest of these is *Cope v. Doherty*, but even in this case the reservation of Lord Justice Knight Bruce at page 621 of the report in 2 De G. & J. would make me pause. On the other hand, where it is a case of giving a remedy to a foreigner the decision of Dr. Lushington in *The Milford* (1858) Swabey Adm. 362, and the constant practice which was followed upon that decision, is the other way. This latter position is, I think, sound. Our courts are not only open, but open equally to foreigners as to British subjects, and foreigners who have the benefit of the English common law have also the benefit of English statutes. At any rate, where a statute brings the English law into harmony with the law of the foreigner, as in the case of *The Milford*, I think this must be so."

We do not think that, in order to entitle an alien to maintain this action, specific authority therefor must be granted such alien by the legislature. The act is broad and comprehensive, and by its terms includes any surviving husband, wife, child, or parent, irrespective of their residence or citizenship; and this includes aliens, in the absence of any restrictive legislation. We know of no rule of law that prohibits the legislature from extending such rights to nonresident aliens, or prevents their accepting the same. As Mr. Chief Justice Holmes said, in effect, *supra*, legislative power is territorial, and restricted thereto only so far as it imposes duties on persons outside its jurisdiction, and not in so far as it confers benefits. The object of the act is to extend beyond the limits of the common law the right to recover reparation for a wrong,

and we fail to see why, the wrong having been committed, the same reparation should not be made, whether those entitled to it are citizens of a state of our Union, or citizens of that country whose law we have inherited, and whose legislation in this instance we have adopted. In the absence of any constitutional provision, the same principle under which we extend this right to citizens in other parts of our country beyond our territorial limits having the same law in force applies to its extension by us to citizens of another country having the same law in force. An alien can maintain in our courts an action to enforce rights cognizable at common law. A statute authorizing a right of action, if declaratory merely of the common law, in the absence of a specific restriction, would not exclude aliens, or prevent them from availing themselves of its benefits. There is no difference in principle between such a case and a statute which grants rights not cognizable at common law, or extends rights beyond the limits fixed by the common law. In the absence of a specific restriction, the legislature must be presumed, by its enactment enlarging rights common to all, to have intended that such enlargement of rights be common to all. We think the doctrine cited by counsel for defendant in error, as quoted approvingly by the supreme court of Pennsylvania in *McCarthy's Appeal*, 68 Pa. 217,—"We do not legislate for men out of our jurisdiction,"—is not one that commends itself, or is in accord with the spirit of our age or our institutions, and should not be inferred or read into a statute which in its terms is broad and comprehensive, and contains no suggestion of limitation as to citizenship or residence. A construction of such a statute with respect to its application to rights of aliens thereunder which will include such aliens is more in accord with the liberal policy of our government, and the decisions of our courts in regard to the enforcement of their rights, when they grow out of or are connected with commercial interests or business relations. It is not a valid objection thereto to urge, as is urged in this case, that the act is penal in its nature, and its terms should therefore be strictly construed, for, if such were its nature, there is nothing in the terms of the act which excludes an alien, and a literal or strict construction thereof is rather in favor of than against its application to an alien. The Supreme Court of the United States has held, however, that such an act is not penal, but remedial. *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

We think the weight of authority, both in this country and in England, is in favor of the contention of the plaintiffs in error, and that the learned court erred in sustaining the demurrer and entering judgment thereon for the defendant.

The judgment is reversed, and the case remanded for a new trial.

Sloan, Davis, and Dean, JJ., concur.

MAINE SUPREME JUDICIAL COURT.

William H. FISHER *et al.*

v.

Robert G. SHEA *et al.*

(97 Me. 372.)

The defense of a suit to recover damages from a police officer for assault while acting in the line of his duty, under an adverse judgment in which he would be liable to an arrest, is necessary, so as to bring a claim for legal services rendered therein within an exception of claims for necessities in a statute forbidding the garnishment of wages.

(March 21, 1903.)

REPORT by the Supreme Judicial Court for Sagadahoc County of a proceeding to subject to plaintiffs' claim for services rendered wages due to defendant and unpaid. *Judgment in plaintiffs' favor.*

The facts sufficiently appear in the opinion.

Mr. W. H. Fisher, for plaintiffs:

The term "necessaries" has been defined as "whatever naturally and reasonably tends to relieve distress, or materially and in some essential particular to promote comfort either of body or mind."

Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532; *Peaks v. Mayhew*, 94 Me. 577, 48 Atl. 172.

Legal services may, under some circumstances, properly fall within the class of necessities.

Peaks v. Mayhew, 94 Me. 577, 48 Atl. 172.

Legal services rendered infants are necessities.

Helps v. Clayton, 17 C. B. N. S. 553; 10 Am. & Eng. Enc. Law, p. 662; *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160; *Hunson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151.

Mr. F. E. Southard, for defendants:

No doubt in some instances legal services are necessities. But services in successfully defending a wife against a libel for divorce are held not to be necessities, in *Ooffin v. Dunham*, 8 Cush. 404, 54 Am. Dec. 769; and services in prosecuting the complaint of a wife against her husband for assault and battery are said not to be necessities, in *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532.

Peaks v. Mayhew, 94 Me. 577, 48 Atl. 172.

Whether a thing is necessary or not depends upon the circumstances of the particular case.

Provost v. Piche, 93 Me. 455, 45 Atl. 506; *McAuley v. Tracy*, 61 Me. 523; *Kilgore v. Rich*, 83 Me. 305, 12 L. R. A. 859, 22 Atl. 176; *Tupper v. Cadwell*, 12 Met. 559, 46 Am.

NOTE.—On the question as to whether services of attorney in defending or prosecuting suit for infant are "necessaries," see cases in notes to *Kilgore v. Rich* (Me.) 12 L. R. A. 860, and *Askey v. Williams* (Tex.) 5 L. R. A. 176; also *Crafts v. Carr* (R. I.) 60 L. R. A. 129, 61 L. R. A.

Dec. 704; *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160.

In the action in which the services sued for were rendered the defendant's liberty was never in any danger. The likelihood of his being arrested upon an execution which might be issued in that suit was most remote; and while, if that contingency had ever happened, services rendered in releasing him from the arrest, perhaps, might be held to be necessary within the meaning of the statute, in the suit itself the services do not come within the meaning of the term.

Peabody, J., delivered the opinion of the court:

This case comes before the law court on report. The plaintiffs were attorneys at law, and brought this action to recover \$24 due them for professional services rendered by them in behalf of the defendant in defense of an action for an alleged assault and battery. The defendant at the time of the alleged assault was acting as a police officer. He was not arrested on the writ. The suit was disposed of by an entry of "Neither party, no further action." The amount claimed by the attorneys was a reasonable compensation for the services rendered in defense of the action.

At the time of the service of the writ in the present action there was due from the trustee to the principal defendant the sum of \$15 as wages for his personal labor for a time not exceeding one month next preceding the service of the process.

The question is presented whether the funds in the hands of the trustees are exempt from attachment by this process under the provisions of Rev. Stat. chap. 86, § 55, ¶ 6. This statute provides as follows:

"No person shall be adjudged trustee . . . by reason of any amount due from him to the principal defendant, as wages for his personal labor, or that of his wife or minor children, for a time not exceeding one month next preceding the service of the process, and not exceeding \$20 of the amount due to him as wages for his personal labor; and this is not exempt in any suit for necessities furnished him or his family. . . ."

The fund in the hands of the trustee being due as wages for the personal labor of the defendant performed within one month, the trustee can be held only if the subject-matter of this suit is "necessaries furnished him or his family."

Aside from the exclusion of certain classes of services or articles concerning which it may be predicated as a matter of law that they are not comprised in the term "necessaries," what are necessities is a question of fact, dependent on the varying circumstances of each case. *Provost v. Piche*, 93 Me. 455, 45 Atl. 506. Legal professional services do not belong to a class which can be excluded as a matter of law. *Peaks v. Mayhew*, 94 Me. 571, 48 Atl. 172; *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532.

Attempts have been made to state general rules by which legal services rendered in a given case may be tested as belonging to the class of necessities. It is impossible to make these rules sufficiently definite to admit or exclude all cases as matter of law. A more practical rule would be to contract the debatable ground so far as possible, for there must always be border lands in which a slight variation of circumstances leads to reasonable difference of opinion among men.

A safe standard for lines of demarcation, as applied to legal services rendered in litigation, is found in the case of *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532. From the illustrations presented by this case it may be stated as a safe rule of general application that legal services rendered in the defense of a criminal prosecution fall within the class of necessities (see also *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101); that such services rendered in the institution of criminal proceedings are not comprehended in the meaning of the term. Between these extremes lie those services of an attorney rendered in the defense or in the prosecution of civil actions. It would be safe to go a step further, and say that there may be services in the defense of a civil action which are included in the term "necessaries" (*Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160), and that there may even be services rendered in the prosecution of civil actions which are so included (*Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151).

It is unnecessary to consider further the prosecution of civil actions. The present case comes within the class of those legal services which are rendered in the defense of a civil action. In most, if not all, cases of arrest of the defendant legal services rendered in protecting and defending him could be properly classed as necessities. Whether this could be said of the defense of a contract right, where an adverse result of the

suit would involve only a pecuniary loss, is doubtful.

In the present case there was no arrest on the writ, but the fact that he was liable to arrest on execution after judgment against him is a circumstance proper to be considered. It is analogous to cases where original arrests were made. The defendant was a police officer, and as such peculiarly subject to prosecutions of the character described in this case. The suit against him could not fail to affect seriously his reputation as a citizen and his efficiency as an officer of the law, and he was forced to defend it to avoid consequences more injurious than the loss of property rights.

It is well to consider here the purpose of the statute invoked in this case. The reason for its existence rests on public policy. It is for the best interests of the state that the wage earner should have the incentive to labor for the maintenance of his home which comes from a judicious protection of his earnings, and equally so that he should be protected from the effects of his own improvidence or misfortune by holding out to those who can furnish him with the things he needs a reasonable expectation of remuneration. It is obviously the intent of the statute to encourage furnishing to all, without regard to financial responsibility, those things whose lack might not only cause hardship to the individual, but detriment to the community.

The defense of a citizen from injury to his person or his reputation, the protection of a public officer in the performance of his duties, and the maintenance of his official character, may properly be included among those things to which the statute has given preference.

It is our opinion that the services rendered in this case were necessities within the meaning of the law.

Trustee charged for \$15.

MARYLAND COURT OF APPEALS.

Mayor, etc., of BALTIMORE City *et al.*,
Appts.,
v.

Bartlett S. JOHNSTON.

(96 Md. 737.)

A "seat" in an unincorporated stock exchange, which can only be disposed of subject to the regulations of the exchange, is not taxable under a statute which makes no direct provisions for its assessment, where the provision for assessment of tangible personal property "at its cash value without looking to a forced sale" is inapplicable, and no attempt has been made to assess such

NOTE.—As to nature of property interest in seat in stock exchange, see also, in this series, *Lowenberg v. Greenebaum* (Cal.) 21 L. R. A. 399, and cases in note thereto; also *Re Page* (C. C. App. 3d C.) 59 L. R. A. 94. 61 L. R. A.

seats since the organization of the exchange, a period of fifty years.

(April 1, 1903.)

APPEAL from an order of the Baltimore City Court setting aside an assessment for taxation of a seat in the Baltimore Stock Exchange. *Affirmed.*

The facts are stated in the opinion.

Mr. Olin Bryan, with *Mr. Pinkney Whyte*, for appellants:

The legislature did not intend to leave any uncertainty as to what was meant by the word "property," but used language which seemed to reach in every direction, and to be sufficient in itself to embrace all property of every species, of every character, of every kind, of every nature, of every description, and in fact, that which is property in any sense in which the word may be used.

Maacrell v. State, 40 Md. 273; *Smith v. State*, 66 Md. 217, 7 Atl. 49; *Clark v. Baltimore*, 29 Md. 277, 96 Am. Dec. 533.

In construing statutes the intention of the legislature is to be carried out.

Gill v. Cacy, 49 Md. 246; *Frazier v. Warfield*, 13 Md. 301.

As taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; and it cannot be taken to have been intended when the language on which it depends is doubtful or uncertain.

Cooley, Taxn. 2d ed. p. 204.

If the word "property" is construed in a restricted sense, there would be exemptions permissible, which is directly contrary, to the well-recognized and universally accepted rule of construction.

Appeal Tax Court v. Rice, 50 Md. 312; *Appeal Tax Court v. St. Mary's Seminary*, 50 Md. 321; *Buchanan v. Talbot County*, 47 Md. 293; *Anne Arundel County v. Annapolis & E. Ridge R. Co.* 47 Md. 608.

There can be no doubt that a seat or membership in the exchange is, in a certain sense, property.

Platt v. Jones, 96 N. Y. 29; *Grocers' Bank v. Murphy*, 60 How. Pr. 426; *Hyde v. Woods*, 94 U. S. 523, 24 L. ed. 264; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Ritterband v. Baggett*, 4 Abb. N. C. 87; *Re Ketchum*, 1 Fed. 840; *Re Werder*, 15 Fed. 789; *Elliot v. Merchants' Exchange (Mo.)* 17 Cent. L. J. 376; *Re Warder*, 10 Fed. 275; *Clute v. Loveland*, 68 Cal. 254, 9 Pac. 133; *Habenicht v. Lissak*, 78 Cal. 357, 5 L. R. A. 713, 20 Pac. 874; *People ex rel. Lemmon v. Feitner*, 167 N. Y. 1, 60 N. E. 265; *Page v. Edmunds*, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 300.

Mr. W. Burns Trundle, for appellee:

The citizen is bound and concluded by a former decision, as to the liability for taxes for one year, in a subsequent suit for taxes for another year.

Baldwin v. Maryland, 179 U. S. 220, 45 L. ed. 160, 21 Sup. Ct. Rep. 105, Affirmed in 89 Md. 537, 43 Atl. 857.

If the judgment with reference to the liability of the *res* to assessment for taxation, as to one year, is, as against the citizen, conclusive as to another year, the conditions being identical, why is not the municipality, to which the power of taxation ad valorem is delegated by the legislature, equally estopped by an adverse judgment?

New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; *Gould v. Evansville & C. R. Co.* 91 U. S. 526, 533, 23 L. ed. 416, 418; *Johnson Steel Street Rail Co. v. Wharton*, 152 U. S. 252, 256, 38 L. ed. 429, 432, 14 Sup. Ct. Rep. 608; *Last Chance Min. Co. v. Tyler Min. Co.* 167 U. S. 683, 691, 692, 39 L. ed. 859, 863, 15 Sup. Ct. Rep. 733; *Mitchell v. First Nat. Bank*, 180 U. S. 471, 480, 45 L. ed. 627, 632, 21 Sup. Ct. Rep. 418; *Baker v. Cummings*, 181 U. S. 117, 124, 45 L. ed. 776, 779, 21 Sup. Ct. Rep. 578; *Hancock v. 61 L. R. A.*

Singer Mfg. Co. 62 N. J. L. 289, 42 L. R. A. 852, 41 Atl. 846; *Grunert v. Spalding*, 104 Wis. 216, 78 N. W. 606, 80 N. W. 589; *Chicago Theological Seminary v. People*, 189 Ill. 443, 59 N. E. 977; *State ex rel. Wright v. Savage (Neb.)* 90 N. W. 898.

The question necessarily presented and decided in the former case of the appellee against the appellants, was whether or not the membership of the appellee in the Baltimore Stock Exchange is property assessable ad valorem in the sense in which that term is used in the Bill of Rights and the revenue statutes of the state. The decision adverse to the contention of the appellants is "final and conclusive in every respect."

Alison's Case, L. R. 9 Ch. 25; *Dundas v. Waddell*, L. R. 5 App. Cas. 249; *Re South American & M. Co.* [1895] 1 Ch. 37; *Whitehurst v. Rogers*, 38 Md. 503; *Harryman v. Roberts*, 52 Md. 77; *State v. Brown*, 64 Md. 204, 1 Atl. 54, 6 Atl. 172; *Archer v. State*, 74 Md. 435, 22 Atl. 8; *Albert v. Hamilton*, 76 Md. 309, 25 Atl. 341; *Barriack v. Horner*, 78 Md. 258, 27 Atl. 1111; *Canal Company's Case*, 83 Md. 637, 35 Atl. 161, 354, 581; *National Marine Bank v. Heller*, 94 Md. 213, 50 Atl. 521.

The "attributes" of membership proved by the appellants,—absence of exclusive and unrestricted dominion; nonexistence of the power of absolute and unfettered alienation; nondevolution upon the heir or executor; not subject to pledge or hypothecation; incapacity of accurate valuation, depending in part on "good will,"—taken singly or collectively, not only do not prove that such membership is property in the language of common life and every-day business, in which the term "property" was used by the framers of the Constitution, but prove just the opposite.

Smith, Pers. Prop. p. 1; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Rutherford*, Inst. 20 Puff. b. 4, chap. 4, § 2; *Wynehamer v. People*, 13 N. Y. 396; 1 Bl. Com. 138; 2 Kent, Com. 320; *Arapahoe County v. Rocky Mountain News Printing Co.* 15 Colo. App. 189, 61 Pac. 494; *Maillard v. Lawrence*, 16 How. 251, 261, 14 L. ed. 925; *Glover v. United States*, 164 U. S. 294, 297, 41 L. ed. 440, 441, 17 Sup. Ct. Rep. 95; *Savannah v. Hartridge*, 8 Ga. 29.

Assuming that it is within the power of the legislature, under the Bill of Rights, to confer upon the local municipalities of the state the authority to tax occupations as property, that authority has not been delegated; but the state has, from the beginning, through the legislature, exercised that power, for its own use, under the license laws.

Duties are never imposed upon the citizen upon vague or doubtful interpretations.

Powers v. Barney, 5 Blatchf. 202, Fed. Cas. No. 11,361; *Hartranft v. Wiegmann*, 121 U. S. 609, 616, 30 L. ed. 1012, 1015, 7 Sup. Ct. Rep. 1240; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; *Adams v. Bancroft*, 3 Sumn. 384, Fed. Cas. No. 44; *Sewall v. Jones*, 9 Pick. 412; *Vicksburg &*

M. R. Co. v. State, 62 Miss. 105; *Savannah v. Hartridge*, 8 Ga. 23; *Dean v. Charlton*, 27 Wis. 522; *Boyd v. Hood*, 57 Pa. 98; *Gurr v. Scudds*, 11 Exch. 190; *Wroughton v. Turtle*, 11 Mees. & W. 561; *Williams v. Sangar*, 10 East, 66; *Denn ex dem. Manifold v. Diamond*, 4 Barn. & C. 243; *Tomkins v. Ashby*, 6 Barn. & C. 541; *Oriental Bank Corp. v. Wright*, L. R. 5 App. Cas. 842; *Pryce v. Monmouthshire Canal & R. Cos. L. R. 4 App. Cas. 197*; *Daines v. Heath*, 3 C. B. 938; *Gosling v. Veley*, 12 Q. B. 328; *Potter's Dwarr. Stat. p. 255*; *Cooley, Taxn.* 2d ed. 267, 268.

It was not the intention of the legislature, by the general language at the end of § 2, chap. 120, act of 1896, to include, as the subject of taxation ad valorem, a right of this nature. It is here not a question of exemption from taxation, nor of the extent of the power of the legislature as to the subjects of taxation. It is a question of intention.

State Bd. of Tax Comrs. v. Holliday, 150 Ind. 216, 42 L. R. A. 826, 49 N. E. 14; *Hart v. Smith (Ind.)* 58 L. R. A. 949, 64 N. E. 664.

Where a particular class of persons or things is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class.

Canterbury's Case, 2 Coke, 46a; *Oasher v. Holmes*, 2 Barn. & Ad. 594; *Lyndon v. Stanbridge*, 2 Hurlst. & N. 51; *Reiche v. Smythe*, 13 Wall. 164, 165, 20 L. ed. 566, 567; *Cole v. Ensor*, 3 Md. 446; *Rea v. Twilley*, 35 Md. 409; *Broom, Legal Maxims*, 7th ed. § 651; *People ex rel. Lemmon v. Feitner*, 167 N. Y. 1, 60 N. E. 265.

Value is not the distinguishing attribute of property.

Exchange Bank v. Hines, 3 Ohio St. 7; *Hart v. Smith (Ind.)* 58 L. R. A. 949, 64 N. E. 661; *State Bd. of Tax Comrs. v. Holliday*, 150 Ind. 216, 42 L. R. A. 826, 49 N. E. 14.

Membership in stock exchanges is not subject to assessment for taxation.

San Francisco v. Anderson, 103 Cal. 69, 36 Pac. 1034; *People ex rel. Lemmon v. Feitner*, 167 N. Y. 1, 60 N. E. 265; *Re Hellman*, 77 App. Div. 355, 79 N. Y. Supp. 201; *Arapahoe County v. Rocky Mountain News Printing Co.* 15 Colo. App. 189, 61 Pac. 494; *State Bd. of Tax Comrs. v. Holliday*, 150 Ind. 216, 42 L. R. A. 826, 49 N. E. 14; *Hart v. Smith (Ind.)* 58 L. R. A. 949, 64 N. E. 661.

Boyd, J., delivered the opinion of the court:

The appeal tax court of Baltimore city assessed for taxation a seat in the Baltimore Stock Exchange held by the appellee at the sum of \$7,000 for the year 1903. In pursuance of the statute he appealed to the Baltimore city court, which passed an order by which the assessment was vacated and annulled, and from that order this appeal was taken.

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It is contended on the part of the appellee that a previous determination of this question, in reference to an attempted assessment against him for the years 1901 and 1902, precludes the appellants in this proceeding, as it is *res judicata*; but it will not be necessary for us to pass on that branch of the case, by reason of the conclusion we have reached on the main question, which may be thus stated: "Is a seat in the Baltimore Stock Exchange property within the meaning of that term as used in article 15 of the Bill of Rights, and in the revenue statutes of this state?"

It would be useless to undertake to reconcile the decisions of the various courts which have been called upon to determine how far a seat in an exchange of this character can be said to be property, or to point out in what particulars they have differed. The learned judge below correctly determined that, by the great weight of authority, it cannot be said to be merely a personal privilege, but must be regarded as property, although in a limited and qualified sense. Among the cases in which such an interest in an exchange has been held to be property for some purposes are *Platt v. Jones*, 96 N. Y. 29; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Hyde v. Woods*, 94 U. S. 523, 24 L. ed. 264; and *Page v. Edmunds*, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200. The question has generally been considered in cases in which it was claimed that the interest of the holder of the seat passed to his assignee or trustee in bankruptcy, or where it was sought in some way to subject such interest to the payment of debts. In the one last mentioned the Supreme Court held that, under the provision in § 70 of the bankrupt act of 1898 (Act July 1, 1898, 30 Stat. at L. 565, chap. 541 [U. S. Comp. Stat. 1901, p. 3451]), that the trustee shall be vested with the title of the bankrupt in "property which prior to the filing of the petition he could by any means have transferred," the power of the bankrupt to transfer it was sufficient to vest it in his trustee. As that case arose in Pennsylvania, the court reviewed at length *Thompson v. Adams*, 93 Pa. 55, and *Panocoast v. Gowen*, 93 Pa. 66, in both of which it was said that a seat in an exchange could not be seized under an execution. The Supreme Court did not deem it necessary to determine that question, but said, in speaking of the opinion in *Thompson v. Adams*, that, if the court meant to say that the seat was not property at all, they could not concur. In *Barclay v. Smith*, 107 Ill. 349, 47 Am. Rep. 437, and *Loewenberg v. Greenebaum*, 99 Cal. 162, 21 L. R. A. 399, 33 Pac. 794, it was also held that such seats were not property subject to judicial sales.

Although counsel for both sides showed commendable zeal in the preparation of this case, and cited many authorities which seemed to them to reflect on some of the questions involved, we have not been referred to a single decision in which a seat in an exchange of this kind has been taxed. In *Re Hellman*, 77 App. Div. 355, 79 N. Y.

Supp. 201, the court said: "That a seat in the exchange is property, and that the legislature would have power to impose a tax upon the transfer of such property, is conceded; but the legislature, in defining personal property which is taxable under the tax law, has not included a right to a seat in the exchange as property that shall be taxable, and for that reason the court below had no authority to impose the tax."

And in *People ex rel. Lemmon v. Feitner*, 167 N. Y. 1, 60 N. E. 265, the court of appeals held that a seat in the New York Stock Exchange was not personal property, within the meaning of the tax laws of that state. In *San Francisco v. Anderson*, 103 Cal. 69, 36 Pac. 1034, it was held that "a seat in the San Francisco Stock and Exchange Board is not taxable." The court said: "It is a mere right to belong to a certain association with the latter's consent, and to enjoy certain privileges and advantages which flow from membership of such association. Those privileges and advantages cannot be transferred without the consent of the association, and a forced sale of them would not give to the purchaser the right to occupy said seat. It is too impalpable to go into any category of taxable property." In *Arapahoe County v. Rocky Mountain News Printing Co.* 15 Colo. App. 189, 61 Pac. 494, it was held that a contract of membership in an associated press was not property subject to taxation, within the intention of the laws and Constitution of Colorado, although in that case the interest was first valued at \$25,000, and reduced by the lower court to \$20,000. In *Hart v. Smith* (Ind.) 58 L. R. A. 949, 64 N. E. 661, the supreme court of Indiana held that the good will that attaches to the business of conducting a newspaper belonging to a copartnership is not, in and of itself, property, within the constitutional provision that the general assembly shall provide by law for a uniform and equal rate of assessment and taxation. In *State Bd. of Tax Comrs. v. Holliday*, 150 Ind. 216, 42 L. R. A. 826, 49 N. E. 14, it was held that taxation of paid-up, or non-forfeitable and partly paid up, life insurance policies, was not provided for by statute, although there was a provision (Burns' Rev. Stat. 1901, § 8410) that "all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation;" and, after specifying what should be embraced in the schedules of property for taxation, it provided that "all other goods, chattels, and personal property, not heretofore specifically mentioned, and their value, except properties specifically exempted from taxation," should be included. In *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 45 L. R. A. 126, 53 N. E. 685, copyrights and patent rights were held to be exempt; but the good will of a corporation, which was the result of carrying on business in that state, was said to be taxable.

We might continue at great length citations of cases illustrating the views taken by the courts on such questions, but those we have cited are sufficient to show that, as 61 L. R. A.

a rule, the courts in this country have held that such a right as that now being considered is property, but of such a nature that the terms usually found in tax laws do not embrace it. In the absence of some determination by this court directly bearing on the question, we have thought it proper to give the trend of the decisions of other courts before discussing the provisions of our own laws, which we will now do.

The learned counsel for the appellants relies on the provision in the Declaration of Rights that "every person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property," and especially on the language used by the statute. Section 2, art. 81 (*Revenue and Taxes*), after enumerating various kinds of property to be assessed, contains the clause so much relied on, which is: "All other property of every kind, nature, and description within this state, except as provided by the 4th section of this article, shall be valued and assessed for the purpose of state, county, and municipal taxation to the respective owners thereof in the manner prescribed by this article." That section, as now in force, was passed in 1896; but the same language was used when the Code of 1888 was adopted, and has been since the act of 1874. Prior to 1874 the statute did not use so many words, but in the Code of 1860, art. 81, § 2, it read "and all other property of every description whatsoever, shall be liable to assessment and taxation;" and those terms were used at least since the year 1852, back of which we have not deemed it necessary to look. There is therefore no material difference between the language now used and that which was adopted as early as 1852.

The Baltimore Stock Board was organized on the 29th of January, 1844, and on the 14th of May, 1881, its name was changed to the Baltimore Stock Exchange. This case was argued in this court on the fifty-ninth anniversary of its organization, and yet there was never any attempt to assess seats in this exchange until the assessments for 1901 and 1902 were made. That is not necessarily conclusive of the question, but it is an important circumstance, when we remember that the language now relied on is, in substance, the same that has been in the statutes for so many years. The value of a seat may change from year to year, but, if it is property now, within the meaning of our tax laws, it has been during all those years. If it was, not only have the owners of those seats been placed in a position, by the construction put on the law by the tax officers, by which they omitted them from their schedules of personal property, as provided for in § 174 of article 81, although each swore that his schedule contained "a true, full, and complete list of all real and personal property held or belonging to me," etc., but the tax officers themselves have failed to discharge their duties. Not only the original assessors were required

to add any property omitted from the schedules, but the appeal tax court, and assessors appointed by them, are required to take steps to place unassessed property on the books. It cannot be assumed that during these many years all the tax officers of the city were in ignorance of the fact that the Baltimore Stock Exchange and other such exchanges were in existence, or that the seats were not taxed. We certainly can assume that all of the holders of such seats would not intentionally have violated the law in making up their schedules, and we are equally positive that the tax officers throughout all those years would not have wilfully failed to discharge their duties. In view of the fact that the testimony shows that such seats had never been assessed before 1901, and knowing, as every intelligent person who reads newspapers must know, that such persons as are qualified to fill such positions as judges of the appeal tax court of Baltimore city could not during all these years be ignorant of the existence of those seats, we must assume that they have not heretofore been attempted to be assessed because the law officers and officials of the tax department of the city have not deemed them to be taxable under existing laws. During these years the legislature has frequently had questions of taxation before it, and has passed many laws in relation thereto. When the last general assessment law was passed (1896) this exchange had been in existence over fifty years, and the rights of the members therein had never been taxed. Property intended to be taxed was designated with more particularity than had been previously done, and the effort to reach property which had escaped taxation, and which was intended to be taxed, is manifest from the statute itself. Our present tax laws have gone into considerable detail as to the method of taxing shares in incorporated companies, and collecting the taxes levied thereon. And although the members of the legislature and the city and state tax officers may be presumed to know that these seats have not been assessed, the legislature has not attempted, in terms, to have them taxed; and, as we have seen, the construction placed on the tax laws during this great length of time seems to have been that they were not taxable. It was said in *Hays v. Richardson*, 1 Gill & J. 366, in speaking of the construction of a statute: "This contemporaneous unvarying construction of the act of assembly for sixty years ought not to be disregarded, but upon the most imperious and conclusive grounds." See also *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658; *Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3. When, therefore, the language of the statute relied on is not now more comprehensive than it has been for half a century, and the thing sought to be taxed has been in existence during all that time, but has never been taxed, there ought to be some valid and substantial reason assigned, before the new construction of 61 L. R. A.

the statute, now contended for, should be adopted. Has that been done?

It cannot be said that the value of a seat in this exchange has now become so fixed that it can be more readily ascertained. This record discloses that as late as 1897 a seat was sold for \$60, and, in the attempt of the appeal tax court to tax them, they assessed them for 1901 at \$3,500, for 1902 at \$10,000, and for 1903 at \$7,000; and one of the witnesses who was examined testified that he thought his seat would bring, if sold at that time, \$5,000. It is manifest that their value is not only constantly varying, and, perhaps, to do full justice to all parties, would have to be revalued every year, but it must depend upon the number of vacancies there happen to be, and the demand for admission. We do not find in the record any provision in the constitution or by-laws fixing the number of seats that the exchange can have, but in answer to the question, "How many seats have you?" one of the witnesses said: "86 or 87. That includes alternates. Probably there are half a dozen alternate members." And he also said, "They are not sold, as a rule, unless a man retires from business." The exchange is not incorporated, declares no dividends, "and was formed for the purpose of affording to its members—being stockbrokers—facilities for the transaction of business, by providing them with a convenient exchange or sales-room rented for that purpose, in which room its meetings are held." A member cannot voluntarily dispose of his membership unless the proposed transferee is elected by the governing committee. No transfer is permitted until all dues to the exchange are paid in full, and, if the owner is indebted to any member, he cannot transfer his membership until he pays such indebtedness, if a protest is filed. In case of death the seat is disposed of by the committee on membership, and, after paying the claims of the members, it pays the balance to the legal representatives of the deceased. The member does not even hold a certificate of membership, and there is no evidence at all of it, beyond being enrolled as a member. Stockbrokers are licensed by the state, for which they pay a license tax. It is thus apparent that while a membership in the exchange is, in a sense, property, it is qualified and limited, and lacks one of the most valuable and usual characteristics of property,—the right of disposing of it as the owner deems proper, so long as he violates no law.

But § 2 of article 81 states how "all other property of every kind, nature, and description within this state, except," etc., shall be valued and assessed; that is to say, "in the manner prescribed by this article." How is this seat in this exchange to be valued and assessed under that provision? It is not tangible personal property, and hence can hardly be said to be assessable as that is,—at its full cash value, without looking to a forced sale." If the exchange was incorporated, and stock was issued, the state tax commissioner would assess it. By § 194 certificates of indebtedness issued by any in-

dividual or firm are assessed and valued according to the rate of interest stipulated to be paid. If they bear 6 per cent, they are assessed at 50 per cent of their face value; if 5 per cent, at 41 $\frac{1}{2}$ per cent of their face value; and so on as to other rates; and the section concludes that "such upon which no interest shall be actually paid, shall not be valued and assessed at all." Then § 201 provides for valuation and assessment of bonds, certificates of indebtedness, or evidences of debt, in whatever form made or issued by public or private corporations, or by a state (other than Maryland), territory, etc., at their actual market value, upon which the regular rate of taxation for state purposes is to be paid, and 30 cents (and no more) on each \$100 for county, city, and municipal taxation, but "such upon which no interest shall be actually paid shall not be valued at all." Other illustrations might be given, such as the tax on mortgages, on stock of foreign corporations, etc., to show, not only how the assessments of personal property vary as "prescribed by this article;" but, as reflecting upon the intention of the legislature in the use of the language relied on, in determining whether such property as a seat in this exchange was intended to be included, these and similar provisions throw much light on the subject. Can it be supposed that the legislature intended to tax such a membership in an exchange as this is shown to be at what it cost the member, or at what he could get for it, when it has provided that on bonds, etc., issued by corporations or some other state or country, only 30 cents on each \$100, on a valuation fixed by its market value, shall be paid for county, city, and municipal taxation, and those upon which no interest is paid are not to be valued at all? Or that it intended such tax as is claimed in this case, when it provided for the assessment of certificates of indebtedness issued by individuals or firms at the rates provided for by § 194? If so, then it would require a broker to pay taxes on the amount of money he has invested in order to acquire proper privileges for the conduct of his business, from which money he receives no income whatever,—and that, too, when he does not even have a certificate of membership, or any evidence of his ownership, excepting that he is enrolled as a member,—at a much higher rate than it has fixed for other incorporeal property. He may own \$100,000 of bonds or shares of stock in foreign corporations, on which he receives interest or dividends, and can only be required to pay the city of Baltimore 30 cents on each \$100 thereof; but if he has a seat in this exchange, for which, according to the evidence, he might get from \$60 to \$10,000, depending upon whether there are vacancies or a demand for admission, he must pay the regular rate of taxation on its value, under the theory of the appellants, notwithstanding he pays the state a license fee for carrying on his business.

The learned judge below, as reflecting 61 L. R. A.

upon the question whether the legislature intended to impose a tax on this property, pointed out in his opinion the difficulties that would be in the way of enforcing payment under the existing tax laws; but, although there is force in his suggestions, we will not stop to discuss those provisions. Seeing what has been the uniform and unvarying construction placed on the statutes providing for taxation in this state for over fifty years by the tax officers of the state and the city of Baltimore, and apparently by the legislature itself, and having before us such statutes as we have referred to, which provide different methods of taxation of property much nearer akin to that under consideration than tangible personal property is, we are forced to the conclusion that the legislature did not, by the statute now in force, intend to tax seats in this exchange, and, if it did, it is utterly uncertain as to what rate it intended they should be taxed, although it has established rates for other incorporeal property. That there can be no justification in taxing them in the method attempted seems to be perfectly clear, when the provisions for other property such as we have mentioned are considered; and it would be impossible to place them in the category of bonds, stock, evidences of indebtedness, etc., for the purpose of taxation under existing laws, as they are not embraced by any of them. We are therefore of the opinion that, notwithstanding the broad language of the statute, the legislature has not only not made provision as to how property such as this should be taxed, but as yet has expressed no intention of taxing it.

It is not necessary to discuss at length the meaning of the 15th article of the Declaration of Rights, which has so frequently been before us. It is well settled that there may be "property" in the state which is not covered by that provision. In *State v. Philadelphia, W. & B. R. Co.* 45 Md. 379, 24 Am. Rep. 511, we said: "A franchise is a special privilege conferred by the state on certain persons, and which does not belong to them of common right; and, although the franchises of a company may be considered, in one sense, property, and valuable property, yet they are not property in the meaning of that term as used in the Bill of Rights." In some of the statutes above cited we have seen that what is undoubtedly property is exempt from taxation, when no interest or dividends are paid, and different rates of valuation, as well as exemptions, are provided for, and have been sustained by this court. *Faust v. Twenty-Third German American Bldg. Assn.* 84 Md. 186, 35 Atl. 890; *Allen v. National State Bank*, 92 Md. 509, 52 L. R. A. 760, 48 Atl. 78; *Frederick County v. Frederick*, 88 Md. 654, 42 Atl. 218; *Simpson v. Hopkins*, 82 Md. 478, 33 Atl. 714; and other cases that might be cited.

Order affirmed; the appellants to pay the costs.

WEST VIRGINIA CENTRAL & PITTSBURG RAILWAY COMPANY, *Appt.*,

v.

STATE of Maryland for Use of Ida F. FULLER.

(96 Md. 652.)

1. The question of proximate or remote cause does not arise as between the elements of a cause which hurled a car out of a right of way to the injury of a bystander, where, although in point of time each act was prior to that which succeeded it, all taken together constituted the efficient cause, but for the occurrence of which the accident would not have happened.
2. A railroad company which permits a car to break loose from a train on a grade, and run down into collision with another car at the foot of the decline in such a way as to be hurled off of the right of way to the injury of a bystander, is liable for the injury thereby caused to him, unless it is shown that the accident was unavoidable.
3. It is not error to reject a prayer for instructions, the theory of which is covered by others which are granted.
4. A railroad company owes the duty to persons near its track to use air brakes on its cars, if they are necessary to prevent them from breaking from the train on an incline and running down in such a way as to be hurled from the track to the possible injury of persons who may be there.
5. When a car is thrown off from the right of way of a railroad company to the injury of a stranger, that act must be regarded as the efficient cause of the injury in determining the liability of the railroad company, and not the various steps which lead to it; so that the company cannot relieve itself from liability by showing that neither of such steps was negligent.

(March 31, 1903.)

APPEAL by defendant from a judgment of the Circuit Court for Allegany County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The plaintiff's prayer for an instruction to the jury was as follows:

"If the jury find from the evidence that on or about the 8th day of July, 1901, Melville Fuller, under the age of twenty-one years, was killed by the cars of the defendant while operated by its agents on its road, and that the equitable plaintiff herein is related to him in the manner as set forth in the pleadings, and that the said killing resulted from the want of ordinary care and prudence on the part of the agents of the defendant, and not from the want of ordinary care and prudence of the deceased, directly contributing to the accident, that then the plaintiff is entitled to recover in this cause."

NOTE.—As to liability of railroad company for injury to persons near track, see also, in this series, *Doyle v. Chicago, St. P. & K. C. R. Co.* (Iowa) 4 L. R. A. 420.

For negligence in kicking cars or making flying switches, see note to *Kentucky C. R. Co.* 61 L. R. A.

Defendant's prayers were as follows:

1st: "That the plaintiff has offered no evidence in this case legally sufficient to entitle it to recover, and their verdict must be for the defendant."

2d: "That there is no evidence in this case of any such negligence on the part of the defendant in the discharge of its legal obligations to the deceased, or to the equitable plaintiff in this case, as entitles the plaintiff to recover in this action."

3d: "That if the jury find from the evidence that, at the time of the accident sued for, the defendant was operating a railroad through the suburbs of the village of Luke, in Allegany county, and that immediately west of its main track it had a siding opposite the house of a certain Mr. Rogers, and that the boy, Melville W. Fuller, for whose death this suit is brought, was standing on the company's right of way between the fence of said Rogers' lot and said siding, waiting for a train of cars which was then on said siding to move off the same so that he could cross the same with a bucket of water to the automobile works on the east side of said railroad, and that while said boy was so standing there part of the cars of freight train of the defendant which had gone up the track about a quarter of a mile broke loose from the train to which they were attached and ran back down the main line of said track, and that just before said cars broke loose and ran back said train, which had been standing on said siding, was pulled onto the main track going east by the servants of the defendant, and had all gotten off of said siding onto said main track except one car and the caboose on the rear end of said east-bound train, and that said cars so running back on said main track side-wiped and struck said caboose and knocked it over against and upon said boy, where and while he was so standing on the west side of said siding waiting to cross the track, whereby said boy was killed,—still the plaintiff is not entitled to recover, even though the jury shall further find that at the time he was waiting to cross said track and for a long time before there was a path or walk across the right of way of the tracks of the defendant from the property of said Rogers over to said automobile works, over which persons, together with the said boy, were accustomed to pass and re-pass, and over which said boy on said occasion was waiting to pass; and even if the jury shall further find that none of the cars which broke away from said train and ran back on the main track were equipped with air brakes, or connected up with air-brake connections, with the balance of said train from which they had just broken."

6th: "That under all the circumstances of this case the defendant owed no duty to the deceased, or to the equitable plaintiff, to

v. Smith (Ky.) 18 L. R. A. 63; also *Roth v. Union Depot Co.* (Wash.) 31 L. R. A. 855.

As to liability for injury to person crossing track by breaking in two of a moving train, see *Patton v. East Tennessee, V. & G. R. Co.* (Tenn.) 12 L. R. A. 184.

equip its cars, or any of them, with air brakes, in the running of its trains; and, even if the jury believe from the evidence that the defendant failed so to equip its cars, and that the death of the said Fuller boy resulted from that failure, yet the plaintiff is not entitled to recover."

7th: "That even if the jury shall find that the cars which broke loose and ran back were not equipped with air brakes, and if they had been so equipped they would have stopped, and not run back, resulting in the collision testified to by the witnesses, yet that the direct and proximate cause of the accident was the parting of the cars from the train, and not the failure to have said cars equipped with air brakes, and there being no sufficient evidence in this case to show that the parting of the train was due to any negligence of the defendant, the plaintiff is not entitled to recover."

8th: "That if the jury find that, but for the intervention of the train going east, the cars which broke off and ran back would have gone on down the main track of the defendant's railroad, and done no injury to the deceased, then the plaintiff is not entitled to recover, even though the jury may find that the cars which ran back and struck the intervening train were not equipped with air brakes, unless the jury further find that in drawing said eastbound train out of the siding on to the main track the servants of the defendant were guilty of negligence in so doing."

9th: "That there is no evidence in this case legally sufficient to show that the servants of the defendant were guilty of any negligence, under the circumstances, in drawing said eastbound train from the siding on to the main track, or that the parting of said train was in any way caused by the negligence of the defendant."

Messrs. Benjamin A. Richmond and C. W. Daily for appellant.

Messrs. D. James Blackiston and David J. Lewis for appellee.

McSherry, J., delivered the opinion of the court:

This is a personal injury case. All the questions involved arise on the instructions granted and on the prayers rejected by the trial court, and they are brought up by the one bill of exceptions which the record contains. The legal principles that must control the final decision are perfectly familiar, and the only difficulty presented springs, as is generally the case, from the application of those principles to the peculiar facts of the occurrence. A brief statement of the facts—both those which are uncontroverted and those which are disputed—will now be made, as they furnish the basis of the discussion which will follow.

The appellant is a railroad company whose road extends from Cumberland, in the state of Maryland, southwardly to West Virginia Junction, and thence on to Elkins, in the state of West Virginia. The accident out of which this case grew happened near the town of Luke, in Allegany county. At the 61 L. R. A.

place of the accident there is a siding used to let trains going in opposite directions pass. On the day the injury was inflicted a train of 49 freight cars, 33 of which were loaded with steel rails and 16 of which were empty, was proceeding southwardly towards West Virginia Junction up a considerable grade, whilst a train of empty freight cars, destined northwardly, stood on the siding waiting for the south-bound train to pass. Upon one side of the railroad track an automobile works was located. Upon the opposite side of the track a man by the name of Rogers lived. The men employed at the automobile works got their drinking water from a well in the yard of Rogers. Melville W. Fuller, a boy of little more than fourteen years of age, was employed at the automobile works to carry water from the Rogers well to the works for the use of the workmen there. To go from the works to the well he was compelled to cross the main track and the siding by a path used by him and others, though the path was not a regular public or private crossing. On July 8th, 1901, the boy crossed the two tracks with a bucket in his hand to get water. Before he could return the north-bound train of empty freight cars backed into the siding, and the south-bound train of loaded and empty freight cars passed, going up a heavy grade. This latter train was hauled by two engines, one of which was in front and the other was some six or seven cars back from the front. After it had passed the switch the train of empties standing on the siding started to pull out. The boy all this while was standing, according to the contention of the railroad company, on its right of way, but according to the contention of the appellee, in the yard of Rogers, waiting for the two trains to clear the crossing at the path so that he might return with his bucket of water to the automobile works. After the south-bound train had passed some distance up the grade, six or eight of the rear cars broke loose and came back at a high rate of speed, and as the train of empties had not entirely cleared the siding the caboose of the former struck with a glancing blow the caboose of the latter, derailing both, and driving the last-named caboose over into the yard of Rogers. It fell upon the boy, and instantly crushed him to death. This suit was then brought in the name of the state for the use of the boy's widowed mother against the railroad company to recover damages for the injury she sustained by the death of her son. It was shown that whilst most, if not all, of the cars in the south-bound freight train were equipped with air brakes, all of those so equipped were not coupled up with the air; and it was proved that, if the air brakes had been properly coupled up, the moment the train parted both sections of it would have instantly stopped, and the collision which ensued would have been avoided, and the boy would not have been killed. It was not shown by the appellee what caused the six or eight rear cars of the south-bound train to part from the other cars, nor did the

appellant offer any explanation of that occurrence.

At the close of the evidence the appellee offered one prayer, which was granted, and the appellant offered ten, of which the fourth, fifth, and tenth were granted and the others were rejected. The verdict and the judgment thereon being in favor of the appellee, the appellant appealed, and the rulings of the trial court in granting the appellee's prayer, and in refusing to grant the appellant's first, second, third, sixth, seventh, eighth, and ninth prayers, are assigned as errors for review in this court. The prayers will be found set out at length in the reporter's statement of the case.

The first and second prayers of the appellant go to right of recovery, and were designed to withdraw the case from the jury, on the ground that no legally sufficient evidence had been adduced to show negligence on the part of the appellant in the discharge of its legal obligations to the deceased boy or to his mother. This opens up the whole law of the controversy.

Of course there can be no negligence where there is no duty that is due; for negligence is the breach of some duty that one person owes to another. It is consequently relative and can have no existence apart from some duty expressly or impliedly imposed. In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which duty would have averted or avoided the injury. This has been so often stated that it is not deemed necessary to elaborate it. As the duty owed varies with circumstances and with the relation to each other of the individuals concerned, so the alleged negligence varies, and the act complained of never amounts to negligence in law or in fact, if there has been no breach of duty. Thus, the duty due by a common carrier to its passengers is entirely different from the duty owed by the same carrier to a trespasser on its right of way, and therefore an act which in the first instance would be negligent because a breach of the particular duty there due would not be negligent in the second instance, simply because the same duty is not due. The duty owed to a trespasser on a right of way is measurably less than the duty owed to the same person when not a trespasser, but when entirely off the right of way. As said by this court in *Western Maryland R. Co. v. Kehoe*, 83 Md. 434, 35 Atl. 94: "A railway company is not bound to anticipate that a person will be negligently or wrongfully on its tracks, but if its servants see a person in a place of peril on the right of way then the duty arises to avoid injuring him if possible. But, to recover for an injury sustained when in such a position, the plaintiff must show (1) that the company's servants had knowledge of his peril; (2) that they had knowledge in time to avoid the injury; (3) that they then failed to exert proper care to avoid the injury." This doctrine, stated even more broadly, the appellant had the full benefit

of in its fifth instruction; for the jury were there told that if the boy was on the right of way the appellee would not be entitled to recover, although the death of the boy was the result of the appellant company not having air brakes on the cars that became detached from the train, "or the result of defective appliances or machinery." But whilst the measure of duty due by a railroad company to a trespasser is as stated in *Kehoe's Case*, 83 Md. 434, 35 Atl. 94, there is manifestly a higher duty due by railroad companies to persons on their own premises or lawfully on the premises of others. So use your own rights and property as to do no injury to those of others is a maxim of the law which imposes upon a railroad company a duty towards the public and towards each individual who is not himself a wrongdoer, and which is no less binding than when applied to natural persons in their ordinary relations. Numerous illustrations of the application of this doctrine might be given, but a few familiar ones will suffice. The maxim, though not as applying to a railroad company, was cited and adopted generally by this court in *Scott v. Bay*, 3 Md. 446. That was a suit brought to recover damages which the plaintiff sustained by the quarrying of stone by the defendant on the latter's own premises. The blasting threw large quantities of stone on the plaintiff's land. The defendant asked the lower court to instruct the jury that the defendant had a right to quarry stone from his quarries, and that the plaintiff could not recover for any injury he sustained in consequence of such quarrying, if the jury believed that proper precautions were used in working the quarries, and that such injuries were sustained without default of the defendant. The prayer was rejected, and on appeal that court said: "In the first place, there is no sufficient evidence in the record to warrant such a prayer, that proper precautions were used in working the quarries. But, if proper precautions had been taken, they would still constitute no vindication of the defendant for the injuries resulting to the plaintiff. Unless a party can show a right, either in the nature of a presumed grant or easement, or in some other mode, to use his property in a particular way, he cannot use it in that particular way, if it occasions injury to his neighbors in the quiet enjoyment of their legal rights and privileges, and it makes no difference whether precautions were used or not to prevent the injury complained of." The same principle underlies the decision of *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117. There the railroad company had been given authority to construct a tunnel under Wilson street, in the city of Baltimore. In doing the work the walls of Reaney's house were injured. The house stood on Madison avenue, nearly 25 feet northwest of Wilson street, with another dwelling intervening between it and Wilson street. The excavation made for the tunnel did not come within something over 25 feet of Reaney's house, but did approach quite near the one adjoining it. The walls of the latter settled, and

that caused the walls of Reaney's house to crack. Reaney sued the company for the damage thus inflicted, and recovered a judgment. On appeal the judgment was affirmed, and this court, speaking through Judge Alvey, said: "That there was no negligence or want of care in doing the work is no answer in a case like this. . . . That the excavation of the street for the tunnel was lawful, and done in a lawful manner at the time, can constitute no defense to this action, if damages actually resulted from the work. There are many cases in which an act may be perfectly lawful in itself, and will continue to be so until damage has been done to the property or person of another, but from the moment such damage arises the act becomes unlawful, and an action is maintainable for the injury." And *Bonomi v. Backhouse*, El. Bl. & El. 622; *Smith v. Thackerah*, L. R. 1 C. P. 564, and *Addison, Torts*, 9, are cited. The same doctrine was applied at an early date in actions of trespass. Thus, in trespass *quare clausum fregit*, the defendant pleaded that he had land adjoining the plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which was the same trespass, etc. On demurrer judgment was given for the plaintiff, on the ground that, though a man may do a lawful thing, yet, if any damage thereby befalls another, he shall be answerable, if he could have avoided it. *Broom's Legal Maxims*, 161, and cases there cited. It is true these last cases were in trespass, and the declaration now before us is in case. But the prayers at present under consideration are demurrers to the evidence, and make no reference to the pleadings; hence the right to recover depends, not upon the form of the action or the state of the pleadings, but solely upon the case made by the proof. *Baltimore Bldg. Asso. No. 2 v. Grant*, 41 Md. 569; *Leopard v. Chesapeake & O. Canal Co.* 1 Gill, 222.

There is another class of cases, more akin to the one stated in the declaration in this record, wherein it has been recognized as the settled law that when an injury results from the negligent performance of a lawful act a right of action arises by reason of the negligence. *Baltimore & P. R. Co. v. Reaney*, 42 Md. 130; *Leader v. Moxon*, 3 Wils. 461; *Jones v. Bird*, 5 Barn. & Ald. 837; *Lawrence v. Great Northern R. Co.* 16 Q. B. 653. The running of its trains by the railroad company was a lawful act; but was there negligence in permitting some of its cars to be hurled outside of the right of way, whereby the injury was inflicted? It must be borne in mind that we are dealing with a demurrer to the evidence, and as there was some proof from which the jury could conclude that the boy, when killed, was not on the right of way, it must be assumed as a fact that he was not.

Let us see, then, first, What caused the death? and, secondly, What duty due by the appellant was disregarded by it?

It is obvious that the injury would not

have happened if the rear cars of the south-bound train had not become detached from those in front of them, or if the detached cars had been equipped with air brakes in working order, or if just at the precise moment of the collision the caboose of the north-bound train had been clear of the siding and on the main track, because then the glancing blow which threw the caboose to the side could not have been given. The concurrence of these three things produced the injury. Whilst each was prior in point of time to the one that succeeded it, when measured by minutes, or perhaps seconds, all together constituted the efficient cause, but for the occurrence of which the boy would not have been killed. No independent act emanating from some other agency than the defendant itself intervened to give rise to the application of the doctrine of proximate and remote cause, because all three acts which combined to produce the death were acts of the appellant.

Now, it would seem to be a perfectly plain duty of a railroad company to keep its cars on the rails laid on its right of way, or, at least, to keep them within the limits of its right of way. Every abutting land proprietor has a right to insist that this shall be done, so that in using the dangerous agencies employed in operating the road his person and property may not be injuriously affected. This duty is due, not only to the abutting landowner but to every individual lawfully on contiguous property to the right of way. It is therefore a duty due to every person along, or who may be passing along, but not on, the right of way. And this duty springs out of the obligation upon the company to so use its own rights and property as not to injure the rights or the property of others. Starting with that duty, it is clear when a car has by a collision been hurled outside the right of way, and an injury has been inflicted on one lawfully there, a breach of duty has occurred, and consequently there has been negligence, and for the injury thus inflicted an action will lie unless it be shown that an unavoidable accident was the efficient cause of the injury. No effort was made to do this, and therefore it does not become necessary to trace back of the breach of duty which occasioned the injury the causes which produced that breach, or to ascertain whether the causes of the cause were themselves acts of negligence.

From the views we have expressed it is quite clear, in the light of the conflicting evidence as to whether the boy was within or outside of the right of way, that the court was entirely right in refusing to withdraw the case from the consideration of the jury, and it only remains to inquire whether there was any error in the other rulings to which exception was reserved.

The appellant's third prayer proceeds upon the theory that if the boy was standing, when killed, within the company's right of way, then no cause of action exists, even though the cars which broke away from the south-bound train and collided with the oth-

er train were not provided with air brakes or connected up with the air-brake appliances. There was no error in rejecting that prayer, for the plain reason that its theory was distinctly covered by the fourth and fifth, which were granted. The theory which both the fourth and fifth instructions announce is that the failure to use appropriate appliances to prevent such collisions as the one described cannot be relied on by a trespasser as evidence of an omission by the company to discharge any duty which it owed to him. It would have been error to repeat that same doctrine by granting the third prayer.

The appellant's sixth prayer was radically defective. It asked the court to rule that "under all the circumstances of this case the defendant owed no duty to the deceased" to equip its cars or any of them with air brakes, and that, even if the death of the boy resulted from the company's failure to so equip its cars, no recovery could be had. Had the prayer been granted, the legal conclusion deducible from it is this: Even though the boy had not been on the right of way, and even though by the failure to supply air brakes the company had not so used its rights and property as to avoid injury to others to whom it owed a duty of not inflicting an injury upon them, still no recovery could be had. What has been said in disposing of the first and second prayers of the appellant is sufficient to show the fallacy of this sixth prayer.

The seventh prayer is defective, in that it undertakes to divide up and segregate the several elements which constitute the final and ultimate cause of the injury, and to say that inasmuch as the parting of the train, and not the failure to have air brakes, was the proximate cause of the accident, no recovery could be had, because there was no evidence to show that the severing of the train was due to any negligence on the part of the appellant. It is clear that this prayer entirely ignores the difference in the duty owed by the company to a trespasser and to one not a trespasser on its right of way, and wholly disregards the principle that the company in using its own appliances was bound to so use them as not to injure another in the lawful pursuit of his rights. If the boy was killed when not on the right of way, then the company did not so use its own rights and property as not to injure another, and in consequence was responsible, because the failure to keep within its right of way was, in the circumstances

stated, a breach of duty that it owed to everyone so situated, and was therefore negligence, and it was not incumbent on the appellee to prove that there had been antecedent negligence producing the ultimate negligent act. The act claimed to be the ultimate negligent act being established, the appellant was then required to show in exculpation or defense that the act was an unavoidable accident, which did not proceed from prior or coincident negligence.

A kindred vice runs through the eighth and ninth prayers. By the eighth the court was asked to say to the jury that if, but for the intervention of the train of empty freight cars, the detached cars from the south-bound train would have gone on down the track without injuring the deceased, then no recovery could be had unless there had been negligence in drawing the train of empty cars from the siding; and by the ninth an instruction was sought to the effect that there was no evidence of negligence in so drawing the train of empty cars from the siding, or that the parting of the south-bound train was in any way caused by the negligence of the appellant. The actionable negligence did not consist of one or the other of a series of acts, but in the ultimate outcome of all. Separated and wholly segregated from everything else, there may have been no negligence in the act of moving the train of empties from the siding, but when the concurrence of that act with the parting of the other train, and with a failure to equip the cars with air brakes in working order, resulted in a collision which threw the caboose outside of the right of way; and when the throwing of the caboose outside of the right of way is the thing which caused the death, that act, and not the antecedent steps which led to it, must be treated as the efficient cause of the injury and the act of negligence for which the appellant is answerable, because that is the act whereby the railroad company, in exercising its own right, exceeded the limits of those rights, and inflicted an injury, outside of its right of way, upon a person towards whom it owed the duty not to inflict such an injury, as that person was then situated. The plaintiff's or appellee's prayer, whilst very general, is not open to such criticism as would justify a reversal. *Baltimore & O. R. Co. v. State*, 33 Md. 545. As we find no errors in the rulings complained of, the judgment will be affirmed.

Judgment affirmed, with costs above and below.

MISSISSIPPI SUPREME COURT.

KANSAS CITY, MEMPHIS, & BIRMINGHAM RAILROAD COMPANY, *Appt.*,

v.

J. T. WIYGUL & SON.

(.....Miss.....)

1. A state may, in the absence of con-

NOTE.—As to right to obstruct or destroy rights of navigation, see also *Hutton v. Webb* (N. C.) 59 L. R. A. 33, and note.
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gressional legislation, authorize an obstruction in the bed of a navigable river of the United States, where it is entirely within its limits, which is necessary to repair a bridge which has been placed across the stream under its authority, although the stream extends into another state.

2. The provision in the act of Congress of March 3, 1899, forbidding obstructions in navigable rivers which are not authorized by Congress, does not apply to an obstruction

placed in the bed of a river for the purpose of repairing a bridge which had been placed across the river under state authority prior to the passage of that act.

(March 24, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Monroe County in favor of plaintiff in an action brought to recover damages for injuries caused by the alleged unlawful obstruction of a navigable river. *Reversed.*

Defendant, in repairing a bridge across the Tombigbee river, which is a navigable stream flowing through Mississippi and Alabama, placed temporary structures in the stream which interfered with its navigation during the rafting season. Plaintiff, in attempting to use the stream for the floating of rafts, suffered injury through its obstruction in having its rafts destroyed and the logs scattered.

Further facts appear in the opinion.

Mr. J. W. Buchanan, for appellant:

The mere grant by the state to defendant of the right to build its road gave, of necessity, the right to construct such bridges as were essential over all intervening waterways.

The right to construct carries with it the right to maintain, and, of course, the right to repair when necessary.

Central Trust Co. v. Wabash, St. L. & P. R. Co. 32 Fed. 566.

If defendant had the right to repair, clearly it was not liable unless it was guilty of an improper exercise of the right.

Hamilton v. Vicksburg, S. & P. R. Co. 119 U. S. 285, 30 L. ed. 395, 7 Sup. Ct. Rep. 206, 34 La. Ann. 973, 44 Am. Rep. 451; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 32 Fed. 566; *Cantrell v. Knoxville, O. G. & L. R. Co.* 90 Tenn. 638, 18 S. W. 271; *Ward v. Louisville & N. R. Co.* (Tenn.) 3 Am. & Eng. R. Cas. 506; *Green & B. River Nav. Co. v. Chesapeake, O. & S. W. R. Co.* 88 Ky. 1, 2 L. R. A. 540, 2 Inters. Com. Rep. 515, 10 S. W. 6.

The state of Mississippi had the power and right to confer such authority upon the company.

Hamilton v. Vicksburg, S. & P. R. Co. 119 U. S. 280, 30 L. ed. 393, 7 Sup. Ct. Rep. 206; *Green & B. River Nav. Co. v. Chesapeake, O. & S. W. R. Co.* 88 Ky. 1, 2 L. R. A. 540, 2 Inters. Com. Rep. 515, 10 S. W. 6; *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 432, 15 L. ed. 437.

A break in the line of railroad communication from the want of a bridge may produce much greater inconvenience to the public than the obstruction to navigation caused by a bridge with proper draws. In such cases, the local authority can best determine which of the two modes of transportation should be favored, and how far either should be subservient to the other.

Gilman v. Philadelphia, 3 Wall. 713, 729, 18 L. ed. 96, 100; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 282, 30 L. ed. 394, 7 Sup. Ct. Rep. 206.

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Mr. W. H. Clifton, for appellee:

Since Acts of Congress of 1890, chap. 907, p. 81, Acts 1892, pp. 30, 88, 110, any obstructions to navigable waters that materially interfere with the use of the stream for public passage is a nuisance, even if erected under authority of the state.

Wood, Nuisances, §§ 597-599; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249; *Monongahela Nav. Co. v. United States*, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622; *United States v. Bellingham Bay Boom Co.* 176 U. S. 211, 44 L. ed. 439, 20 Sup. Ct. Rep. 343.

With respect to navigable streams wholly within the state, and about which Congress had never legislated, the law of the state is supreme.

Wood, Nuisances, § 596, note 1; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 8, 31 L. ed. 632, 8 Sup. Ct. Rep. 811; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 281, 30 L. ed. 394, 7 Sup. Ct. Rep. 206; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 687, 27 L. ed. 446.

In the case at bar appellant's charter prohibits it from obstructing navigation; hence, under both state and national law, the appellant would be indictable for stopping up, as it did, the channel of this river.

Miss. Acts 1886, p. 193, § 5; *Acts of Congress, supra*; *Acts of Congress* 1899, chap. 425, p. 1151; *Leovy v. United States*, 177 U. S. 622, 44 L. ed. 914, 20 Sup. Ct. Rep. 797; *Code* 1892, §§ 1145, 1146.

Streams that are floatable, and not perennial, are held to be navigable under our laws.

Wood, Nuisances, §§ 579, 580, 586, 588; 1 Am. & Eng. Enc. Law, pp. 242, 243, note 1; *Smith v. Fonda*, 64 Miss. 551, 1 So. 757.

This obstruction or closing up of the channel of this navigable river being a nuisance, it was a special injury to plaintiff when it caused its rafts to be torn up, logs scattered, some lost, and great expense, labor, and exposure incurred in collecting them together for the market, and entitles it to the damages recovered.

Cooley, Torts, p. 736; *Canton Cotton Warehouse Co. v. Potts*, 69 Miss. 31, 10 So. 448; *Wood, Nuisances*, §§ 860, 892, 893; 5 Am. & Eng. Enc. Law, p. 38.

Whitfield, Ch. J., delivered the opinion of the court:

The legislature of this state granted the appellant a charter (Acts 1886, chap. 123, p. 192, § 2, subsec. 5), by which appellant was authorized to construct the bridge in question over the Tombigbee river, which is an interstate stream, a navigable river of the United States. At the time this charter was granted, and until after this bridge was constructed, Congress, which has the supreme power to control the navigation of such rivers, had not acted with respect to this river. It is well settled that, as to such rivers, in the absence of congressional legislation, the states may authorize the construction of bridges over them. *Wood, Nuisances*, §§ 596 *et seq.*; Gould, Waters,

§ 130; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 281, 30 L. ed. 394, 7 Sup. Ct. Rep. 206, with Rose's notes appended thereto, showing the subsequent citations of the case; 4 Am. & Eng. Enc. Law, 2d ed. p. 923, which last states the rule thus: "It is a well-established doctrine that, subject to the exercise of the power of Congress to regulate navigation, a state has the power to authorize the building of bridges over navigable and tide waters, although such bridges may, to some degree, obstruct navigation." It is also thoroughly settled that power to bridge a navigable stream includes the right to make repairs. Gould, Waters, § 135, p. 207, note 5, and all authorities therein cited, especially *Rhea v. Newport News & M. Valley R. Co.* 50 Fed. 16, and *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 281, 30 L. ed. 394, 7 Sup. Ct. Rep. 206; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 8, 31 L. ed. 632, 8 Sup. Ct. Rep. 811; *Adams v. Ulmer*, 91 Me. 53, 30 Atl. 347. It became necessary in 1900 and 1901 for the railroad company to repair its bridge, which it proceeded to do. Previously to the repairing of the bridge there was an 80-foot space between the piers, through which logs could be floated. The railroad, in repairing, found it necessary to remove the center pier, so as to keep it in the center of the channel, the channel having changed from its old position on account of a sand bar which had formed on the east side, and forced the current to the western shore. In constructing this center pier it became necessary to build a cofferdam of such size that it left a channel of only 40 feet for the floating of logs. There is ample testimony on the part of the railroad that this change was absolutely essential, and that the work was done by competent, skilled men, and in a proper manner in every way; and that the obstruction only continued during such space of time as was absolutely necessary within which to complete the repairs.

Counsel for the appellee obtained from the court the following charges: "If the defendant drove piling in the channel of the river, which materially interfered with the use of the stream for the purpose of rafting, then they will find for the plaintiff, although defendant drove piling in the river for the purpose of repairing its railroad bridge. (3) The court charges the jury that, if defendant in repairing its railroad bridge, placed obstructions in the river which materially interfered with the use of the river for public passage of rafts made of logs cut from lands through which the river passes, then it is liable for all damages caused by said obstructions, and the jury will find for the plaintiff." And the court refused to the defendant the following charge: "The court charges the jury for the defendant that the railroad company had a right, for the safety of the traveling public and its bridge, to make the necessary repairs to its bridge; and in doing so the company is only required to construct the same in a reasonable, proper, and skilful manner, having in view the interest of those using the river as well 61 L. R. A.

as the safety of the traveling public and its own property; and if the jury, from the evidence in the case, believe that the work done by the defendant on its bridge and in the river was done in a reasonable and skilful and proper manner, they will return a verdict for the defendant."

Counsel for the appellee insists that no material obstruction to navigation could be placed in the Tombigbee river, because, and merely because, it is a navigable river of the United States; that is to say, that no material obstruction to navigation could be placed in the river even to repair a bridge previously constructed under state authority, at a time when Congress had not acted with respect to such river, merely because it was a navigable river of the United States, even though such obstruction was necessary to the repair of the bridge, and the work done skilfully done, and the obstruction continued only during the time absolutely essential for the repairing of the bridge. And it is obvious that the court, in its instructions, adopted this view. Counsel for appellee cites the case of *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249; but Congress had acted with respect to the Ohio river, and the bridge in that case, therefore, was constructed after Congress had acted. See this case analyzed in Gould, Waters, § 129. Counsel also cites the case of *Monongahela Nav. Co. v. United States*, 148 U. S. 334, 37 L. ed. 471, 13 Sup. Ct. Rep. 622, but a careful examination of that case shows that (p. 334, 148 U. S., p. 471, 37 L. ed., and p. 629, 13 Sup. Ct. Rep.) "there was not only the full authority of the state of Pennsylvania, but also so far as respects this particular lock and dam, they were constructed at the instance and implied invitation of Congress." It would seem that the court would have sustained the construction under state authority alone, for it declares that it was done under "the full authority of the state," and the citations in the opinion (pp. 330-332, 148 U. S., pp. 469, 470, and pp. 628, 629, 13 Sup. Ct. Rep.) establish the general doctrine we have laid down. The fact that the court referred to the fact that the dam was constructed at the instance and invitation of Congress merely shows that the court relied upon that as an added ground for decision; not that it held that, in the absence of such congressional approval, the state authority would have been insufficient. Counsel also cites *United States v. Bellingham Bay Boom Co.* 176 U. S. 211, 44 L. ed. 439, 20 Sup. Ct. Rep. 343, which construes § 10 of chap. 425 of the acts of Congress of 1899 (30 Stat. at L. 1151, chap. 425 [U. S. Comp. Stat. 1901, p. 3540]), but an examination of that case shows that the court distinctly held that the language, the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any of the waters of the United States is hereby prohibited, etc., embraces state authorization as well as congressional authorization. The court said: "As Congress had not assumed such jurisdiction, either at the time of the

passage of the act by the legislature of Washington, permitting the construction of a boom by the defendant, nor at the time of its actual construction, then, if it were constructed in a manner conformable to the state statute, it was affirmatively authorized by law, at the time of the passage of the act of Congress. It is contended by the government that this term refers to a law of Congress, and does not include any law of a state legislature. We do not so construe § 10. Congress, it must be assumed, was aware of the fact that, until it acted upon the subject of navigable streams which were entirely within the confines of a single state, although connecting with waters beyond its boundaries, such state had plenary power over the subject of that navigation; and it knew that when, in the absence of any statute of Congress on the subject, an obstruction to such a navigable river had been built under the authority of an act of the legislature of the state, such obstruction was legal, and affirmatively authorized by law because it was so authorized by the law of a state at a time when Congress had passed no act upon the subject. When Congress, in 1890, passed the river and harbor bill, we think the expression contained in § 10 [26 Stat. at L. 454, chap. 907] in regard to obstructions, 'not affirmatively authorized by law,' meant not only a law of Congress, but a law of the state in which the river was situated which had been passed before Congress had itself legislated upon the subject. An obstruction created under the authority of a state statute under such circumstances we cannot doubt was an obstruction 'affirmatively authorized by law.' When, therefore, the section continues, and provides that 'any such obstruction, . . . whether heretofore or hereafter created,' shall constitute an offense, it referred to an obstruction as described in the first sentence of the section, namely, an 'obstruction not affirmatively authorized by law.' If the obstruction were affirmatively authorized by a law of the state, it did not come within the condemnation of the section, and its continuance was, therefore, valid."

It must be obvious that the construction of the bridge at the time it was constructed is, by this case, held to be authorized by law. It is true that § 10 of the act of March 3, 1899 (30 Stat. at L. 1151, chap. 425 [U. S. Comp. Stat. 1901, p. 3540]), differs from the act construed in *United States v. Bellingham Bay Boom Co.* 176 U. S. 211, 44 L. ed. 439, 20 Sup. Ct. Rep. 343, which was the act of 1890, in that it has substituted for the words "authorized by law," "authorized by Congress," and, as Congress had not authorized the temporary and necessary obstruction caused by the cofferdam, etc., that was (counsel says) "the creation of an obstruction," within the meaning of this § 10. We think this a misconstruction of the section. The section is prospective purely, as held in the case referred to above, and prohibits the "creation of obstructions," etc. Congress had no intention, by this section, of taking away from the railroad com-

pany, the construction of whose bridge over a navigable river of the United States had been "affirmatively authorized by law," as provided, the necessary power, embraced in and carried by the grant to construct the bridge, of making necessary repairs, provided such repairs were made with due care, and within reasonable time. Counsel's construction of this section would put Congress in the attitude of requiring all bridges previously constructed over navigable waters of the United States to be removed as nuisances, or at least to remain without repair until they fell in. Acts of Congress must not receive a construction which attributes folly to Congress. But it is clear from previous legislation that Congress always provides against such retroactive effect of legislation of this character; for by § 7 of the act of September 19, 1890 (26 Stat. at L. 454, chap. 907), as well as its amendment (§ 3 of the act of July 13, 1892, 27 Stat. at L. 110, chap. 158), it appears that Congress by express proviso saved such bridges previously built from the operation of said sections, the language of the proviso being: "Provided that this section shall not apply to any bridge, drawbridge, piers, and abutments, the construction of which has heretofore been duly authorized by law."

The consideration of these acts of Congress, therefore, clearly shows that Congress had sedulously guarded against applying these various sections in river and harbor bills providing penalties for putting such obstructions in such navigable waters from having any retroactive application to bridges previously constructed under "affirmative authorization of law."

Counsel for appellee misconceives the power of a state, in the absence of congressional legislation, to authorize the construction of bridges over navigable rivers of the United States. He allows himself to be confused by the difference as to the law in its application to rivers wholly within a state and interstate rivers. The law is as we have stated it above, but we quote in conclusion, to adopt as our own, the clearest exposition of the subject we have yet found,—that in *Rhea v. Newport News & M. Valley R. Co.* 50 Fed. 10. Judge Jackson says: "The *Wheeling Bridge Case*, 13 How. 518, 14 L. ed. 249, specially relied on to support the master's conclusion, does not control the present case. It will be seen by reference to the leading opinion in the *Wheeling Bridge Case* that the law of Virginia, which authorized the erection of the bridge there complained of, was held to be inoperative chiefly on two grounds: First, because it impaired the obligation of the compact between Virginia and Kentucky that the use and navigation of the Ohio, so far as the territory of said states was concerned, should be free and common to the citizens of the United States; and, second, because it was in conflict with the legislation of Congress, which has expressly sanctioned said compact, and thereby made it a 'law of the Union.' In the present case there is no such compact between Tennessee and Ken-

tucky in respect to the Cumberland river; nor has Congress, under its constitutional authority, legislated on the subject. The Wheeling bridge was in itself a permanent obstruction to navigation, while defendant's structure or false work was only a temporary and partial interruption to the usual course of navigation, with provision and arrangement made for the transfer of freight and passengers without extra charge to either, and without serious delay, risk, or danger. The question of whether the state of Kentucky had the constitutional right to authorize the erection of a bridge across the Cumberland river within its jurisdiction, and the consequent lawfulness or unlawfulness of defendant's temporary obstruction to navigation in rebuilding said bridge in order to restore its severed line, must, in the opinion of the court, be settled and determined by the principles announced in the cases of *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Palmer v. Ouyahoga County*, 3 McLean, 226, Fed. Cas. No. 10,688; *Mississippi & M. R. Co. v. Ward*, 2 Black, 494, 17 L. ed. 316; *Gilman v. Philadelphia*, 3 Wall. 721, 18 L. ed. 98; *Pound v. Turck*, 95 U. S. 462, 24 L. ed. 525; *Northern Transp. Co. v. Chicago*, 99 U. S. 643, 25 L. ed. 338; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Esanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 687, 27 L. ed. 446, 2 Sup. Ct. Rep. 185; *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 281, 30 L. ed. 394, 7 Sup. Ct. Rep. 206; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; *Sands v. Manistee River Improv. Co.* 123 U. S. 293, 31 L. ed. 151, 8 Sup. Ct. Rep. 113; and *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811. It is not necessary to review these decisions. While they establish beyond all question the paramount authority of Congress, under the commerce clause of the Constitution, over all navigable waters of the United States, they also settle the proposition that, until Congress exercises its superior right of control and regulation, the states or state within whose territorial limits such waters or streams are located may directly or through delegated authority authorize the erection of bridges across the same, and that such structures are not unlawful until so declared by Congress. In respect to such structures over navigable waters within the limits of a 61 L. R. A.

state, nonaction by Congress is not a declaration that such waters must remain free and unobstructed, but that the state's authority over the same may be exercised to the extent, at least, of permitting and authorizing the establishment of ferries, and the building of bridges over the same, necessary or convenient for either its local or interstate commerce. Navigable waters lying within the limits of a state are both state and national in their character, with the paramount right of control or regulation in the general government when Congress chooses to exercise the authority over the same. But until such authority is exercised the jurisdiction and power of the state to authorize the erection or construction of bridges over the same is clearly established. But it is urged by counsel for complainants that such authority of the state is confined, as reported by the special master, to cases in which the navigable stream or water is located wholly, throughout its entire length, within the limits of the state. It is true that in most of the cases above cited the public or navigable waters were wholly within the limits of the state authorizing the erection of bridges or obstructions in or over the same, and that expressions are found in one or more of the opinions which apparently attach some importance to that fact. The decisions did not, however, proceed or rest upon that ground, but upon the principle that such portions of navigable waters as lay or were embraced within the limits of territorial jurisdiction of the state were subject to state authority, in respect to bridges over the same, until Congress exercised its superior and paramount authority of regulation and control. Navigable waters entirely within the limits of a state stand upon the same footing, and are subject to the same controlling authority of Congress, as those extending through or reaching beyond the state. The right of the state, in the absence of congressional regulation to the contrary, to authorize the erection of bridges over such portion of navigable waters as may be embraced within its limits, does not depend upon the length of such waters, nor is the state's authority restricted or affected by the fact that some portion of the stream may extend beyond its territorial jurisdiction."

It follows from these views that the court erred in giving the instructions above quoted to the plaintiff, and in refusing the instruction above set out to the defendant.

Reversed and remanded.

WASHINGTON SUPREME COURT.

Burns W. BEALL, *Appt.*,
v.
City of SEATTLE, *Respt.*

(28 Wash. 593.)

1. Whether or not a city should have known that a boiler for the heating of an abutting building was located under the sidewalk is a question for the jury, where the city ordinances prescribe a certain kind of structural work in case the space under the walk is to be utilized, require inspection by city officials of all alterations in buildings, and a permit to make certain alterations affecting that walk, which would require inspection, had been granted.
2. Notice to an assistant building inspector of intention to place apparatus for heating an abutting building under the sidewalk is notice to the city, where the chairman of the board of public works referred the applicant for permission to make the necessary alterations to that official as the one having authority to grant the permission.

3. Notice of intention to place heating apparatus under a sidewalk, while not notice that it has been done, is such notice as emphasizes the duty of inspection to discover if it is really done.
4. Consent on the part of a city to the placing of heating apparatus under the sidewalk may be found from the fact that it made no inspection after receiving notice that it would be so placed.
5. A *prima facie* case of negligence, rendering a city liable to a traveler injured by the explosion of a boiler under the sidewalk, in the absence of evidence that it exercised reasonable care in the premises, is made out by showing that it consented to the maintenance of the boiler there under conditions, which were a violation of the city ordinance prescribing the structural work to be used in case the space under the walk was to be utilized.
6. The explosion of a boiler, unexplained, will raise a presumption of negligence.

(May 10, 1902.)

NOTE.—*Liability of municipal corporation for injuries to travelers, caused by persons using the space under the street.*

- I. Introduction, 583.
- II. Liability for defective condition.
 - a. In general, 583.
 - b. When defect not apparent 586.
- III. Liability for negligent use, 587.
- IV. Necessity of notice, 589.
- V. Questions for jury, 589.
- VI. Action over, against person primarily liable, 591.
- VII. Conclusion, 591.

I. Introduction.

The subject under consideration in this note includes only those cases where the space beneath the street is formed, or made and used, not by the municipal corporation, but by others. And therefore it may be said at the commencement that a different rule applies from that which prevails where the municipal corporation, by its own act, makes the street unsafe. *Warsaw v. Dunlap*, 112 Ind. 576, 11 N. E. 623, 14 N. E. 569; *Franklin v. Harter*, 127 Ind. 446, 26 N. E. 862.

And so the mere fact of the existence of an area beneath the sidewalk in a city or village will not, of itself, make the municipal corporation responsible; but such existence may be important in determining whether the care and diligence exercised by it in reference to the sidewalk was reasonable or not. *Atchison v. Jensen*, 21 Kan. 560.

It will be seen that the liability of the municipal corporation in the cases under consideration, as in all other cases of injury caused by improper construction of, or defects in, streets and sidewalks, depends entirely upon the negligence of the corporation and its officers, to fasten which upon the corporation there must always exist the essential of actual or constructive notice. What is such notice of either character is a general proposition applicable to all defects in the streets; and will not be gone into here further than to give those cases where the court discussed the sole question whether the corporation had that notice which would render it liable, thus apparently assuming that, if it had, its liability existed.

The liability to lay down a definitive rule reg-

ulating the liability of a municipal corporation for an injury caused by its negligence; or establishing when and under what circumstances such negligence as the proximate cause of such injury exists; is nowhere more apparent than in cases of the kind discussed herein. Whether the liability is occasioned by a knowledge, by the municipal corporation, of the defective condition of the street or sidewalk; and if so, if such condition is apparent from ordinary outward inspection; or, if such a condition is not so plain as of itself to create the liability, whether the latter may be fixed by a continued negligent use by the occupant of the abutting premises of the space under the street or the entrance to or covering above it,—are questions which arise, and are sometimes so commingled as to make it difficult to decide which is the prevailing reason for holding the corporation liable.

II. Liability for defective condition.

a. In general.

It may be said, in the first place, that if an injury is done to a traveler rightfully upon the street or sidewalk and exercising ordinary care, by reason of a defective condition of the street or walk caused by the person using the space thereunder, which condition is, or should be, known to the municipality, or to any of its officers in any way charged with the care of such matters, the corporation will be liable for such injury; and the following cases illustrate when, and under what circumstances, such liability will attach.

Both the city and the owner of adjoining premises are liable to a person who, without fault, is injured by falling into an opening into a cellar or vault in front of the premises of such adjoining owner, the covering to which constitutes a part of the usual sidewalk, which covering has been permitted to be and remain insufficient and defective, whereby the sidewalk is left in an unsafe condition, of which the defendants had notice. *Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683.

It is unquestionable negligence on the part of the city to allow a dangerous cellar way to be constructed in the sidewalk by the owner of adjoining premises, as the corporate authorities are vested with full control of the streets and

APPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by an explosion beneath a sidewalk. *Reversed.*

The facts are stated in the opinion.

Messrs. Shank & Smith, for appellant:

A traveler upon a public highway has a right to assume that it is safe for ordinary modes of travel.

Weed v. Ballston Spa, 76 N. Y. 329; *Seward v. Milford*, 21 Wis. 491; *Williams, Mun. Liability*, pp. 74, 224.

The city had notice that the ordinances were being violated. It neglected its legal duty, both in permitting the violation of the ordinances, and in failing to inspect, and now it comes into court and claims the same immunity from liability as if it had com-

plied with every legal requirement, and there was no fault at its own door.

Abilene v. Cowperthwait, 52 Kan. 324, 34 Pac. 795; *Morris v. Woodburn*, 57 Ohio, 330, 48 N. E. 1097.

When appellant was injured by an unseen instrument exploding, within the area of the street over which the city had control, he is bound to show nothing further than the explosion and the injury in order to make out a prima facie case.

Judson v. Giant Powder Co. 107 Cal. 549, 29 L. R. A. 718, 40 Pac. 1020; *Rose v. Stephens & C. Transp. Co.* 20 Blatchf. 411, 11 Fed. 438; *Klepech v. Donald*, 4 Wash. 436, 30 Pac. 991; *Warn v. Davis Oil Co.* 61 Fed. 631; *Robinson v. New York C. & H. R. Co.* 20 Blatchf. 338, 9 Fed. 877; *Illinois C. R. Co. v. Phillips*, 49 Ill. 234; *Kibele v. Philadelphia*, 105 Pa. 41; *Posey*

sidewalks, and are required to maintain them in a reasonably safe condition for public travel; and the city cannot escape liability for injuries received thereby. *Abilene v. Cowperthwait*, 52 Kan. 324, 34 Pac. 795.

If a permit is granted by a municipal corporation to excavate for cellars and areas, and to dig trenches to connect with water mains, gas pipes, and sewers, the fact is notice to the authorities that the work is in progress, and they are then charged with the duty of seeing that it is properly conducted. *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

In *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271, the plaintiff, after coming out of a restaurant and proceeding down several steps leading therefrom to the sidewalk and street, was injured by stepping into an opening extending out into the sidewalk and street, a distance of 8 feet, to a point beyond the lowest step. The only protection from this opening was a trapdoor fastened upon hinges, and the opening and trapdoor had been there for some three years prior to the accident. An ordinance of the city provided that entrances to areas and basements should not extend into the sidewalk more than 2 feet next to the building. The trapdoor in question was left open a considerable portion of the time, and was open at the time of the accident. There was no claim made on the part of the city that it was not guilty of negligence in permitting the opening in the sidewalk and the trapdoor to be left open, the whole contest being over the question as to whether or not the plaintiff was guilty of contributory negligence. The court, in this case, did not decide that there was negligence on the part of the city, but, as there was no claim made by its counsel that there was not, the case would seem to be some authority that there was, under the particular circumstances mentioned.

In an action for injuries sustained by plaintiff by stepping upon one edge of a coal-slide cover which protected a coal hole under the sidewalk, which cover turned over upon being stepped upon, and one of the plaintiff's legs went through, in consequence of which he was seriously injured, the city, having charge of the streets and sidewalks, is liable for the injury where the defect had existed long enough to imply notice of its existence. *Reinhard v. New York*, 2 Daly, 243.

A person who, without his fault, was injured by falling into a cellar way which had been maintained by the owner of the building for five years, and which was in the street in front of said building and extended to the cellar by steps

6 feet deep, may recover damages of the city for the injury sustained by him, where, on the day previous to the accident, the tenant in possession of the building caused a trapdoor to be put over the cellar way, and on the day of the accident, and before, it had been repeatedly shut and opened, there being no protection to the cellar way when the door was up, though the city did not know of the fact that the tenant had caused said door to be made and put down until after the injury to the plaintiff. *Smith v. Leavenworth*, 15 Kan. 81. The theory of the court was that the original negligence of the city in allowing a dangerous opening to be made in the sidewalk was not totally terminated by the construction of a guard intended to be constant, permanent, and lasting, but it was merely mitigated by the construction of a guard that would sometimes be sufficient and sometimes not sufficient. The original negligence of the city continued, merely modified and mitigated; and nothing would wholly terminate it except to so close up the cellar way as to make it permanently and constantly safe for those traveling on the sidewalk.

Ordinarily an area under the sidewalk of a street of a city is supposed to be for the benefit of the adjoining building, for light, air, approach, or storing; and there may be a presumption that it was constructed by the owner, or at his instance, or for his benefit. But when it is shown that it was not for the benefit of the building,—was not and could not be used for any purpose in connection with the building,—it does away with any presumption that it was constructed by the owner, or that he is responsible for injuries resulting from it. And hence, where a judgment is rendered in an action against the city and such owner in favor of the defendants, and negligence is shown in failing to keep such area under the walk safely covered, such negligence will be imputed to the city, and not to the adjoining owner, and the judgment in favor of the city will be reversed, but that in favor of the owner will be affirmed. *Jansen v. Atchison*, 16 Kan. 358. In this case the court said that, "If the city permits a lot owner to occupy the sidewalk, or obstruct the free passage over it, or endanger its safety by excavations beneath it, it does not thereby relieve itself from responsibility. It is, as to third parties, the same as though it had done these things itself. In other words, it cannot transfer to private citizens that responsibility which, for wise purposes of public policy, the law casts upon it, in reference to the care and safety of its streets and walks."

The case was afterwards retried, and a ver-

v. Scoville, 10 Fed. 140; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Kearney v. London, B. & S. C. R. Co.* L. R. 5 Q. B. 411; *Scott v. London Docks Co.* 3 Hurlst. & C. 506; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418, 31 N. E. 870.

The city would be equally liable with the property owner in a case like the one at bar *Bacon v. Boston*, 3 Cush. 179; *Bourget v. Cambridge*, 159 Mass. 388, 34 N. E. 455; *Saylor v. Montesano*, 11 Wash. 333, 39 Pac. 663.

In any view of this case there was sufficient evidence upon the question of negligence to have gone to the jury.

Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 663; *Payne v. Troy & B. R. Co.* 83 N. Y. 572; *Abilene v. Cowperthwaite*, 52

dict rendered in favor of the plaintiff against the city, and a new trial refused, and judgment rendered thereon. The case was again reversed, and sent back for a retrial. The only thing that is said in the case affecting the subject under consideration is what the court said in treating an instruction of the trial court, to the effect that the city had no right to permit the adjoining owner, or any other person, to use any portion or part of the streets as an area way or opening, or to construct an area way or opening therein; and that, if the jury found from the evidence that there was an opening or area way under that part or portion of the street constructed by the adjoining owner or any other private individual, and that the city had notice thereof, or permitted the area way or opening to remain there, after a reasonable time had elapsed from its construction for it to have had notice thereof, and any injury resulted to the plaintiff without fault upon his part on account of said area or opening, then the jury would find for the plaintiff. In holding that such an instruction was erroneous, the supreme court said: "It would be burdensome, indeed, if in all such cases the city were an insurer of the strength of the sidewalk above such area; that no matter what care and diligence it had used, what precautions taken, it should be responsible for all injuries which anyone might sustain therefrom, if without fault on his part; that though it had done all which human prudence and foresight could suggest, it must nevertheless respond in damages. Such is not the law. Such was not the decision in *Smith v. Leavenworth*, 15 Kan. 81, nor the intimation in the opinion filed when this case was here before. Indeed, the whole scope of the discussion in this respect therein was as to the negligence of the city in failing to discover and repair the defect in the sidewalk, not as to its ignorance of the existence of the area." *Atchison v. Jansen*, 21 Kan. 560.

Where plaintiff was injured by the breaking of a flagstone which formed part of the sidewalk in front of the house in which he occupied two rooms which he hired of the occupant of the whole premises, which flagstone covered a coal hole or vault under the sidewalk, connected with the house, which was designed for getting in or storing coal, and had been used for that purpose; and the plaintiff had no knowledge of the existence of the vault except what he might infer from seeing the iron cover of a hole into the vault in the sidewalk, the vault extending from the cellar under the steps leading from the house to the sidewalk, and under the sidewalk, the three sides of it being built with

Kan. 324, 34 Pac. 795; *Kibele v. Philadelphia*, 105 Pa. 41.

Even though the defect in the heating apparatus was not patent, the city would be liable if it was constructed in a negligent and insecure manner, although it may have been erected without notice to any officer of the city.

Gray v. Emporia, 43 Kan. 704, 23 Pac. 944; *Hume v. New York*, 74 N. Y. 264; *Hutchinson v. Olympia*, 2 Wash. Terr. 314, 5 Pac. 606; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Wells v. Brooklyn*, 9 App. Div. 61, 41 N. Y. Supp. 143; *Sproul v. Seattle*, 17 Wash. 256, 49 Pac. 489.

Messrs. W. E. Humphrey and Edward Von Tobel, for respondent:

There was a total failure to show any facts from which negligence on the part of the city could be inferred.

brick walls about 4 inches thick to within 2 or 3 inches of the level of the sidewalk, the side toward the house being open, upon which walls rested a single flagstone of the size of, and covering, the vault, and forming the sidewalk over it, and this had existed for several years, and for six months or more before the accident, there had been cracks in the stone, visible on the upper surface, extending from the coal hole in the middle to the edges of the stone, and the injury was caused by the breaking of the flagstone along the cracks and in other places,—the city was held liable for the damages sustained by him. *Burt v. Boston*, 122 Mass. 223.

In *Mancuso v. Kansas City*, 74 Mo. App. 188, it was held that, where the plaintiff was injured by stepping upon a coal-hole cover which turned, letting him into the hole, the same being an area for the reception of coal, which was made in the sidewalk by the owner of the premises, and was used by his tenant for that purpose, where the premises were leased with the coal hole in the sidewalk out of repair, and allowed to remain so by the tenant,—the landlord (the owner), the tenant, and the city were all held liable to the plaintiff for the injury.

In an action against the trustees of a village for an injury sustained by the plaintiff on account of a defective sidewalk, such defect consisting of a loosened grate on the level of the flagging, which gave way under the plaintiff's foot as he stepped upon it in passing, the village is liable for the damages so sustained, where a special statute clothed the trustees with powers to regulate, repair, etc., the streets and walks, thus making it their duty to repair the sidewalks. *McSherry v. Canandaigua*, 35 N. Y. S. R. 432, 12 N. Y. Supp. 751, affirmed in 129 N. Y. 612, 29 N. E. 821.

This is all that is said in the case in regard to the nature of the defect. But in *Canandaigua v. Foster*, 156 N. Y. 354, 41 L. R. A. 554, 50 N. E. 971, which was an action by the trustees of the village against the adjoining owner to recover the amount of the judgment obtained by the plaintiff in the above case against the village, it is stated that the grate in question, with several others, was constructed by the defendant (the abutting owner) to enable him and his tenants to convey coal to the cellars under the block of buildings owned by him, and that this grate was in the sidewalk in front of one of the stores in the block.

Where a municipal corporation is charged by law with the duty of keeping in repair the streets and sidewalks within its corporate limits, it is bound to use ordinary care and diligence in regard thereto, and the want of such

Curtis v. Rochester & S. R. Co. 18 N. Y. 534, 75 Am. Dec. 258.

Reasonable care would not have discovered the danger, such as the explosion of soda fountains or empty barrels.

Kirby v. Delaware & H. Canal Co. 48 App. Div. 636, 62 N. Y. Supp. 1110; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Purdy v. Westinghouse Electric & Mfg. Co.* 197 Pa. 257, 51 L. R. A. 881, 47 Atl. 237; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Olive v. Whitney Marble Co.* 103 N. Y. 292, 8 N. E. 552; *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. 301, 13 Atl. 286; *Morrison v. Phillips & C. Constr. Co.* 44 Wis. 405, 28 Am. Rep. 599; *Kuhns v. Wisconsin, I. & N. R. Co.* 70 Iowa, 561, 31 N. W. 868; *Murray v. Denver & R. G. R. Co.* 11 Colo. 124, 17 Pac. 484.

Hadley, J., delivered the opinion of the court:

This action was brought by the appellant

care and diligence is the true measure of its liability, where it is charged with having caused the death of a foot passenger by its negligence in not keeping in repair a cellar door forming part of the surface of the sidewalk. *Johnston v. Charleston*, 3 S. C. N. S. 232, 16 Am. Rep. 721. The case does not state, nor does it appear, what the cellar door opened into under the sidewalk, and it can only be left to inference that it was a covering of the steps that descended into and entered the cellar under the building at the line of the sidewalk.

Where a steam boiler had been placed beneath the pavement of the sidewalk of a street in the city of Washington adjoining a hotel, for the purpose of warming and in other ways administering to the uses of the hotel, and the opening had been closed, with the exception of a place left for a sort of manhole or light, which was walled up, and which, when completed except for its cover, presented an opening 2 feet 1 inch by 3 feet 2 inches, the plan being to cover it permanently with something which would afford illumination to the vault beneath; but, the permanent cover not being ready, the workmen in charge had placed over this hole a mortar board, which was large enough to completely overlap the hole, and this condition existed from five to ten days, during which the plaintiff, while walking along the street, stepped upon the mortar board and fell with his right leg through the hole and was injured,—the District of Columbia was held liable for the damages sustained by him. *Woodbury v. District of Columbia*, 5 Mackey, 127, Affirmed in 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

See *McClure v. Sparta*, 84 Wis. 269, 54 N. W. 337; *Denver v. Dean*, 10 Colo. 375, 16 Pac. 30; and *Grove v. Kansas*, 75 Mo. 672,—*infra*, V.

Some cases have arisen wherein the question whether the notice of the defect or negligent use was sufficient to charge the municipality with liability was the principal or only one discussed; but through the discussion there appears to run an inference or implication that, if there was, or had been, notice, liability would attach; and the following are cases of this nature:

Under a statute of Massachusetts, in an action against a municipal corporation to recover for injuries on account of the negligence of the corporation, if the defect is not shown to have existed for twenty-four hours the plaintiff must show that the defendant had reasonable notice of it, or fall in his action. In *Harriman v. Boston*, 114 Mass. 241, it appeared that the plain-

against the respondent to recover damages for personal injuries received from an explosion which occurred underneath the sidewalk on which the appellant was walking, near the corner of Second avenue south and Washington street, in the city of Seattle. The complaint alleges that prior to March 21, 1899, the date of the accident, one Van der Van was the owner of certain premises in Seattle, extending along Second avenue south, and also of a business block erected thereon; that, with the knowledge and consent of respondent, the said owner utilized, in connection with the said building, the space underneath the sidewalk adjoining the said premises on the west side of Second avenue south, and placed immediately beneath the sidewalk, within the limits of said street, a certain hot-water boiler and connections, constructed in such a manner as to carry steam; that, with the knowledge and consent of respondent said apparatus was

tiff was injured by falling through an uncovered opening in the sidewalk into the cellar of a building facing on the street. This opening was surrounded by a stone frame, and was used for taking in coal and wood, and for other uses in connection with the cellar. It was 30 to 32 inches long, from 18 to 20 inches wide, and about 3 feet deep. There was a plank cover fitted to, and used for closing, the opening. The only question considered by the court seems to have been as to whether the notice was sufficient to charge the city with liability. The court held that it was, and remanded the case for trial.

In *Crosby v. Boston*, 118 Mass. 71, it was shown that the plaintiff, while walking on the sidewalk of a street of the city, stepped on a coal-hole cover; that the cover was warped and twisted and did not fit firmly into its rim, but would slip back and forth, and was not fastened down; and that, when she stepped on it, it tipped, and she fell into the hole, receiving severe injury. The only question raised, or which seems to have been involved in the case, was that of notice to the city. This was submitted to the jury, who found for the defendant, and exceptions to refusals of plaintiff's request to charge substantially that the city had notice, were overruled.

b. When defect not apparent.

Whether or not the defect complained of must, in order to charge the municipal corporation with notice of it and consequent negligence in failing to remedy it, be such a one as would appear from an inspection outside of the space under the street or sidewalk is considered in the following cases:

If a municipal corporation has no actual notice of the existence of a defect in a sidewalk, consisting of an insufficient grate or cover of an opening of a vault therein, existence of the defect for a considerable time will not be construed as constructive notice, where such defect is not apparent from the street. *Hart v. Brooklyn*, 36 Barb. 228. This decision was made under the provisions of title 10, § 1, of the then (1862) charter of the city of Brooklyn, and also subd. 22, § 13, title 2, thereof, which provisions are stated in the opinion to be peculiar to that municipality, and to differ from the statutes which apply generally to municipal corporations throughout the rest of the state.

A city is not liable in an action brought

placed beneath the sidewalk in a negligent and unlawful manner, and without an inspection thereof; that respondent permitted the use of said space below the sidewalk in connection with said building without requiring the owner thereof to comply with the ordinances of the city of Seattle; that the sidewalk thus extended above said apparatus was open to the public as a highway for pedestrians, and was apparently in all ways safe for travel, there being nothing to indicate the presence of said boiler thereunder, and the plaintiff had no knowledge or warning thereof; that on the date aforesaid, while the plaintiff was walking upon said sidewalk, the said boiler exploded with terrific force at the moment when the plaintiff was exactly above it, hurling the plaintiff into the air to a height of 30 feet, whence he fell with great force upon the

hard, uneven surface of the ground; that the plaintiff was thereby seriously wounded and injured, and he therefore demands damages. The answer is a general denial. The cause came on for trial before a jury, and at the conclusion of the plaintiff's testimony the court granted a motion for nonsuit. Plaintiff moved for a new trial, which was denied, and judgment was thereupon entered dismissing the action and taxing costs to the plaintiff. From said judgment, plaintiff appeals.

It is assigned as error that the court took the case from the jury and entered judgment of nonsuit; also that the court erred in holding that notice to the assistant building inspector of the placing of the heating apparatus beneath the sidewalk was not notice to the city. The proofs show that the appellant, a commercial traveler who re-

against it for damages sustained by reason of the plaintiff falling into a coal hole in the sidewalk on account of the defective covering thereof, if there is no evidence of actual notice to the city of the dangerous condition of the coal hole. And, as its liability depends, therefore, upon whether it had constructive notice, it is only chargeable with such knowledge of the method of construction of the coal hole, cover, and attachments as would be acquired by properly inspecting the same from the street. *Mathews v. New York*, 78 App. Div. 422, 80 N. Y. Supp. 360.

Where the owner of the fee to the center of the street, subject to the public easement or right of use for all legitimate purposes of travel, made an opening under the street or sidewalk, as he had a right to for vault purposes, in order to put in wood, coal, and other articles of use in the vault below, and properly covered it with a trapdoor, let into the walk at the time of its construction, so as not then to impede public travel thereover, such construction was not in itself at the time a nuisance. And if such opening was so made and secured and brought down to an equal surface with the walk, and if the walk itself was then safe and secure, and the door over the opening was fastened, and was as firm as the walk, then the city, in the absence of any corporate action opposing the building of the same, or in opposition thereto, and permitting the public to use it, must be regarded as having adopted this trapdoor as part of the walk, and is under the obligation to keep it, as well as the rest of the walk, in safe and suitable repair and security for public travel; and it would be liable for any damage resulting to a person lawfully walking over the same from such want of repair; provided, the defendant city had prior notice of such condition of things in time to have made the same secure; and such notice may be implied when such condition of things has existed long enough for the city, by its proper officers, in the exercise of ordinary care, to have known and discovered such want of repair in time to have made the repairs prior to the accident. If it clearly appears from the evidence that the accident happened by reason of a want of repair of the sidewalk itself, or that such want of repair of the sidewalk contributed directly to the accident. *Papworth v. Milwaukee*, 64 Wis. 389, 25 N. W. 431.

But where an excavation underneath the sidewalk was made by the owner of adjoining premises, and used by the occupant thereof for receiving coal and wood through four coal holes in the sidewalk, and the plaintiff was injured by stepping upon the cover of one of such holes,

and the evidence of the plaintiff showed that the flange on which the cover rested was defective, and that it had repeatedly tilted or tipped up by simply being stepped on, and the jury found that the coal hole and cover in their existing condition were defects in the sidewalk, and that the cover was liable to be tipped when stepped upon; that the defendant city had no actual notice of the defect, but that it had existed so long and so notoriously that the city would, in the exercise of proper care on the part of its agents and officers, have known of it,—such finding will not be sustained, as the defect in the sidewalk was a secret one, not apparent to ordinary observation; and the nature and character of a defect, notice of which would be imputed to the city within the proper rule, was not pointed out as it should have been by the trial judge. And it is not the duty of a municipality to examine covers to coal-hole openings, such as the one in question, to ascertain if they are unfastened, unless there is something apparent on the surface, or otherwise brought to its attention, to lead its proper officers to believe that the same are loose and likely to become displaced. *Cooper v. Milwaukee*, 97 Wis. 458, 72 N. W. 1130.

As to failure to fasten covers to such openings, see *infra* III. See also *Denver v. Dean*, 10 Colo. 375, 16 Pac. 30, *infra*, IV.

III. Liability for negligent use.

Where the construction, by the abutting owner, of a street or walk with the space under it for his use is in and of itself lawful, yet, if the person occupying such space, by the continued negligent and improper use of the same, or of the opening or covering thereof, renders it unsafe and dangerous to travelers upon the street or sidewalk, the municipal corporation will be liable for an injury caused by reason thereof, if it had actual notice of such improper and negligent use, or the latter had continued for such length of time that the corporation, in the exercise of the requisite reasonable care and diligence, should have known of it.

In *Hanscom v. Boston*, 141 Mass. 242, 5 N. E. 249, it appeared that there was a coal hole under the sidewalk of a street, which was closed with a tight-fitting cover, which presented a smooth surface on the top, and which was designed to be fastened on the inside, but which at the time the plaintiff was injured was not, and, in stepping upon it, it turned, and he fell, his right leg going down into the opening, and was injured; and the city was held not liable. Upon sustaining the exceptions of the defend-

sides in St. Louis, was at the time of the explosion walking upon the sidewalk immediately over the location of said boiler. Two companions were with him, between whom appellant was walking. The force of the explosion seems to have centered at about the point where appellant and his companions were walking. The sidewalk was torn up and destroyed, and appellant's companions received injuries from which each died the same night. Appellant was covered with soot so that he was almost unrecognizable, was for the most part unconscious for two days, and received severe and probably permanent injury about the foot, besides a shock to his nervous system of a serious and damaging character. Under the evidence as introduced, it is manifest that appellant received injuries which were due to the explosion of the boiler under the

sidewalk, and the question to be determined is, Was there evidence tending to show negligence on the part of the city, that should have been submitted to the jury?

The evidence shows that the owner of the premises adjoining the sidewalk under which the explosion occurred employed a carpenter to finish the incompleated basement of his building, put an outside stairway 30 inches in width down from the sidewalk, and make certain other repairs in the basement. Before commencing the work the carpenter applied to the secretary of the board of public works for a permit, and, after stating the location of the premises as being within the fire limits, he was referred by the secretary to a Mr. Josenhans, the assistant building inspector. Mr. Thomson, the city engineer, and also chairman of the board of public works, testified that Josenhans was the as-

ant, the supreme judicial court said: "We think, if the coal hole was properly constructed, and the cover was properly fitted and was not apparently insecure, and the only defect, if any, was that it was left unfastened on the inside by the occupant of the cellar, and this was not known to the officers of the city, or apparent from the street,—that the jury could not properly find, under existing statutes, that the city could have remedied the defect or prevented the injury by reasonable care and diligence." (The statute referred to is probably that mentioned in *Harriman v. Boston*, 114 Mass. 241, *supra*, II.)

But where a coal hole was maintained under the sidewalk of the street of a city by the occupant of the abutting premises, with a cover to the opening thereto, which was constructed and intended to be fastened inside, but which, because of not being fastened inside, when the plaintiff stepped upon it, tipped over and permitted the plaintiff to fall in, whereby she was injured, and it appeared that the same cover had tipped on several occasions before to the knowledge of a police officer of the city, who had reported it to his superior, the city was held liable to the plaintiff for the damages sustained by her. *McGaffigan v. Boston*, 149 Mass. 289, 21 N. E. 371. In this case the court said that it does not appear that the covers of coal holes cannot be so constructed that they will not slip off or turn up, in any ordinary use of the streets, even if they are not fastened down on the inside. That while it might be impracticable for the city, if it permits coal holes in the streets at all, to guard against the possibility of there being left open, it is not shown to be impracticable for the city to require a cover of such a kind that, when the covering is shut, the street is reasonably safe, although the cover is not fastened inside. It distinguished *Hanscom v. Boston*, 141 Mass. 242, 5 N. E. 249, saying that in that case there was no evidence that the appearance of a hole or cover indicated any defect, or that it had ever before been out of place, or that the officers of the city had any knowledge that it was not fastened down on the inside.

A city is liable for damages caused by a person falling into an opening made by cellar doors in the sidewalk, where such doors had been frequently left open during day and night for a sufficiently long space of time previous to the injury to charge the city with notice of such negligent use of the cellars. *Chapman v. Macon*, 55 Ga. 566. There is no statement of the fact, but the inference is that these cellar doors

covered steps descending from the sidewalk into the cellar.

A city is liable to a person for injuries sustained in falling through a hole into an area under a sidewalk, which had been built by the owners of the property fronting thereon, three years previous to the event in question, leaving the opening in question about 8 feet wide by 5 feet long, to which a trapdoor was fitted, which door they and their tenants were accustomed, from the time the walk was built, to remove whenever they had occasion, either to lower merchandise or other articles into the area, or to remove any articles therefrom, where it appeared in evidence that at times the opening was left uncovered and unguarded, as it was at the time of the plaintiff's injury, since the city authorities, by the exercise of reasonable care and diligence, could have known those facts and the recurring danger, and if they should have known those things, they are conclusively presumed to have known them. *Philbrick v. Niles*, 25 Fed. 265.

A city is liable to a person who, without negligence on his part, falls through a trap or opening which extends the full width of the sidewalk except 21 inches next to the wall, being about 7 feet in length by 3½ feet in width, which had existed for three years previous, during which time it was frequently opened by throwing the door over flat on the sidewalk, leaving an open space of several feet unplanked, unguarded, and unprotected in any manner, and making a dangerous opening into the cellar below, where the evidence showed that the hatchway had existed, and had been so used, for a much longer period than the three years mentioned, and that the proper officers of the city had knowledge of it. *Barstow v. Berlin*, 34 Wis. 357.

Permission by a city to an adjoining lot owner to use the space under a sidewalk, with an opening thereto in the walk, and the proper use thereof, do not violate any duty owing to the public by such city; but, if the opening is negligently used, the proper officers of the city having sufficient notice to enable them, by the exercise of reasonable diligence, to remedy the mischief, its duty to the public is thereby violated. And where the occupant of the abutting lot frequently, and as often as he desired, had opened a hatchway over an excavation under the sidewalk for convenience in conveying merchandise to and from the basement of the building, without providing any guards whatever or means of warning to prevent persons using the walk from falling through the opening, and this was permitted by the city for a period of three years, and the plaintiff approached the opening

assistant building inspector, and that applications for permits within the fire limits were referred by the secretary of the board of public works to either the inspector or assistant inspector of buildings. The permit to do the repair work was issued; and the carpenter, Mr. Hamilton, testified that when he applied for the permit he also made application for a permit to move out under the sidewalk the heating apparatus then located in the unfinished basement of the building. He further testified that, after he explained what he desired to do, the inspector told him he needed no permit to move the heating apparatus, and then directed him how to place the boiler in the proposed position under the sidewalk. Hamilton testified that he followed the directions of the inspector. The testimony shows that up to this time the basement was

not only unfinished, but was simply a hole in the ground, filled with trash and rubbish, and that the space under the sidewalk was in the same condition. The outside of the sidewalk rested upon wooden blocks or piles, with a stringer running lengthwise of the walk, supporting wooden cross joists, with planks above. Ordinance No. 2833 of the city of Seattle provides as follows: "Sec. 22. Any person desirous of utilizing the under side of the sidewalks in front of any building owned by him shall construct a sufficient stone or hard brick wall, not less than 2 feet thick, to be laid in one part cement and four parts sand, to retain the roadway of the street, and shall extend the side, division, or party walls of such building under the sidewalk to such curb wall. The sidewalks in all cases shall be of incombustible material entire, supported by walls or iron

in the exercise of ordinary care, stepped into it, and was injured, the city is liable for the damages caused thereby. *Whitty v. Oshkosh*, 106 Wis. 87, 81 N. W. 992.

See *Chicago v. Balcock*, 143 Ill. 358, 32 N. E. 271, *supra*, II. a; *Lapworth v. Milwaukee*, 64 Wis. 389, 25 N. W. 431, *supra*, II. b; *Grove v. Kansas*, 75 Mo. 672, *infra*, V.

IV. Necessity of notice.

As in all cases where it is sought to hold the municipal corporation liable on account of a defect in the construction or use of streets and sidewalks, notice, either actual or constructive, is necessary in order to charge the corporation, so, also, is it in cases of the character under consideration.

In *Foster v. Boston*, 127 Mass. 290, it appeared that the plaintiff was injured by falling into an open coal hole in the sidewalk in front of a public schoolhouse on a highway in Boston. The only question raised in the case was as to whether the city had notice sufficient to charge it with liability, and it was held that it did not.

A city is not liable to a person falling into an opening in the pavement of the sidewalk of one of its streets, which opening covered a space under the sidewalk used by the occupant of the premises as a receptacle for coal, where such occupant had left the opening of the vault in the sidewalk uncovered for a short time while engaged in putting coal into the vault, and the city officials did not have notice that it was uncovered. *Lafayette v. Blood*, 40 Ind. 62.

In an action against a city to recover damages sustained by the plaintiff in consequence of the giving way or turning over of a grate covering a vault under the sidewalk upon which he had stepped, the plaintiff, in order to recover, is bound to show, affirmatively, that there had been a neglect of duty by the corporation, and this is not shown merely by proving that the grate was insufficiently fastened at the time of the accident, where there is no reason to believe, from the evidence, that the grate was improperly constructed, or that the defendant had any notice or was chargeable with the knowledge of its defective state. *McGinty v. New York*, 5 Duer. 674. The case is not of much value, being the decision of a judge at special term in granting a new trial to the defendant corporation, and it does not appear whether the vault which the grate covered was used by the occupant of the abutting premises or not. All that can be said of it is that perhaps an inference might be drawn that, if it had been shown that the grate was improperly constructed, and 61 L. R. A.

that the city had notice or was chargeable with knowledge of the defective state of the grating, it would have been liable.

A city is not liable to a person who, while passing on the sidewalk, received an injury by stepping upon an improperly secured grating or covering, to a stairway in the sidewalk leading to the basement of an adjoining building, where such iron grating, covered with boards, was fitted to the opening in such a way that it could not be left in an insecure position except by gross carelessness, and the same had been in that condition for forty years, during which time it had never been known to be left out of its place, and the passageway was used by a stranger, who did not replace the grating properly, a few minutes before the plaintiff stepped upon it, and it gave way. *Littlefield v. Norwich*, 40 Conn. 406.

Means of knowledge essential to give constructive notice to a city of the existence of a defect in the opening to a coal hole under the sidewalk used by the abutting occupant includes only knowledge of visible defects, or obstructions or defects that are the natural and legitimate result of use and climatic influences; and an instruction by the court that the knowledge gained by the chief of police of the city in pursuance of his duties and employment as such officer may have been sufficient to have afforded the city the means of knowledge, so as to charge it with negligence if it disregarded such means of knowledge, is erroneous. *Denver v. Dean*, 10 Colo. 375, 16 Pac. 30.

See *Lapworth v. Milwaukee*, 64 Wis. 389, 25 N. W. 431, and *Cooper v. Milwaukee*, 97 Wis. 458, 72 N. W. 1130, *supra*, II. b; and cases in *supra*, III.

V. Questions for jury.

Negligence being a mixed question of law and fact, it may be safely said that in all cases where it is the gravamen of the action the question of the negligence of the defendant must be submitted to the jury whenever it is a matter of controversy. And this rule is, of course, applicable to the subject here considered.

Whether a system or custom adopted by a city, permitting cellars in its sidewalks in front of the business houses thereon, is reasonably calculated to insure the safety of those who travel on them by day or night, is a question of fact for the jury, and not for the court, to decide; and, in an action to recover for damages sustained by falling into such a cellar, the doors of which had been negligently left open by the occupant of the premises, a charge by the court that, if the council of the city permit the use of

beams in accordance with the following schedule. [Here follow details for construction.]” It is manifest, under the evidence as it now stands, that the space under this sidewalk was being utilized without a compliance with the requirements of said ordinance. When the owner of this building sought to use the space under the sidewalk, it involved the alteration of the building by way of the extension of the side walls and otherwise as required by said ordinance. Being in the nature of an extension to the building, and for its use and benefit, the work therefore became, in effect, an alteration of the building itself. This alteration necessarily involved the use of the materials and the manner of construction for the extended side walls and the sidewalk and its supports required by the ordinance aforesaid, and an inspection of the work as it progressed or when completed might have disclosed the manner of construction, and the location of this boiler, with its attachments connecting it with the main building. Ordinance No. 2662 provides that the board of public works shall appoint a superintendent of buildings, bridges, and wharves. Among other duties designated for him, § 5 of said ordinance provides as follows: “It shall be the duty of the superintendent to visit each house, building, wharf, or bridge which may be in

the course of erection, construction, or alteration within the limits of the city of Seattle, and to see that said building, bridge, or wharf is being erected, constructed, or altered according to the provisions of the city ordinances; that the materials used are suitable for the purpose; that the structure is of sufficient strength and solidity to answer the purpose for which it is designed; that the foundation is down the required depth to get the best bearing that can be obtained, and if the nature of the soil requires piling, flagging, or lagging, to see that it shall be done.” It is thus clearly made the duty of the superintendent to examine and inspect each building in course of erection or alteration. It is also provided that he shall keep a record of all permits issued. The permit issued in this instance specifically authorized the construction of a stairway 30 inches wide down from the sidewalk to the basement, and the application not only disclosed that it was the intention to use at least a portion of the space under the sidewalk for the stairway purposes, but the permit actually authorized it. In any view of the matter, it would therefore appear that the city had actual notice that some alterations were being made under that sidewalk as an attachment to, and for the benefit of, that building, and that actual consent to make the alterations

the streets or sidewalks for cellar, or other private, uses, they are responsible for whatever injury accrues to a citizen from such use,—is erroneous, as it assumes to decide the question of negligence, which would make the defendant liable in regard to allowing cellars under its sidewalks, instead of leaving that question to the jury. *Augusta v. Hafers*, 59 Ga. 151. The case was afterwards retried and plaintiff had a verdict for \$500, and the judgment was again reversed after a charge of the court that, if the jury found the system of cellars with covered doors in the sidewalk, as adopted by defendant, to be reasonably safe and secure, it was then for them to ascertain whether the defendant was guilty of negligence in the use of the cellar by the occupant or owner thereof; and, if they found that the defendant had been guilty of negligence,—they should give such damages as to fully compensate the plaintiff for all injuries received, which was held to be erroneous, the court holding that the question which should have been submitted to the jury was, whether the defendant was liable to the plaintiff in damages for negligence in allowing the use of the cellar by the owner thereof, under the evidence in the case. 61 Ga. 48, 34 Am. Rep. 95.

There is no rule of law which forbids the construction of ways through the sidewalk to cellars under adjacent buildings, and when so constructed they may be used, and, of necessity, the doors covering the same may be opened both in the daytime and nighttime, and if, when open, they are sufficiently conspicuous to be seen by a pedestrian using the sidewalk, in the exercise of proper diligence, or are sufficiently lighted in the nighttime to disclose the danger to such person, it cannot be held that the mere omission to have barriers around them is *per se* evidence of negligence which as a matter of law creates liability; and in an action against a city, by a person, for damages received in falling into such way while the doors were open,

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it is for the jury to determine, in the light of all the circumstances, whether the leaving of a cellar door, upon a pavement, open, is negligence. *Day v. Mt. Pleasant*, 70 Iowa, 193, 30 N. W. 853.

Where the owner of premises adjoining a sidewalk had inserted therein a hatchway with the knowledge and consent of the city authorities, and with their implied license that the same should be opened and used from time to time as the exigencies of his business might require, while it was probably lawful for the city to allow him to make an outside hatchway in the sidewalk leading to his cellar, it was the duty of the city to see to it that the same was so located and constructed as not to render the walk necessarily unsafe to persons passing along the same when the hatchway should be open, and if not thus located and constructed, the walk was defective, and a failure of duty on the part of the city in respect thereto was negligence; and where such hatchway was located nearly in the center of the walk, and directly in the line of most of the travel over the walk, by the adjoining owner with sole reference to the convenient transaction of his own business; and it appeared that the city failed in its duty to direct the location of the hatchway either close to the store or close to the curb with due regard to the safety of travelers upon the walk,—the question of the negligence of the defendant city was properly submitted to the jury, and, they having resolved the question against the city, the latter cannot be heard to allege that the submission of the question to the jury was error. *McClure v. Sparta*, 84 Wis. 269, 54 N. W. 337.

It is the province of the jury to determine whether or not the chief of police of a city had personal knowledge of a defective cap covering an excavation under a sidewalk used by the adjoining occupant as a receptacle for coal; and also whether such knowledge, if found to

to the extent required for stairway purposes was given. We do not think it can be said, as a matter of law, that a proper inspection of that completed work, as required by the ordinances of the city, would not have led to the discovery of the entire situation there, including the location of the boiler and its attachments. We think it is at least a question for the jury to determine whether, with the exercise of reasonable care under the circumstances, the city should have known that this boiler was there located, and the purposes for which it was so placed. Moreover, as we have seen, Mr. Thomson, chairman of the board of public works, testified that Josenhans, the assistant building inspector, was a proper official to whom should be referred the matter of permits for building alterations within the fire limits; and Hamilton, the carpenter, testified that he not only told Josenhans that he intended to place the boiler under the sidewalk, but actually received instructions from him as to the manner of placing it. We think, under the evidence as it now stands, that Josenhans occupied such a position in the premises as made notice to him notice to the city. Whatever notice was involved in the conversation between him and Hamilton related to something that was yet to be done, and not to what had been done, and it is urged that it could not be notice that the

thing was actually done. Strictly speaking, it probably cannot be said to have been notice of the thing actually accomplished; but, being an expression of intention to do a thing, we think it was such notice as at least emphasized the duty of an inspection to discover what was really done, and it is for the jury to say whether that duty was neglected. If no inspection was ever made of the premises after the receipt of notice of intention to place this boiler under the sidewalk as an attachment to the building, then, without other testimony, the jury would be justified in finding that no objection was made by the city, and that it consented thereto. There is testimony in the record to the effect that no inspection of the premises was ever made by any city official either during the progress of the work or after its completion. The work of placing the boiler and making the alterations was done in December, 1898, and the explosion occurred in March, 1899. Under all the circumstances, we think it cannot be said, as a matter of law, that the city had no notice of the existing conditions; and, for further purposes of this opinion in the consideration of the motion for nonsuit, it must be held that there was sufficient evidence to go to the jury upon that subject.

With knowledge of the conditions brought home to the city, what is the status of the

exist, had been acquired a sufficient length of time previous to the accident to render the city liable. And it does not necessarily follow, because the jury, under the law as submitted to them, found, from the conduct and declarations of the chief of police and others, that the city had means of knowledge, and therefore constructive notice, that, under a proper instruction, they would have found that officer possessed of adequate information for a sufficient period to charge the city with actual notice. *Denver v. Dean*, 10 Colo. 375, 16 Pac. 30.

A city is liable to a person injured by falling through a trapdoor in a sidewalk, leading to the cellar under the building adjoining, where the sidewalk was in the most populous part of the city and streams of persons going both ways were almost constantly passing on and over it; and where for a considerable time before the accident the hinges of the door were broken, and it had been necessary to force the door back in its place, after using the cellar, by stamping it down; and the accident by which the plaintiff was injured was occasioned when the plaintiff was passing and attempting to go over it, by a person stamping upon the door to force it into position, which stamping, rendered necessary by the broken hinges in question, caused the strip below on which the door rested to give way, and thus precipitate the plaintiff into the cellar and cause the injuries complained of. *Grove v. Kansas*, 75 Mo. 673.

VI. Action over, against person primarily liable.

In nearly all, if not all, of the cases where a municipal corporation has been held answerable in damages to a traveler injured by reason of the defective construction or negligent use of space under the street, the municipality has an action over against the user of such space as one on whom is the primary liability. And it has been repeatedly decided that, in an action by the municipal corporation to recover what it has

been compelled to pay to the party injured, the judgment against the corporation is conclusive evidence of its liability.

The following are cases in which the injury sustained by the person bringing the original action and recovering judgment against the municipality was caused by such defective construction or negligent use; and while they do not exactly adjudicate the liability of the municipal corporation, they are authority that it has been held liable for such injury, it having been decided that, as before stated, the judgment against the municipality is conclusive evidence of its liability: *Gridley v. Bloomington*, 68 Ill. 47; *McDonald v. Lockport*, 28 Ill. App. 157; *Wickwire v. Angola*, 4 Ind. App. 253, 30 N. E. 917; *Independence v. Jekel*, 38 Iowa, 427; *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775; *Boston v. Worthington*, 10 Gray, 496, 71 Am. Dec. 678; *Boston v. Gray*, 144 Mass. 53, 10 N. E. 509; *Canandaigua v. Foster*, 81 Hun, 147, 30 N. Y. Supp. 686, Affirmed in 156 N. Y. 354, 41 L. R. A. 554, 50 N. E. 971; *Rochester v. Montgomery*, 72 N. Y. 65; *Pawtucket v. Bray*, 20 R. I. 17, 37 Atl. 1.

VII. Conclusion.

The conclusion to be drawn from the foregoing is that a municipal corporation is liable for injuries to travelers caused by persons using the space under the street, either when the construction whereby such space is made available for use is defective and unsafe, or when the use of it by the persons occupying the space is negligent and dangerous, and the municipality through its proper officer knows or should know, i. e., has actual or constructive notice, of such defective and unsafe construction, or of such negligent and dangerous use; and that, except where the fact of such notice which imposes negligence on the municipality is palpable or uncontroverted, the question is for the jury.

P. H. V.

case, without further testimony? It is a well-settled principle that a traveler upon a public highway has a right to assume that it is safe for ordinary modes of travel. This principle is well stated in Williams on Municipal Liability for Torts (§ 128) as follows: "In the absence of anything that would suggest to the mind of a man of ordinary prudence a peril of travel, a person who is passing along a public highway is not bound to anticipate danger, but has a right to assume that the municipal authorities have made the way reasonably safe for public travel in the ordinary modes. And he may indulge in this assumption as well when he is traveling in the nighttime as when he is traveling by daylight. 'A person may walk or drive in the darkness of the night,' says Chief Justice Hunt in *Davenport v. Ruckman*, 37 N. Y. 568, 573, 'relying upon the belief that the corporation has performed its duty, and that the street or the walk is in a safe condition. He walks by a faith justified by law, and if his faith is unfounded, and he suffers an injury, the party in fault must respond in damages.'" Applying the above rule to the case at bar, we find, as the evidence stands, that the appellant was walking upon a public highway of the respondent city, entirely unconscious of any present danger, when he was instantly subjected to great danger by a violent explosion from a source concealed, immediately under the highway upon which he walked. In *Abilene v. Cowperthwait*, 52 Kan. 324, 34 Pac. 795, a lot owner had made a dangerous cellarway under a sidewalk and street in front of his house, which he covered with a trap door. It remained in that condition for about two months, when a person traveling over the sidewalk stepped upon the trap door, which broke down and precipitated him into the excavation below, causing severe personal injuries. It was held that the city could not relieve itself from responsibility because the dangerous opening was made by a lot owner; and, further, that it was the duty of the city authorities to supervise the work of covering the cellarway, and to cause the use of suitable precautions to prevent accidents. Under similar circumstances, it was held in *Morris v. Woodburn*, 57 Ohio St. 330, 48 N. E. 1097, that the injured party may elect to sue either the party creating the nuisance, or the city for its tort in failing to discharge a duty imposed by law. This court said in *Saylor v. Montesano*, 11 Wash. 328, 333, 30 Pac. 653, 654: "That this particular portion of the street was not in a safe condition was demonstrated by what actually happened thereon. Respondent not only had a right to drive over any portion of the street, but a right to expect that all portions of it were in a safe condition for ordinary use." In *Hume v. New York*, 74 N. Y. 264, injuries had been received from a wooden awning constructed in the street. The court, at pages 274, 275, of the opinion, said: "Regarding, then, the ordinance referred to as still in force as is claimed by the defendant, it appears that it required that the erection

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should be made under the direction of the street commissioner. If under the direction of that officer, or through his neglect to supervise it, it was constructed in a negligent and insecure manner, and injury to an individual ensued, the city would be liable for such negligence. *Wendell v. Troy*, 39 Barb. 337, and *Id. 4 Keyes*, 261. And this liability would exist even if the defect were not patent. *Ibid.* If the erection was made without authority from the city, and without the approval or direction of the street commissioner, then it was an unlawful erection in the public streets by an individual for his private purposes, which the jury have found to be obviously unsafe and dangerous to persons using the street, and which it was the duty of the officers of the city to cause to be removed, after having actual or implied notice of its existence." In *Chicago v. Robbins*, 2 Black, 418, 422, 17 L. ed. 298, 302, Mr. Justice Davis says: "It is well settled that a municipal corporation having the exclusive care and control of the streets is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and anyone is injured, it is liable for the damages sustained." In *Wells v. Brooklyn*, 9 App. Div. 61, 41 N. Y. Supp. 143, a show case was maintained on a sidewalk without permission of the municipal authorities; and the city was held liable for injuries caused by its fall, though it had been securely fastened until the day before the accident, when a truck collided with it and broke it loose. The contention was made in behalf of the city that an essential element of its liability was that the obstruction should have been actually dangerous in the first instance, or manifestly likely to become so, in the judgment of prudent men, and that, if originally it was neither, the fact that it subsequently developed into a menace to public travel did not render the municipality chargeable with negligence for the resulting injury. Upon this subject the learned writer of the opinion says at page 63, App. Div., and page 145, N. Y. Supp.: "I think this is too limited a view of the rule of law applicable to such a case, both upon reason and authority. When a municipality tolerates for years the continuance of an unlawful obstruction in a public street, which it is in duty bound to remove therefrom, its action is distinctly wrongful. It must bear the natural consequences of that wrongful action. Any unlawful obstruction in a public highway may prove dangerous to travelers, either from the manner in which it is originally erected, or by reason of accidental or other interference with it by strangers to its erection. Notice to the municipality, therefore, of its presence, is notice that the safety of public travel is endangered, or liable to be endangered. If, under such circumstances, the obstruction is allowed to remain, the municipality takes the risk. If injury ensues, the presence of the obstruction is to be deemed the proximate cause thereof, for the

injury could not have happened if the municipal authorities had performed their duty. In that event in the case at bar the show case would not have been on Grand street at all, and could not have been loosened by the collision with the truck, or fallen upon the plaintiff."

In the case at bar, as we have seen, this boiler was being maintained as an attachment to a building, but located within the limits of a public street, under conditions which were in violation of a city ordinance. If the extended side walls, the supporting stone or brick wall laid in cement, and the stronger overhead structure had been constructed, as required by the ordinance, at places where the space beneath the sidewalk is used, who can say that appellant would have been injured? The defect in the boiler, if there was a defect in the beginning, may not have been patent; but, under the evidence as it now stands, the boiler was maintained and operated there for a period of three months under unlawful conditions. It may therefore have been a nuisance which it was the duty of the city to abate, whether there was any apparent defect in the structure of the boiler or not. Appellant was injured by an unseen instrument exploding within the area of the street over which the city had control. We think, when he had shown those facts, that a prima facie case of negligence was established, and that it devolves upon the city to show that it exercised reasonable care in the premises, in order to overcome the presumption of negligence arising from the fact of the explosion. An explosion being a thing so unforeseen and unexpected in its nature, it is held that negligence will be presumed, if unexplained. There is some conflict in authority upon

this subject, but we believe the better reasoning and the weight of authority support the above statement of the law. Some distinction has been made between cases where contractual relations exist between the parties, and those where there is no such relation; it being held that, when such relation exists, proof of the explosion carries with it the presumption of negligence, and makes a prima facie case, when such would not be true if the contractual relation did not exist. We think the better reasoning is with those cases which hold that the presumption arises, not only in favor of those sustaining contractual ties, but in favor of all others as well. The duty to exercise reasonable care in the maintenance and operation of instrumentalities and devices liable to explosion runs to all mankind. In support of this view, see the following cases: *Judson v. Giant Powder Co.* 107 Cal. 549, 29 L. R. A. 718, 40 Pac. 1020; *Warn v. Davis Oil Co.* 61 Fed. 631; *Rose v. Stephens & C. Transp. Co.* 20 Blatchf. 411, 11 Fed. 438; *Illinois C. R. Co. v. Phillips*, 49 Ill. 234; *Posey v. Scoville*, 10 Fed. 140; *Robinson v. New York C. & H. R. R. Co.* 20 Blatchf. 338, 9 Fed. 877; *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991.

For the reasons hereinbefore assigned, we think there was such evidence as should have been submitted to the jury, and we therefore believe the court erred in granting the motion for nonsuit.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial.

Reavis, Ch. J., and Fullerton, Anders, Dunbar, Mount, and White, JJ., concur.

MISSOURI SUPREME COURT.

STATE of Missouri *ex rel.* Edward C. CROW, Attorney General, *Resp't.*,
v.
City of ST. LOUIS *et al.*, *Appts.*

(.....Mo.....)

1. A municipal corporation may reimburse a member of its police department who is by statute made its officer and required to remove nuisances from the city streets, the amount which he is required to pay upon a judgment recovered against him for shooting a bystander, in attempting, under obedience to the orders of his superior officer, to shoot a mad steer at large in the streets.
2. A proviso at the end of a section of a municipal charter, punctuated only by commas, giving the council power by a two-thirds vote to do what is prohibited by the general terms of the section, which forbid

NOTE.—As to right of municipal corporation to indemnify officers against liabilities incurred in the discharge of their duties, see also cases in note to *Daggett v. Colgan* (Cal.) 14 L. R. A. 477.
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releasing a lawful tax, exempting from any burden imposed by law, paying any demand not authorized by law, compromising any disputed demand, or paying any demand for alleged injuries, will not be limited to the immediately preceding clause, but will apply to all equally, in the absence of anything to indicate why it should not be so applied, while, on the contrary, the history of the statute indicates an intention that the proviso shall apply to the whole section.

3. An appropriation to cover the expenses incurred and paid by a municipal officer in the discharge of his duty is not within a constitutional prohibition of the granting of public money to an individual.

(April 1, 1903.)

A PPEAL by defendants from a judgment of the St. Louis Circuit Court enjoining the payment of a claim as directed by an ordinance. *Reversed.*

Statement by **Marshall, J.:**

This is a proceeding by injunction to enjoin the city of St. Louis, its auditor and

treasurer, from paying to the defendant William Desmond the sum of \$971.30, pursuant to an ordinance of the city of St. Louis, numbered 19,716, entitled "An Ordinance for the Relief of William Desmond," approved March 10, 1899. Said ordinance is as follows:

19,716.

**An Ordinance for the Relief of
William Desmond:**

Whereas, on the 6th day of July, 1892, a wild steer had escaped from the people who had charge of said animal, and was running loose upon the streets of the city of St. Louis, at or near the Four Courts building in said city; and said wild steer was charging upon the people of said streets; and there was danger that someone would be hurt thereby, and a number of persons were shooting at said animal in an endeavor to kill same and prevent accident to persons on said streets; among said persons firing shots at said animal being William Desmond, then and now acting as chief of detectives of the metropolitan police force of the city of St. Louis, who fired such shots at the instance and under the orders of his superior officer, Chief of Police L. Harrigan; that while said Desmond was leaning out of a window of the Four Courts building, firing a shot or shots at said animal, under said directions of his chief, a shot struck one Albert Tolch, a minor, who was standing on the north side of Clark avenue, opposite the said Four Courts building, and between Eleventh and Twelfth streets, which said shot may or may not have been fired by the said William Desmond, who was acting under orders from said Chief Harrigan, and was acting to the best of his ability in the discharge of his duty as a city officer at the time of firing such shot or shots; and,

Whereas, afterwards, by his next friend, the said Albert Tolch brought suit against said Desmond in the circuit court of the city of St. Louis, claiming damages for being so injured, which suit was tried before a jury, which said jury rendered a verdict against said William Desmond, which resulted in a judgment against him for \$1,500, which judgment he afterwards compromised for the sum of \$750 and costs, in all amounting to the sum of \$871.30, and he also became liable for attorneys' fees in the sum of \$100, making a total expended by him of \$971.30; therefore,

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

Sec. 1. The auditor is hereby authorized and directed to draw his warrant on the city treasurer, in favor of William Desmond, for the sum of \$971.30, and take his receipt in full of all claims against the city of St. Louis. Said warrant to be charged to appropriation for relief of William Desmond.

Sec. 2. There is hereby appropriated and set apart out of municipal revenue the sum of \$971.30 to fund for the relief of William Desmond.

Approved March 10, 1899.

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The petition charges that the ordinance "is contrary to the provisions of the charter of said city, and in excess of the powers of said assembly, and is null and void."

The answer admits the passage of the ordinance, and that the city and its officers intend to carry it into effect, sets up the facts substantially as recited in the preamble to the ordinance, and asserts the power and authority of the city to pass the ordinance. The plaintiff demurred generally, to the answer. The court sustained the demurrer. The defendants refused to plead over. Final judgment was entered upon demurrer for the plaintiff, and the defendants appealed.

Messrs. Johnson & Richards, Charles Clafflin Allen, Charles W. Bates, and William F. Woerner, for appellants:

The municipal assembly had power to pass the ordinance in question under its powers by statute and charter, to preserve the public peace and order, and to protect life, liberty, and property.

The municipal corporation can indemnify its officials against any liabilities which they may incur in a bona fide performance of their duties, even though they may have exceeded their legal authority.

Tiedeman, Mun. Corp. § 115; Beach, Pub. Corp. § 647; Dill. Mun. Corp. § 147; Throop, Pub. Off. § 495; Mechem, Pub. Off. §§ 877-879.

Or even though their acts were illegal.

19 Am. & Eng. Enc. Law, p. 541; *Cullen v. Carthage*, 103 Ind. 196, 53 Am. Rep. 504, 2 N. E. 571; *Lawrence v. McAlvin*, 109 Mass. 311; *Pike v. Middleton*, 12 N. H. 278; *Fuller v. Groton*, 11 Gray, 340; *Sherman v. Carr*, 8 R. I. 431; *Bancroft v. Lynnsfield*, 18 Pick. 566, 29 Am. Dec. 623; *Hadsell v. Hancock*, 3 Gray, 526; *State, Lewis, Prosecutor, v. Hudson County*, 37 N. J. L. 254; *State, Bradley, Prosecutor, v. Hammonton*, 38 N. J. L. 430, 20 Am. Rep. 404; *Roper v. Laurinburg*, 90 N. C. 427; *Campbell ex rel. Bignold v. Norwich*, 2 Myl. & C. 406; *Queen v. Stamford*, 4 Q. B. 900, note a; *Queen v. Lichfield*, 4 Q. B. 893.

The true test in the case at bar is the power of the city to preserve public peace and protect property; and it is not measured by the city's liability in an action brought against it. The police department is maintained solely for the public welfare, as an agency of the state, as well as of the city. *State ex rel. Hawes v. Mason*, 153 Mo. 23, 54 S. W. 524; *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108, 1 S. W. 240.

Mr. Charles S. Reber, for respondent:

Ordinance 19,716, "For the Relief of William Desmond" is repugnant to the charter of the city of St. Louis, and therefore void. Section 30, art. 3, of said Charter.

It is also repugnant to the Constitution of the state, and is, for this reason, utterly void.

Const. art. 4, § 6, art. 10, § 3.

Being a relief bill, it is a plain usurpation of power on the part of the municipal assembly, and, hence, of no legal validity.

Hitchcock v. St. Louis, 49 Mo. 484; *Campbell v. St. Louis*, 71 Mo. 106; *State ex rel. Crow v. St. Louis*, 169 Mo. 31, 68 S. W. 901; *Halsted v. New York*, 3 N. Y. 430; *Vincent v. Nantucket*, 12 Cush. 103; *Gove v. Epping*, 41 N. H. 539; *Thorndike v. Camden*, 82 Me. 39, 7 L. R. A. 463, 19 Atl. 95; *Grant County v. Bradford*, 72 Ind. 455, 37 Am. Rep. 174.

Marshall, J., delivered the opinion of the court:

William Desmond is, and at the times hereinafter mentioned was, an officer of the metropolitan police force of the city of St. Louis, being the chief of detectives. The board of police commissioners of St. Louis was created by the act of March 27, 1861. Acts 1860-61, p. 446. The original act was amended by the act of 1867 (Acts 1867, p. 179), and by § 11 of that act the members of the police force were expressly declared to be officers of the city and, also officers of the state. This dual capacity was recognized as lawful, under the laws as they existed, by this court, in *Carrington v. St. Louis*, 89 Mo. 1, *loc. cit.* 214, 58 Am. Rep. 108, 1 S. W. 240. Section 11 of the act of 1867 was re-enacted as § 25 of the act of 1899. Acts 1899, p. 60. By the terms of all the acts creating the board, the city of St. Louis is required to pay all the salaries and expenses of the police (except from 1864 to 1876, when the county of St. Louis was required to pay one fourth thereof. *State ex rel. St. Louis Police Comrs. v. St. Louis County Ct.* 34 Mo. 546. But upon the separation of the city and county in 1876, this obligation ceased).

Thus the predicates are established that the police of St. Louis are both state and city officers, and that the city is under obligation to pay the expenses of the force. The preamble to the ordinance recites, and the answer avers, and the demurrer admits, the fact to be that a mad steer was running wild in the city of St. Louis, and the people and their property were in imminent danger, when the chief of police ordered the defendant Desmond to shoot it, and thus prevent such threatened injuries; that such order came from said defendant's superior officer; that, in obedience to said order, he leaned out of the window, and with due care shot at the steer; that other persons were also shooting at the steer; that a shot struck a boy, who was on the opposite side of the street; and that suit was brought by said boy against the defendant Desmond, and a judgment rendered against him, and that the ordinance in question is intended to reimburse said defendant for the judgment and costs which he was thus obliged to pay.

This establishes the further predicate that the liability which the defendant Desmond incurred and paid, and which the ordinance is intended to relieve him from, was a liability incurred by him in the bona fide discharge of his duties as a police officer, as those duties are defined in the acts creating said police force. The act of 1861 (Acts 1860-61, § 5, p. 448) made it the duty of the police to "preserve the public peace, . . .

protect the rights of persons and property, guard the public health, . . . prevent and remove nuisances in all streets, highways, water and other places." A mad steer running wild on the streets of a populous city, and threatening the lives of the people, is a nuisance on such streets. There was, apparently, on hand no gaily attired matadore, with red shawl and keen-edged sword, to remove the animal with neatness and despatch, nor was there a Bossie Mulhall to lasso and tie the steer with speed and grace. Under the circumstances, and under the act aforesaid, it was clearly the duty of the police to remove the nuisance. It does not appear from the record how it fell out that Desmond could hit a boy on the opposite side of the street while leaning out of a window and shooting at a steer in the street below him. It would not be contended that he made a "bull's-eye" on that shot. In fact, such a remarkable exhibition of marksmanship could not even be explained upon the theory that

"Many an arrow at random sent,
Hits mark the archer little meant."

It rather depends for solution upon the precedent recorded in the nursery rhyme, "He shot at the goose, and hit the gander." In short, but for the fact that the verdict of the jury in the damage suit so declared, the idea that such a thing could have happened would not have been tolerated. But, however it came about, it goes to show the state of discipline that existed in the force, and speaks volumes of praise to the spirit of obedience to orders that actuated Desmond; which in some degree, at least, compensates for the poor marksmanship displayed. The incident also goes to prove most conclusively that brains, and not bullets, are necessary to make a successful detective, and that Desmond earned his position and enviable reputation by the possession of a cool head, rather than by superior ability with a gun; and that, even if he could not hit a mad steer, he could "make a hit" as the head of so efficient a detective force. What he did, however, was done in the discharge of official duty, and was necessary to the protection of life and to the removal of a nuisance. It was done by him as an officer, and not as an individual, nor for his individual profit. He incurred a liability while in the performance of his duty, and while in the legitimate scope and discharge of his duty. The general rule of law is that under such circumstances the municipal or other public corporation has a right to indemnify an officer against loss, upon the ground that the officer was acting for the town or corporation when he became liable. *Tiedeman, Mun. Corp.* § 115. The true test in all such cases is, Did the act done by the officer relate directly to a matter in which the city had an interest, or affect municipal rights or property, or the rights or property of the citizens, which the officer was charged with a duty to protect or defend? If it did, the city had a right to employ counsel to defend the officer, and to appropriate funds to pay a judgment rendered against the officer. The cases illus-

trative of this rule are collated in the notes to § 115 of Tiedeman on Municipal Corporations. To the same effect are also Beach, Pub. Corp. § 647; 1 Dill. Mun. Corp. 4th ed. § 147; Throop, Pub. Off. § 495; Mechem, Pub. Off. § 877. A few illustrations, furnished by the many cases cited by the text-writers, will suffice to point the rule. Appropriations of public funds to indemnify officers have been upheld in the following cases: In favor of village trustees, when sued for acts done in the discharge of their public duties, *Powell v. Newburgh*, 19 Johns. 284; in favor of an Indian agent for freight paid by him on supplies in a sudden emergency, *United States v. Stowe*, 19 Fed. 807; in case of a suit for libel growing out of an officer's official report, *Fuller v. Groton*, 11 Gray, 340; in a suit for false imprisonment on account of an arrest made by a town marshal, *Cullen v. Carthage*, 103 Ind. 196, 53 Am. Rep. 504, 2 N. E. 571. Many other cases are collated by Dixon, J., in *State, Bradley, Prosecutor, v. Hammonton*, 38 N. J. L. 430, 20 Am. Rep. 404. The power to pass the ordinance in question was, therefore, fully vested in the city under the general law, and the ordinance is a valid ordinance, unless there is some special provision in the charter of St. Louis or in the Constitution of the state that takes away that power from the city of St. Louis.

The plaintiff contends that such prohibition is found in § 30 of article 3 of the charter of St. Louis (Rev. Stat. 1899, p. 2489), and in §§ 46 and 47 of article 4 of the state Constitution. Section 30 of article 3 of the city charter is as follows: "The assembly shall not have power to relieve any citizen from the payment of any lawful tax, or to exempt him from any burden imposed upon him by law, or ordain the payment of any demand not authorized and audited according to law, nor shall the assembly have power to ordain or authorize the compromise of any disputed demand, or any allowance therefor or therein, except as provided in the contract therefor, or the payment of any damages claimed for alleged injuries to person or property, except by ordinance and adopted by a vote of two thirds of the members of each house, taken by yeas and nays." Section 46 of article 4 of the Constitution is as follows: "The general assembly shall have no power to make any grant, or to authorize the making of any grant, of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, that this shall not be so construed as to prevent the grant of aid in a case of public calamity." And so much of § 47 of article 4 of the Constitution as is material to the contention is as follows: "The general assembly shall have no power to authorize any county, city, town, or township, or other political corporation or subdivision of the state now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association, or corporation whatsoever, or to become a stockholder in

such corporation, association, or company," etc.

It will be observed that § 30 of article 3 of the city charter covers five classes of subjects, which, for the sake of convenience and perspicacity, may be numbered and stated separately as follows: The assembly shall not have power (1) to release any citizen from the payment of any lawful tax; (2) to exempt him from any burden imposed upon him by law; (3) to ordain the payment of any demand not authorized and audited according to law; (4) nor to ordain or authorize the compromise of any disputed demand, or any allowance therefor or therein, except as provided in the contract therefor; (5) to ordain the payment of any damages claimed for alleged injuries to persons or property. The section quoted, after specifying these five prohibitions, then concludes with these words: "Except by ordinance, and adopted by a vote of two thirds of the members of each house, taken by yeas and nays." It will be observed that all these matters are contained in the same section, and that there are no punctuation marks except commas employed. The contention of the plaintiff is that the assembly is absolutely prohibited to do any of the things specified in the first, second, third, and fourth classes, but that the prohibition is not absolute as to the fifth class above specified, and that as to such matters the assembly is given power to act, provided two thirds of the members of each house vote in favor of such an ordinance. In other words, the plaintiff contends that the words, "except by ordinance and adopted by a vote of two thirds of the members of each house, taken by yeas and nays" apply only to the fifth class of subjects, and not to the other four classes of subjects; or, otherwise stated, that it applies only to its immediate antecedent, and not to the whole section. Unless this contention is sound, the section quoted cannot be construed as a prohibition against the power of the municipal assembly to pass the ordinance in question, but, on the contrary, the converse of the contention must be true, to wit, that the section quoted confers the power to pass the ordinance if two thirds of the members voted therefor, and in the absence of allegation and proof that two thirds of such members did not vote to pass this ordinance it will be assumed that the assembly did its duty, and that the requisite two thirds voted for the ordinance. *State ex rel. Crow v. St. Louis*, 169 Mo. 31, 68 S. W. 900.

The history of the evolution of § 30 of article 3 of the charter of St. Louis will serve to throw light upon the true meaning of the section. Section 5 of article 3 of the charter of St. Louis of 1870 (Acts 1870, p. 467) provided as follows: "The city council shall not have power to relieve any citizen from the payment of any tax, or to exempt him from any burden imposed upon him by law." There could be no room for doubt that as to these two subjects there was a clear and absolute denial of power in the city council under that section of the

charter of 1870. It is commonly believed that the cases of *Hitchcock v. St. Louis*, 49 Mo. 484, and *Campbell v. St. Louis*, 71 Mo. 106, were decided on the faith of, or at least were in some manner affected by, the provision of the charter of St. Louis of 1870, above quoted. It is not clear, however, that such is the fact. It does not clearly appear from the report of the case of *Hitchcock v. St. Louis*, 49 Mo. 484, whether it arose under the charter of 1870 or that of 1867 (Acts 1867, p. 56). An examination of the original transcript in that case shows that the ordinance in question was passed on February 8, 1870, and the suit was filed on the 10th of February, 1870. The charter of St. Louis of 1870 was not approved until March 4, 1870. So that case arose before that charter went into effect. But the charter of 1867, under which that case arose, contained substantially the same prohibitions as the charter of 1870. Section 17 of article 2 of the charter of 1867 provided: "The city council shall have no power to exempt persons or property from license or taxation, or from the payment of burdens imposed upon them by law." Laws 1867, p. 61. It is to be observed that this section was not referred to or relied on by either counsel or court in the *Hitchcock Case*. That was a suit "to test the validity of an ordinance passed by the city council of the city of St. Louis, by which the sum of \$1,500 was appropriated out of the general revenue, and ordered to be paid to the mother superior of St. Ann's Orphan Asylum and Widows' Home, as a donation from the city toward the maintenance and support of that institution." It was held that "the donee is a mere private institution, not under the control of the city, and having no connection with it. If the taxpayers' money can be taken and given to it, it may be also to any other private corporation, or it may be distributed gratuitously to individuals." There can be no difference between legal minds that this case was properly decided, but it has no application to the case at bar, and throws no light whatever upon the true meaning of § 30 of article 3 of the present charter, nor upon its ancestral sections of the charters of 1867 or 1870. The case of *Campbell v. St. Louis*, 71 Mo. 106, arose under the charter of 1870, but the provision of the charter above quoted was not referred to or relied on at all. The facts in that case were that the Times Company had a contract to do the city printing. The company and the city disagreed as to the amount due the company for printing done under the contract. The essential difference was that the company claimed that it was entitled to charge double the contract price per line for rule and figure or tabular work. The administrative officers refused to allow it, and treated all lines alike, and applied the contract price to all alike. The city council first adopted a resolution that the "said company be allowed payment in full for printing on their scale of prices for tabular matter." The city officers still refused to allow the claim, and thereafter the 61 L. R. A.

city council passed an ordinance for the relief of the company, directing the auditor to draw his warrant in favor of the company for the amount claimed. Thereupon the plaintiff, as a citizen, instituted a suit for an injunction to restrain the city from carrying the ordinance into effect. The defendants demurred to the petition. The circuit court sustained the demurrer, and the plaintiff appealed. The St. Louis court of appeals reversed the judgment of the circuit court. The reasoning employed by the court of appeals was that it was decided in *Hitchcock v. St. Louis*, 49 Mo. 484, that the city could not make a donation of public money as a gratuity; that the charter required the party having the contract for the public printing to do all the job work required, and that it should not be lawful to cause any printing to be done or paid for except as provided for by the article of the charter relating to public printing; that said article required that the contract for public printing should be let by the comptroller, by competitive bidding, to the lowest and best bidder; and that the power to let the contract being given to the comptroller the city council had no power in the matter except to make an appropriation to pay for the work. The opinion does not state who was vested with the power to determine the amount of work that had been done under the contract, but inferentially it might be said that the opinion regarded that power as vested in the comptroller. It was argued in that case that, as "a dispute had arisen between the city and the Times company [as to the amount due the company] growing out of a lawful contract, to settle which the parties might have had recourse to a court of justice, therefore the city had a right to settle and adjust it by compromise out of court." But the court of appeals answered that contention by saying: "The plain duty of the council would be to refer the subject to the courts of the state; and where it attempts, in place of this, to determine the validity of the claim, and provide for its payment, it is guilty of a plain usurpation of power, and a wanton waste of the money of the city." The defendants appealed from this decision of the St. Louis court of appeals to this court (*Campbell v. St. Louis*, 71 Mo. 106), where by a *per curiam* opinion the opinion of the court of appeals was affirmed and adopted.

It will be observed that the prohibitions of § 5 of article 3 of the charter of 1870 were not referred to or relied on. Manifestly, they were not applicable to that case. These cases have been thus fully analyzed to show that they did not depend for their decision upon the provisions of the city charter which formed a part of the evolution of § 30 of article 3 of the present charter. The present charter of St. Louis was framed by a board of freeholders in 1876, and was adopted by the people at an election held on August 22, 1876. Section 30 of article 3 was made up by taking § 5 of article 3 of the charter of 1870, and inserting the word "lawful" before the word "tax," and adding

three classes of subjects thereto, and then adding the last clause as to the two thirds vote being necessary. Thus the first two classes of subjects treated of in § 30 of article 3 of the charter of 1876 are the same as the two prohibitions of the charter of 1870; that is, they prescribe that the assembly shall not have power (1) to release any citizen from the payment of any lawful tax, or (2) to exempt him from any burden imposed upon him by law. With this as a foundation, the framers of the charter of 1876 builded § 30 by adding thereto: (3) or to ordain the payment of any demand not authorized and audited according to law; (4) nor to ordain or authorize the compromise of any disputed demand, or any allowance therefor or therein, except as provided in the contract therefor; (5) or the payment of any damages claimed for alleged injuries to persons or property. And then were added the words, "except by ordinance, and adopted by a vote of two thirds of the members of each house, taken by yeas and nays." Thus it will be observed that the first and second classes relate to excusing a citizen from paying money into the city treasury. The third class relates to paying money out of the treasury. The fourth class might result in the payment of money into or out of the treasury. The fifth class relates wholly to the payment of money out of the treasury.

Now, the contention is that by the qualifying clause at the end of the section it was intended to give the assembly power, by the prescribed vote, to sit as a quasi court, and award and pay damages to a citizen for injuries done by the city to his person or property, but that the assembly had no power whatever to compromise a disputed claim, or to order the payment of any demand not authorized and audited according to law, or to exempt a citizen from any burden imposed upon him by law, or to relieve a citizen from the payment of any lawful tax. Or, otherwise stated, that the wisdom and integrity of the assembly could be trusted to pay out money for damages for injuries to persons or property, and thus relieve the city of the expense incident to forcing every such matter into court, but that the assembly could not be trusted to compromise a disputed demand, which might result in the city paying or receiving more or less than its administrative officers claimed was right, and that, as decided in *Campbell v. St. Louis*, "the plain duty of the council [assembly] would be to refer the subject to the courts of the state," notwithstanding the costs in the case might exceed the difference in dispute. And, further, that the assembly could not be trusted to deal with the other three classes of subjects covered by the section in question. This contention necessarily means that the assembly could be trusted to pay out money for one class of municipal liabilities, but could not be trusted to pay out money for any other class of such liability, and could not be trusted at all to deal with a citizen when it came to the question of the payment of money into the treasury, or the settlement of any question of a tax or burden due from or resting upon the citizen. No reason is attempted to be given for this inexplicable difference of power in the assembly. The contention is based solely upon the cold words of the section, which it is said precludes all debate as to the meaning or reason of the law. As to the first two classes of subjects it is said that the charter of 1870 absolutely denied power to the assembly to deal with them, and, as they were brought forward into the charter of 1876, they must be still construed as absolute prohibitions. But, if this be conceded to be the correct meaning of that part of the section, it will not solve the problem; for neither the charter of 1870 nor any previous charter contained any prohibition against the assembly ordaining the payment of any demand not authorized and audited according to law, nor any prohibition against the assembly authorizing the compromise of a disputed demand. So the argument that the section intended that there should be an absolute prohibition against the assembly doing any of these acts could not be drawn from any prior laws, and hence that reason for excluding the qualifying clause at the end of the section from those classes of subjects would not apply. There is, therefore, no reason for thus restricting the qualifying clause to the fifth class of subjects, and not applying it to the other four classes; and "the reason of the law is the life of the law."

But it is said that the general rule of law is that, in the absence of punctuation showing a different intent, an exception or proviso in a statute applies only to its immediate antecedent in the statute, and therefore the exception in this section applies only to the fifth class of subjects. Sutherland on Statutory Construction, § 267, thus states the rule: "Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent. A proviso is construed to apply to the provision or clause immediately preceding." But, after referring to the cases illustrative of the general rule, the author, in the same section, adds: "This principle is of no great force. It is only operative when there is nothing in the statute indicating that a relative word or qualifying provision is intended to have a different effect. And very slight indication of legislative purpose, or a parity of reason, or the natural and common-sense reading of the statute may overturn it, and give it a more extended application. . . . Qualifying words have been applied to several preceding sections where the nature of the provisions and the obvious sense required it. . . . Where the intention is manifest, a proviso or qualifying words or clauses found in the middle of a sentence may be placed at the end; or, when inserted in one section, they may be applied to the matter of another section." The many cases cited in the notes to the text afford ample illustration of the many instances in which the general rule has found exceptions. In fact, the exceptions have been applied often-

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er than the rule. Dwarrris's Treatise on Statutes, 2d ed. p. 600, says: "When words are at the beginning of a sentence, they may govern the whole. . . . When words are at the end of a sentence, they may refer to the whole. Thus the words, *per legem terræ*, in cap. 29 of Magna Charta, being towards the end of the chapter, have been always held to refer to all the precedent matter. But if words are in the middle of a sentence, and sensibly apply to a particular branch of it, can they be extended to that which follows? Agreeably to reason, and in grammatical construction, it would seem not; but, as statutes are read without breaks and stops, it is not at any time clear that words belong to any particular branch of a sentence; it must be collected from the context to what they relate; and they are often, as will be seen, to be read distributively—*reddendo singula singulis*." Sedgwick on Statutory & Constitutional Law, 2d ed. p. 226, says: "A limiting clause is generally to be restrained to the last preceding antecedent." The author cites in support of this statement the case of *Cushing v. Worrick*, 9 Gray, 382, but omits the very important words of that decision which complete the part of the sentence wherein the rule stated is laid down, which are "unless there is something in the subject-matter which requires a different construction." Id. p. 385. But the same author (page 225) says: "Common sense should prevail over strict grammatical rules, and punctuation should not control. *Gyger's Estate*, 65 Pa. 311. The punctuation of a statute is not to be considered. *Cushing v. Worrick*, 9 Gray, 382; *Hamilton v. The R. B. Hamilton*, 16 Ohio St. 428."

A few illustrations from the many cases collated by the text-writers will point to the rule and its exceptions. Thus, a proviso in the 1st section of an act was held to apply to the 2d section of the act also. *Mechanics' & F. Bank's Appeal*, 31 Conn. 63. A proviso at the end of one section was held to extend to the whole act. *United States v. Babbit*, 1 Black, 55, 17 L. ed. 94; *Cumberland v. Magruder*, 34 Md. 381; *Great Western R. Co. v. Swindon & C. Extension R. Co.* L. R. 9 App. Cas. loc. cit. 808; *Eby's Appeal*, 70 Pa. 311; *Cowson v. Doland*, 2 Daly, 66; *Hart v. Kennedy*, 15 Abb. Pr. 290; *Gyger's Estate*, 65 Pa. 311; *State ex rel. Davis v. Forney*, 21 Neb. 223, 31 N. W. 802; *State ex rel. Ross County v. Zanesville & M. Turnp. Road Co.* 16 Ohio St. loc. cit. 319; *Fisher v. Connard*, 100 Pa. loc. cit. 69. In *Hart v. Kennedy*, 15 Abb. Pr. 290, and in *Cowson v. Doland*, 2 Daly, 66, a provision of the metropolitan police act of New York was involved. It provided that no member of the police force "shall be liable to military or jury duty, or to arrest on civil process, nor to service of subpoenas from civil courts, whilst on actual duty." It was contended that the words "whilst on actual duty" referred only to its immediate antecedent "nor to service of subpoenas from civil courts," and did not apply to the other precedents in the section. But the court 61 L. R. A.

said: "Whatever may have been the object of this alteration, it is very plain that the substitution of the word 'or' for 'nor,' and of 'nor' for 'or,' has made no change in the meaning of the section, and the decision in the case of *Hart v. Kennedy* is as applicable to it now as it was before. 'Or' is a conjunction, marking distribution, an alternative, or opposition; and the conjunction 'nor' performs the same office in negative propositions. The first is properly used in connection with 'either,' and the latter with 'neither.' The use of both in this case was inadmissible, and, as the negative 'shall not' was placed at the beginning of the sentence, the transposition of 'or' for 'nor' from one predicate to another could in no way affect the meaning." Accordingly, it was held that the words "whilst on actual duty" applied to all the precedents in the section, and was not limited to the immediate antecedent. In *Matthews v. Com.* 18 Gratt. 989, two clauses in a section were transposed to make the section constitutional. The American & English Enc. Law, vol. 23, p. 435, thus tersely defines the office of provisos, exceptions, and saving clauses: "A proviso is something ingrafted upon an enactment, and is used for the purpose of taking special cases out of the general act, and providing specially for them. An exception is a clause similar to the proviso, exempting from the operation of an enactment that which, but for it, would have been included. A saving clause is an exception of a special thing out of general things mentioned in the statute. It is ordinarily a restriction in a repealing act, and saves rights, pending proceedings, penalties, etc., from the annihilation which would result from unrestricted repeal. The particular intent expressed in a proviso or exception will control the general intent of the enactment. The proviso should be confined to what immediately precedes, unless a contrary intent clearly appears, and should be construed with the section with which it is connected. This rule is not, however, absolute, and, if the context requires, the proviso may be construed as a limitation extending over more than what immediately precedes, or may amount to an independent enactment." The cases cited in support or illustration of the text are too numerous to be reviewed or analyzed here.

It is in the light of these cases and these rules of law that § 30 of article 3 of the city charter must be read. Neither grammatical construction, punctuation, nor relative arrangement of the several parts of the section must be allowed to absolutely control. A common-sense interpretation is the safest and surest to apply, bearing always in mind the mischiefs to be remedied and the benefits to be secured by the law.

There is nothing upon the face of the section which gives support to the theory that the framers of the charter intended to absolutely prohibit the assembly from legislating as to the first, second, third, and fourth classes of subjects covered by the section, but intended to give the assembly power as to the fifth class, if two thirds agreed to the

ordinance. The character and nature of the subjects embraced in the section is not such as would suggest the denying of such power as to four of the classes and conferring it as to the fifth class. The mischiefs to be remedied did not require or suggest such a difference of power. In fact, the mischief apparent from the history of the evolution of the section, that needed specifically to be remedied, from the standpoint of the city, was that created by the decision in *Campbell v. St. Louis*, 71 Mo. 106, which denied to the city the power to compromise a disputed demand, and made it obligatory upon the city to agree with its adversary on its adversary's terms, or else to throw the matter into court. The other mischiefs to be remedied were such as principally affected the rights of the citizen in his dealings or relation with the city, and as to which no tribunal had any power to relieve the citizen, however gross the wrong suffered. The lawmakers knew that under the prior charters the city had no power to relieve a citizen from the payment of a lawful tax, nor to exempt him from any burden imposed upon him by law. If the framers of the charter of 1876 had been satisfied with the working of the old rule on this subject, it is only reasonable to believe that they would have left these prohibitions just as they were under the charter of 1870, in a section by themselves, and would not have placed them in a section with other matters, and would not have placed them in a section which concluded with the words, "except by ordinance and adopted by a vote of two thirds of the members of each house, taken by yeas and nays." The fact that those matters are so placed in the same section of the charter with the other three classes, and that the section concludes with the words quoted, is most conclusive evidence of the intention of the framers of the charter to change the inexorable character of the old law, and to provide for a more humane, reasonable, flexible, and just method for the city and its citizens to meet and adjust their differences, and correct the mischief which always follow from any set of harsh and immutable rules.

This results in holding that the words "except by ordinance," etc., at the end of § 30 of article 3 of the city charter, apply to all five classes of subjects covered by that section, and not simply to the fifth class, and that the ordinance in question is not prohibited by § 30 of article 3 of the charter.

This leaves for consideration only the contention that the ordinance in question violates the provisions of §§ 46 and 47 of article 4 of the Constitution, which prohibit the general assembly to grant, or to authorize any city to grant, any public money or

thing of value to an individual. Of this but little need be said. If the ordinance in question made a donation of public money to an individual, it would be void, as was well said in *Hitchcock v. St. Louis*, 49 Mo. 484. But such is not the fact here. The ordinance only appropriates the expense that a public officer incurred and paid, while in the discharge of his duty as such officer, in removing a nuisance from the public highway, which the law expressly required him to do, and which the city was under obligation to its citizens to do in the discharge of its police power and its health and safety duty. Such expense was as much public expense as if a leper or person afflicted with smallpox or a violently insane person, with homicidal tendency, was found on a populous street, or in a public park or public building, and it had become necessary to hire a carriage or ambulance to remove him. No one would deny that such an expense was properly a public expense, and that, if any officer whose duty it was to remove such a person had paid such expense, it would be not only competent, but proper, for the public to reimburse him. An act or ordinance appropriating money to pay such expense would not be a donation of public money to an individual.

The Am. & Eng. Enc. Law, vol. 19, p. 540, sums up the law on this subject as follows: "Public officers acting faithfully and without fault, and pursuant to authority, are entitled to be reimbursed for anything reasonably and necessarily disbursed by them in executing the duties of their offices, and the public or a public corporation has power to indemnify their officers and agents against any charge or liability they may incur in the bona fide discharge of their duty, even though their acts were illegal, or they had mistaken their legal rights and authority. But where the corporation has no duty to perform, no rights to defend, no interests to protect, and no pecuniary or corporate concern in the subject-matter connected with the discharge of the duties of the officer, it has no power to indemnify him." Numerous and apposite cases are cited in support of the text. Here the municipal corporation had a duty to perform, rights to defend, and interests to protect in removing or having removed the nuisance from the streets. The officer acted bona fide, within the scope of his duties, lawfully. The indemnity was legal and proper.

It follows that the circuit court erred in sustaining the demurrer to the answer, and that the petition states no cause of action.

The judgment of the Circuit Court is reversed.

All concur.

MONTANA SUPREME COURT.

Andrew LESS, *Resp't.*,

v.

City of BUTTE, *Appt.*

(.....Mont.....)

Injury caused to abutting property by the original establishment of the grade of a street is as much within the prohibition of a constitutional provision that property shall not be taken or damaged for public use without compensation as that caused by subsequent changes of grade.

(April 11, 1908.)

A PPEAL by defendant from a judgment of the District Court for Silver Bow County in favor of plaintiff in an action brought to recover damages for injuries to abutting property by the improvement of a highway. *Affirmed.*

Statement by **Callaway, C.:**

On June 8, 1881, the owners of the ground included in the present Leggett & Foster addition to the city of Butte platted the same in lots and blocks, with intervening streets, and filed a plat thereof with the county clerk of Silver Bow County, Montana. East Broadway street, designated upon the plat, is an extension of Broadway street in said city. On March 25, 1893, this addition was regularly annexed to the city of Butte, and East Broadway was dedicated to the city as a public street. Some time in the year 1893 the plaintiff became the owner of lot 9 in block 4, fronting on East Broadway in said addition, built upon his lot a two-story house, and made other improvements thereon, relying upon the grade of the street as it then existed, and in conformity to the street as the same was then traveled and used. By an ordinance passed and approved July 17, 1895, a grade line was established along Broadway street, across and over the Leggett & Foster addition, and in front of the lot owned by plaintiff. The grade thus established was the first and only grade established by the corporate authority of the city upon the street in front of the lot of plaintiff. Thereafter, on April 21, 1897, the city council passed a resolution ordering Broadway street excavated and graded from the east side of Oklahoma avenue to the east side of Gaylord street, in front of plaintiff's property, to said grade line. The city did not agree, or attempt to agree, with the plaintiff, upon the amount of damages which he would sustain to his premises on account of such change of grade and excavation, and did not

NOTE.—As to right to recover damages for injury to property by first grading and improvement of street, see also, in this series, *Hickman v. Kansas City* (Mo.) 23 L. R. A. 658, and *note*; *Reasegleu v. Sioux City* (Iowa) 28 L. R. A. 380; *Blair v. Charleston* (W. Va.) 35 L. R. A. 852; and *Searle v. Lead* (S. D.) 39 L. R. A. 345.

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pay or tender to plaintiff anything on account thereof, and did not appoint any freeholders to make an appraisal of the damages or of the benefits which would result to the plaintiff's premises by reason of the change of grade and excavation of the street; but, pursuant to said resolution, the city did, during the summer of the year 1897, proceed to grade and excavate the street so as to make the same conform to the grade line so established as aforesaid. The street in front of plaintiff's premises was thus graded and excavated to the depth of about 7 feet, and the sidewalk in front of the plaintiff's house was located at about the same depth, in order to conform to the street as graded. The plaintiff then presented his claim to the city council, demanding \$500 damages because of the grading and excavation mentioned, but the city refused to pay the same, or any part thereof. The plaintiff thereupon began this suit. The case was tried upon an agreed statement of facts and upon oral testimony. At the conclusion of plaintiff's case the defendant moved the court for a nonsuit upon the ground "that the grade on Broadway street adjoining the property of the plaintiff was the first and only grade ever established on Broadway street, and under the laws of Montana in force at the time the city of Butte had a right to establish said grade to reduce the street in conformity to the grade established, and is not liable to the plaintiff by reason of any damages that he may have sustained by reason of the first establishment of the grade." The court overruled the motion, and gave judgment for plaintiff in the sum of \$500, as prayed for in his complaint. From this judgment the defendant appeals.

Mr. Edwin M. Lamb, for appellant:

The establishment of a grade, and the change from the natural grade to such established grade, do not entitle the property owner to compensation.

Gardiner v. Johnston, 16 R. I. 94, 12 Atl. 891; *Aldrich v. Providence*, 12 R. I. 241.

The establishment of a grade line and the change of the grade of a street to conform thereto, which lessen the value of abutting property, are not such damage by the public to private property as comes within the meaning of the Constitution.

Dill. Mun. Corp. 4th ed. § 995a; *Callender v. Marsh*, 1 Pick. 431; *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 7; *Denver v. Vernia*, 8 Colo. 399, 8 Pac. 659; *Rigney v. Chicago*, 102 Ill. 80; *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 509, 6 Pac. 317; *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 274, 57 Am. Rep. 398.

Messrs. McHatton & Cotter, for respondent:

The Constitution changes the common law, and gives a right which did not exist at common law, is self-executing, and entitles the plaintiff in this case to recover.

Reardon v. San Francisco, 66 Cal. 492, 56 Am. Rep. 509, 6 Pac. 317; *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 614, 37 Pac. 750; *Mollandin v. Union P. R. Co.* 4 McCrary, 290, 14 Fed. 394; *Blanchard v. Kansas*, 5 McCrary, 271, 16 Fed. 444; *McElroy v. Kansas City*, 21 Fed. 257; *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420, 23 N. W. 503; *Henderson v. McClain*, 102 Ky. 402, 39 L. R. A. 349, 43 S. W. 700; *Smith v. Kansas City, St. J. & C. B. R. Co.* 98 Mo. 20, 11 S. W. 259; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 575, 7 S. W. 579; *Nearle v. Lead*, 10 S. D. 312, 39 L. R. A. 345, 73 N. W. 101; *Brown v. Seattle*, 5 Wash. 35, 18 L. R. A. 161, 31 Pac. 313, 32 Pac. 214; *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; 6 Am. & Eng. Enc. Law, p. 544, note 2; *Davis v. Missouri P. R. Co.* 119 Mo. 180, 24 S. W. 777; *Hickman v. Kansas*, 120 Mo. 110, 23 L. R. A. 658, 25 S. W. 225; *New Brighton v. United Presby. Church*, 96 Pa. 331; *Werth v. Springfield*, 78 Mo. 107; *Bartlett v. Tarrytown*, 52 Hun, 380, 5 N. Y. Supp. 240; *McCall v. Saratoga Springs*, 121 N. Y. 704, 24 N. E. 1100; Affirming 29 N. Y. S. R. 699, 9 N. Y. Supp. 170; *Re Church of Our Lady of Mercy*, 32 N. Y. S. R. 967, 10 N. Y. Supp. 683; *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Hendrick's Appeal*, 103 Pa. 358; *Jones v. Bangor*, 144 Pa. 638, 23 Atl. 252; *O'Brien v. Philadelphia*, 150 Pa. 589, 24 Atl. 1047; *Bloomington v. Pollock*, 141 Ill. 351, 31 N. E. 146; *Groff v. Philadelphia*, 150 Pa. 594, 24 Atl. 1048; *Ft. Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. 1059; *Hutchinson v. Parkersburg*, 25 W. Va. 226; *Blair v. Charleston*, 43 W. Va. 62, 35 L. R. A. 852, 26 S. E. 341.

Plaintiff was entitled to rely upon the surface grade of the street in the Leggatt & Foster addition, as it existed at the time said addition was made to the city, and at the time he purchased his lot and made improvements thereon.

Davis v. Missouri P. R. Co. 119 Mo. 180, 24 S. W. 777; *Hickman v. Kansas*, 120 Mo. 110, 23 L. R. A. 658, 25 S. W. 225; *Groff v. Philadelphia*, 150 Pa. 594, 24 Atl. 1048; *New Brighton v. United Presby. Church*, 96 Pa. 331; *Werth v. Springfield*, 78 Mo. 107; *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 614, 37 Pac. 750; *Bartlett v. Tarrytown*, 52 Hun, 380, 5 N. Y. Supp. 240; *McCall v. Saratoga Springs*, 121 N. Y. 704, 24 N. E. 1100, Affirming 29 N. Y. S. R. 699, 9 N. Y. Supp. 170; *Re Church of Our Lady of Mercy*, 32 N. Y. S. R. 967, 10 N. Y. Supp. 683; *Ft. Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. 1059; *O'Brien v. Philadelphia*, 150 Pa. 589, 24 Atl. 1047; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420, 23 N. W. 503; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 575, 7 S. W. 579; *Blanchard v. Kansas*, 5 McCrary, 271, 16 Fed. 444; *McElroy v. Kansas City*, 21 Fed. 257; *Nearle v. Lead*, 10 S. D. 312, 39 L. R. A. 345, 73 N. W. 101; *Smith v. Kansas City*, 61 L. R. A.

St. J. & C. B. R. Co. 98 Mo. 20, 11 S. W. 259; *Jones v. Bangor*, 144 Pa. 638, 23 Atl. 252; *Bloomington v. Pollock*, 141 Ill. 351, 31 N. E. 146; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; *Blair v. Charleston*, 43 W. Va. 62, 35 L. R. A. 852, 26 S. E. 341.

Callaway, C., filed the following opinion:

By the common law, municipal corporations were not held liable for consequential damages resulting to property owners by reason of changes in street grades. The municipal authorities might change or alter the grades of public thoroughfares at will, and the adjoining owners had no redress. It was considered that, public improvements being for the good of the body politic, and always being in contemplation, the individual purchased his city or town property charged with knowledge that changes might be made as required by public necessity and convenience. So, too, when one platted a town site, and dedicated certain portions thereof to the public for streets, he and his grantees were presumed to contemplate the changes which would necessarily result from public improvements. The rule *damnum absque injuria* was held to apply to all such cases, unless the injury could be shown to have resulted from the negligent or improper manner in which the work was done. Such is the doctrine asserted in *Callender v. Marsh*, 1 Pick. 418, and other cases cited by appellant. The framers of our Constitution abrogated this harsh rule by § 14, art. 3, which reads as follows: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner." It seems very clear to us that this section was drafted in the broad language stated for the express purpose of preventing an unjust or arbitrary exercise of the power of eminent domain. It overturns the doctrine that one owning city or town property must continually live in dread of the changing whims of successive boards of aldermen. Constitutions which provide that "private property shall not be taken for public use without just compensation" are but declaratory of the common law, and contemplate the physical taking of property only. Under constitutions which provide that property shall not be "taken or damaged" it is universally held that "it is not necessary that there be any physical invasion of an individual's property for public use to entitle him to compensation." *Root v. Butte, A. & P. R. Co.* 20 Mont. 354, 51 Pac. 155, and cases cited. The owner of a city lot "had a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street." *Bohm v. Metropolitan Elev. R. Co.* 129 N. Y. 576, sub nom. *Somers v. Metropolitan Elev. R. Co.* 14 L. R. A. 344, 29 N. E. 802. "These easements are property, protected by the Constitution from being taken or damaged without just compensation." *Root v. Butte*,

A. & P. R. Co. 20 Mont. 354, 51 Pac. 155; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 614, 37 Pac. 750; *Rigney v. Chicago*, 102 Ill. 64; *Brown v. Seattle*, 5 Wash. 35, 18 L. R. A. 161, 31 Pac. 313, 32 Pac. 214; *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Hickman v. Kansas*, 120 Mo. 110, 23 L. R. A. 658, 25 S. W. 225; *Wt. Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. 1059; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420, 23 N. W. 503; *Schaller v. Omaha*, 23 Neb. 325, 36 N. W. 533. Moreover, it may frequently occur that "the consequential damage may impose a more serious loss upon the owner than a temporary spoliation or invasion of the property." *Atlanta v. Green*, 67 Ga. 386.

But the appellant insists that it should not be held liable in this action for the reasons stated in its motion for a nonsuit. The first point is that the appellant cannot be held liable because the grade complained of is "the first and only grade ever established on Broadway street." The Constitution does not distinguish between the first grade and subsequent ones. It provides against the damage occasioned in either case. *Searle v. Lead*, 10 S. D. 312, 39 L. R. A. 345, 73 N. W. 101; *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146; *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 614, 37 Pac. 750. The mischief to be remedied may be greatest in the first instance. *McCall v. Saratoga Springs*, 29 N. Y. S. R. 699, 9 N. Y. Supp. 170, 121 N. Y. 704, 24 N. E. 1100. The first grade of Broadway street was that provided by nature, and the alteration made by appellant was as much a change of grade as if the change had been made from a grade previously established by the authorities. *Hendrick's Appeal*, 103 Pa. 358; *O'Brien v. Philadelphia*, 150 Pa. 589, 24 Atl. 1047; *McCall v. Saratoga Springs*, 29 N. Y. S. R. 699, 9 N. Y. Supp. 170, 121 N. Y. 704, 24 N. E. 1100; *Blair v. Charleston*, 43 W. Va. 62, 35 L. R. A. 852, 26 S. E. 341. And as to whether the appellant is liable "under the laws (statutes) of Montana in force at the time" is

wholly immaterial. Section 14, art. 3, of the Constitution, is both mandatory and prohibitory. It is self-executing, and requires no legislation to rouse it from dormancy. *Searle v. Lead*, 10 S. D. 312, 39 L. R. A. 345, 73 N. W. 101; *Hickman v. Kansas*, 120 Mo. 110, 23 L. R. A. 658, 25 S. W. 225; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420, 23 N. W. 503. While it is doubtless true that the Constitution does not authorize a remedy for every diminution in the value of property that is caused by public improvement, the damages for which compensation is to be made being a damage to the property itself, and not including mere infringement of the owner's personal pleasure or enjoyment (*Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 614, 37 Pac. 750), in the case at bar it is practically conceded that respondent is entitled to damages in the amount of the judgment rendered provided the appellant is liable at all. We think the operation of this section of the Constitution ought not to be restricted. The declarations of constitutions are placed therein to be obeyed, and are not to be "frittered away by construction." In *McElroy v. Kansas City*, 21 Fed. 257, Mr. Justice Brewer, in passing upon a similar constitutional provision, said: "I think, too, in these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and when the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own. . . . Such constitutional guaranty needs no legislative support, and is beyond legislative destruction."

We are of the opinion that the judgment ought to be affirmed.

Clayberg, C. C., and Poorman, C., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment is affirmed.

NEBRASKA SUPREME COURT.

M. W. WARNER, Admr., etc., of Leon Richardson, Deceased, *Plff. in Err.*,
v.

MODERN WOODMEN OF AMERICA.

(.....Neb.....)

*1. A member of a fraternal beneficiary society has no such interest or property in the proceeds of a certificate

*Headnotes by BARNES, C.

NOTE.—On the question, Who is entitled to proceeds of benefit certificate where beneficiary dies before insured? see also, in this series, *Thomas v. Cochran* (Md.) 46 L. R. A. 160. 61 L. R. A.

therein as will impress such proceeds with a trust in favor of his estate or his creditors.

2. Where a certificate in such an association provides that payment thereof shall be made only to the family, widow, heirs, blood relatives, affianced wife, or persons dependent upon the member, and the by-laws of the association, as well as the statutes of the state under which it is organized, contain the same provisions, the death of such member, without the existence of anyone who is entitled to be made a beneficiary under his certificate, creates no interest in his estate to the fund mentioned therein, and his administrator cannot recover against the association on such certificate.

3. Where, under such circumstances,

the certificate is payable to the legal heirs of the member, and he dies leaving no heirs, and without designating any other beneficiary, and it appears that there is no one in existence who could legally become such beneficiary, no equitable rights accrue to either the creditors or the estate of the deceased member, and the fund contemplated by the certificate will revert to the society.

(January 21, 1903.)

ERROR to the District Court for Lancaster County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Ricketts & Ricketts, for plaintiff in error:

In the absence of "legal heirs" in cases of this kind either the plaintiff has a right of recovery, or the defendant practically becomes the beneficiary.

Bacon, Ben. Soc. § 237.

The deceased was to pay to the defendant stated sums at stated periods during his life. The defendant agreed to pay the fund arising therefrom to his legal heirs, at his death. The deceased kept his agreement, but the persons to whom the fund was to be paid have no existence. May the defendant keep the fund for this reason, or may the administrator recover it? A trust will not lapse for want of a trustee. The creator of a trust fund should not lose the fund to the trustee if the contemplated beneficiary did not come into existence.

Perry, Tr. § 66; *Ashhurst v. Given*, 5 Watts & S. 329.

The fund created by the deceased in the hands of defendant was a trust fund.

Grand Lodge, A. O. U. W. v. Child, 70 Mich. 163, 38 N. W. 1; *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 679; *Schmidt v. Northern Life Assn.* 112 Iowa, 41, 51 L. R. A. 141, 83 N. W. 800; *Rindge v. New England Mut. Aid Soc.* 146 Mass. 286, 15 N. E. 628; *Shea v. Massachusetts Ben. Assn.* 160 Mass. 289, 35 N. E. 855; *Burns v. Grand Lodge A. O. U. W.* 153 Mass. 173, 26 N. E. 443.

Where a trust, once created for certain purposes, fails by accident or otherwise, either in whole or in part, there will be a resulting trust in favor of the truster as to the trust fund.

4 Kent, Com. *37; Pom. Eq. Jur. § 1032; *McElroy v. McElroy*, 113 Mass. 509; *Washington Benev. Assn. v. Wood*, 4 Mackey, 19, 54 Am. Rep. 251; *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 679; *Schmidt v. Northern Life Assn.* 112 Iowa, 41, 51 L. R. A. 141, 83 N. W. 800; *Haskins v. Kendall*, 158 Mass. 224, 33 N. E. 495; *Bancroft v. Russell*, 157 Mass. 47, 31 N. E. 710; *Fuller v. Linzee*, 135 Mass. 468; *Clarke v. Schwarzenberg*, 162 Mass. 98, 38 N. E. 17; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166; *Rindge v. New England Mut. Aid Soc.* 146 Mass. 286, 15 N. E. 628; *Bishop v. Grand Lodge, E. O. of Mut. Aid*, 112 N. Y. 627, 61 L. R. A.

20 N. E. 562; *Janda v. Bohemian Roman Catholic F. O. Union*, 71 App. Div. 150, 75 N. Y. Supp. 654; *Re Copeland*, 37 Misc. 569, 75 N. Y. Supp. 1042.

The relation of the parties was, in effect, an express trust, in which the assured was the truster, the insurer the trustee, the amount called for by the certificate was the trust fund, and the legal heirs of the assured were the beneficiaries.

Perry, Tr. § 82; *Schmidt v. Northern Life Assn.* 112 Iowa, 41, 51 L. R. A. 141, 83 N. W. 800; *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 679; *Washington Beneficial Endowment Assn. v. Wood*, 4 Mackey, 19, 54 Am. Rep. 251; *Haskins v. Kendall*, 158 Mass. 224, 33 N. E. 495; *Grand Lodge A. O. U. W. v. Child*, 70 Mich. 163, 38 N. W. 1; *Cleaver v. Mutual Reserve Fund Life Assn.* [1892] 1 Q. B. 147.

Where a trust has lapsed or failed because it cannot be carried into execution, or for the reason that the beneficiary failed to come into existence, the trustee does not for such reason become the beneficiary, but there is a resulting trust of the fund in favor of the truster or his estate. The trust results, not from the terms of the contract, but by operation of law.

Perry, Tr. §§ 66, 157, 159, 160; 4 Kent, Com. *1032; Pom. Eq. Jur. § 1032.

Messrs. Talbot & Allen and J. G. Johnson, for defendant in error:

The contract entered into by a benefit society with its members is executory in its nature, and is contained in the certificate, if any be issued, taken in connection with the charter or constitution and by-laws of the organization and the statutes of the state under which it is organized, and the statutes of the state where the certificate is delivered. To the terms of this contract the member is conclusively presumed to have assented when he became such.

Bacon, Ben. Soc. § 236; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580; *Maryland Mut. Benev. Soc. I. O. of R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Arthur v. Odd Fellows Beneficial Assn.* 29 Ohio St. 557; *Greeno v. Greeno*, 23 Hun, 478; *Worley v. Northwestern Masonic Aid Assn.* 3 McCrary, 53, 10 Fed. 227; *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 489; *Golden Star Fraternity v. Martin*, 59 N. J. L. 207, 35 Atl. 908.

The member of the society, as such, has, under his contract, no interest or property in this benefit, but simply the power to appoint someone to receive it.

Bacon, Ben. Soc. §§ 237, 241; *Eastman v. Provident Mut. Relief Assn.* 62 N. H. 555; *Keener v. Grand Lodge, A. O. U. W.* 38 Mo. App. 543; *Maryland Mut. Benev. Soc. I. O. of R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580; *Arthur v. Odd Fellows Beneficial Assn.* 29 Ohio St. 557; *Greeno v. Greeno*, 23 Hun, 478.

This right of designation is a naked power, because it is a right or authority disconnected from any interest of the donee in the subject-matter, and is governed by the

rules generally applicable to this class of powers, and which, to be available, must be executed according to the terms of the contract.

Bacon, Ben. Soc. § 237; 1 Sudgen, Powers, 250; *Maryland Mut. Benev. Soc. I. O. of R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Arthur v. Odd Fellows Beneficial Asso.* 29 Ohio St. 557; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580.

There being no one competent to become a beneficiary, and the deceased having failed to execute the power, there was a total lapse of the power.

Bacon, Ben. Soc. § 241; *Golden Star Fraternity v. Martin*, 59 N. J. L. 207, 35 Atl. 908; *Eastman v. Provident Mut. Relief Asso.* 62 N. H. 555; *Maryland Mut. Benev. Soc. I. O. of R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580; *McEluee v. New York L. Ins. Co.* 47 Fed. 798; *Order of Mutual Companions v. Griest*, 76 Cal. 494, 18 Pac. 652.

If the deceased had only a power, and not an interest or property in the sum or fund, it was not assets to be returned by the administrator in his inventory.

Bacon, Ben. Soc. § 241; *Maryland Mut. Benev. Soc. I. O. of R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580; *Eastman v. Provident Mut. Relief Asso.* 62 N. H. 555; *Worley v. Northwestern Masonic Aid Asso.* 3 McCrary, 53, 10 Fed. 227; *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 489; *Golden Star Fraternity v. Martin*, 59 N. J. L. 207, 35 Atl. 908.

The benefit fund is created for the use and benefit of that class designated by the by-laws and constitution of the organization and restricted by the statutes of the state where the society is incorporated, and it cannot, therefore, go to the administrator of the member and be subject to his debts, thus diverting it from the purpose for which it was created.

Bacon, Ben. Soc. §§ 168, 244; *Worley v. Northwestern Masonic Aid Asso.* 3 McCrary, 53, 10 Fed. 227; *Golden Star Fraternity v. Martin*, 59 N. J. L. 207, 35 Atl. 908; *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 489; *Keener v. Grand Lodge A. O. U. W.* 38 Mo. App. 543; *Greeno v. Greeno*, 23 Hun, 478; *Maryland Mut. Benev. Soc. I. O. of R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52.

Where there is a failure to designate a beneficiary, or a void designation, or the death of the beneficiary occurs before that of the insured, and no new beneficiary is named, the association is not liable, and if no disposition of the fund is provided for in the contract with the association the fund reverts to the society.

Bacon, Ben. Soc. §§ 241, 243; *Eastman v. Provident Mut. Relief Asso.* 62 N. H. 555; *Golden Star Fraternity v. Martin*, 59 N. J. L. 207, 35 Atl. 908; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580; *McEluee v. New York L. Ins. Co.* 47 Fed. 798; *Order*

of Mutual Companions v. Griest, 76 Cal. 494, 18 Pac. 652.

The classes of persons to be benefited are designated by the by-laws of the association and by the statutes, and the corporation has no authority to create a fund for other persons than those of the classes named.

Bacon, Ben. Soc. §§ 168, 244; *State ex rel. Atty. Gen. v. Central Ohio Mut. Relief Asso.* 29 Ohio St. 399; *State v. Standard Life Asso.* 38 Ohio St. 281; *State ex rel. Atty. Gen. v. People's Mut. Ben. Asso.* 42 Ohio St. 579; *National Mut. Aid Asso. v. Gonser*, 43 Ohio St. 1, 1 N. E. 11.

There was nothing in the transactions between the deceased and the defendant order which had in it any of the elements of a resulting trust.

Perry, Tr. § 125; Bispham, Eq. § 79.

When a fund is created for special purposes, the fund thus created can properly be applied only in that particular manner pointed out in the ordinance creating it.

Niblack, Ben. Soc. § 126, p. 247; *McEluee v. New York L. Ins. Co.* 47 Fed. 798.

No part of this fund can go to the estate or to creditors.

Leavitt v. Dunn, 56 N. J. L. 309, 28 Atl. 590; *Fisher v. Donovan*, 57 Neb. 361, 44 L. R. A. 383, 77 N. W. 779.

Barnes, C., filed the following opinion:

On or before the 20th day of April, 1896, one Leolan Richardson became a member of the local camp of the Modern Woodmen of America, situated at Maquon, Illinois, and on that day made application to said camp for a benefit certificate therein for the sum of \$1,000. Upon the payment of the required charges and fees, such certificate was issued and delivered to him; and the association thereby promised to pay said sum, on the death of the said Richardson, to his legal heirs, the beneficiaries named therein. Richardson during his lifetime complied with all of the rules, conditions, regulations, and by-laws of the association, and paid all dues and assessments made or demanded of him. On the 27th day of June, 1900, he departed this life in Seward county, in this state, leaving no last will and testament. He had never designated any change in the beneficiary under his said certificate, and after his death it was ascertained that he left no children, relatives, kindred, legal heirs, or others sustaining such relation to him as would entitle them to become beneficiaries under the terms of the certificate and the by-laws of the association. Thereupon the plaintiff herein was appointed administrator of his estate, and commenced this action in the district court of Lancaster county upon said certificate to recover the amount due thereon, as a part of said estate. It was alleged in the petition that the defendant is a corporation duly organized under the fraternal insurance laws of the state of Illinois; that it has a large number of lodges organized in the state of Illinois and other states; that the primary purpose and object of the principal organization is to issue benefit certificates to members of its several lodges, in

the nature of life benefit certificates of life insurance, payable on the death of the member of the beneficiaries named in the certificate; that the persons who may become beneficiaries are defined in § 40 of the by-laws of said association as follows: "Sec. 40. Benefit certificates shall be made payable only to the family, widow, heirs, blood relatives, affianced wife or persons dependent upon the member, and to such others who the applicant shall designate in his application." It was alleged that it was also provided in § 41 of the defendant's by-laws that the certificate holder may change the beneficiary designated in the original application, but it confines the beneficiaries to those named in § 40 above quoted; that the beneficiaries named in § 40 are in substantial accord with the beneficiaries named in the fraternal insurance laws of the state of Illinois, under which the defendant is organized; and that the certificate contained the following recital: "This certificate, issued by the Modern Woodmen of America, a corporation organized and doing business under the laws of the state of Illinois, witnesseth that Neighbor Leosn Richardson, a member of Maquon Camp, No. 3,618, located at Maquon, Illinois, is, while in good standing in this fraternity, entitled to participate in its benefit fund, to an amount not to exceed \$1,000, which shall be paid at his death to his legal heirs, related to him as heirs, and subject to all the conditions of this certificate and by-laws of this order, and liable to forfeiture if said member shall not comply with said conditions, laws, and such by-laws and rules as are or may be adopted by the head camp of this order from time to time, or the local camp of which he is a member." The death of Richardson was properly alleged in the petition, the appointment of the plaintiff herein as administrator was set forth therein, and all of the facts necessary to constitute a cause of action, if one could be maintained by the plaintiff, were pleaded. And it was further alleged "that by reason of the premises there is a resulting trust in favor of the plaintiff as administrator of the estate, and there is now due to this plaintiff, in his representative capacity, from the defendant, on said benefit certificate, the sum of \$1,000, together with interest thereon at the rate of 7 per cent per annum from the 1st day of November, 1900," for which the plaintiff prayed judgment. To this petition the defendant filed a demurrer based on the following grounds: First, the plaintiff has not legal capacity to sue; second, the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. The trial court sustained the demurrer. The plaintiff elected to stand upon his petition, refused to further plead, and thereupon a judgment was rendered dismissing the plaintiff's action, and from that judgment the plaintiff prosecutes error to this court. This brings before us the single question as to whether or not the plaintiff, as administrator of the estate of the deceased, is entitled to maintain

this action against the defendant herein to recover the sum alleged to be due upon the benefit certificate set forth in his petition.

Plaintiff in error bases his whole contention on the theory that, by reason of the facts hereinbefore stated, a trust fund was created, which he was entitled, in his representative capacity, to recover. His argument is, in substance, as follows: The defendant was the trustee of the fund which it is alleged was created by the benefit certificate. The deceased was the truster, and his legal heirs were by such certificate made the beneficiaries or the *cestuis que trust*; that, there being a failure of beneficiaries contemplated by the parties, he, as administrator of the estate of the truster, would be entitled to recover the trust fund.

This contention cannot be sustained, for several reasons. The purposes and objects of this beneficiary organization are vastly different from those of ordinary life insurance companies. The so-called old-line insurance companies immediately on the issuance of a policy confer on the beneficiary a valuable right, which cannot be divested without his consent. Such policies may be pledged or assigned by the beneficiary as security for the debts of the insured. These policies often by law have a marketable or cash surrender value, making them a form or kind of property. This is not the case with certificates in fraternal beneficiary societies. They are mere expectancies. The beneficiary has no vested rights in them, and the insured any time, at his option, may change the beneficiary, provided only he keeps within the limitation established by the rules of the society, and complies with its laws respecting such change. These certificates have no cash surrender value. The intestate had no property in the fund. The fund, in fact, was never his property. He had power of appointment, only, and such power did not create any property in him. The only interest he had in the association was his membership interest. *Fisher v. Donovan*, 57 Neb. 361, 44 L. R. A. 383, 77 N. W. 778. The purpose of these certificates excludes the claim that there was any property interest therein in the insured member. *Fisher v. Donovan*, 57 Neb. 361, 44 L. R. A. 383, 77 N. W. 778; *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99, 26 Atl. 253; *Rollins v. McHutton*, 16 Colo. 203, 27 Pac. 254; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580; *Bacon*, Ben. Soc. 237-241; *Eastman v. Provident Mut. Relief Assn.* 62 N. H. 555; *Keener v. Grand Lodge, A. O. U. W.* 38 Mo. App. 543; *Maryland Mut. Benev. Soc. I. O. of R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Arthur v. Odd Fellows Beneficial Assn.* 29 Ohio St. 557.

It follows that, if Richardson had no property in the certificate in question, he had no right or interest therein upon which he could impress a trust; it became upon his death no part of his estate, and his administrator could have no right, title, or interest therein. The defendant was organized to issue certificates of indemnity, calling

for the payment of a certain sum, known and defined, in case of death, to the family, widow, heirs, blood relations, affianced wife, or persons dependent upon the member, only. The by-laws of the defendant provide that "the objects of this fraternity are to promote true neighborly regard and fraternal love, and bestow substantial benefits upon the family, widow, heirs, blood relations, affianced wife, or persons dependent upon the member and such others as may be permitted by the laws of the state of Illinois." These provisions are strictly in accordance with the statutes of that state under which the defendant association was organized. None of these designations include the administrator of the estate of the deceased member, his estate, or his creditors. Section 94 of chapter 43 of the Compiled Statutes of this state provides: "No fraternal society created or organized under the provisions of this act shall issue beneficiary certificate of membership to any person under the age of eighteen years nor over the age of fifty-five years. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband, or affianced wife of, or to persons dependent upon, the member." Not only will it be presumed that the statutes of Illinois are the same as the statutes of this state, but the petition shows that they are identical. It is therefore plain that if the deceased during his lifetime had changed the beneficiary so as to include either his estate, the administrator thereof, or his creditors, such designation, under the by-laws and rules of the association, and the statutes of the state where it was organized, together with the statutes of this state where he departed this life, would have been absolutely void, and would have conferred no rights whatever upon the persons designated therein. A person not of the class for whose benefit a mutual benefit association is organized cannot be a beneficiary. *Fisher v. Donovan*, 57 Neb. 361, 44 L. R. A. 383, 77 N. W. 778; *Wolf v. District Grand Lodge No. 6, I. O. of B. B.* 102 Mich. 23, 60 N. W. 445; *Britton v. Supreme Council of R. A.* 46 N. J. Eq. 102, 18 Atl. 675; *National Mut. Aid Assn. v. Gonser*, 43 Ohio St. 1, 1 N. E. 11; *Alexander v. Parker*, 144 Ill. 355, 19 L. R. A. 187, 33 N. E. 183; *Norwegian People's Home Soc. v. Wilson*, 176 Ill. 94, 52 N. E. 41.

If Richardson during his lifetime could by no act of his confer the right to recover the amount named in the certificate upon his estate, the administrator thereof, or his creditors, it is plain that his death could in no manner operate to create such a right. It appears on the face of the petition that, at the time of his death, diligent search was made, and, so far as could be ascertained, he had no legal heirs. We thus have a case where the situation is the same as though the death of the beneficiary had occurred before that of the insured, and no new beneficiary had been named by him. It is ear-

nestly contended by the plaintiff that, although the beneficiary was not in existence, still such fact would not defeat a recovery, and that, as a matter of equity, the right to recover would be transferred to the administrator of the estate of the deceased member; and several cases are cited in support of this contention. A careful examination discloses that although in each of them the death of the beneficiary had occurred, and the member had made no other designation, there was someone in existence who could have been made a beneficiary under the terms of the certificate, and the statutes under which the association was organized. In the case of *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 679, the insurance company abandoned all claim to hold the proceeds of the certificate. The question as to the right of the administrator to take the proceeds was waived. There was but one question for the court to decide, and that was, Which of the administrators had the better right to the fund? This question was finally decided by the application to the contract of the statute of the state, which was as follows: "But if there are no children upon the death of the wife, such policy shall revert, and become the property of the party whose life is insured, unless it has been transferred as hereinafter provided." In *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L. R. A. 141, 83 N. W. 800, the question before the court was who among the three claimants had the most equitable claim to the money. In that case the wife, who was named as the beneficiary, had murdered her husband, and was in the penitentiary for life. In the body of the opinion it was pointed out clearly that the statutes of Iowa prescribed certain rules from which beneficiaries in such certificates may be named, and it was held that where there was a failure of beneficiary, as was decreed therein, a resulting trust was created in favor of someone within the class named in the statutes; that, while the administrator of the murdered member is entitled to recover, he can only hold the fund recovered as a trustee for claimants who might bring themselves within the class of beneficiaries named in the statutes. It can scarcely be contended that this case supports plaintiff's claim. The statutes both of this state and of the state of Illinois specify the classes from which may be selected the beneficiaries in such contracts as the one in suit, and thus exclude the estate, the administrator, and the creditors of the insured. In *Rindge v. New England Mut. Aid Soc.* 146 Mass. 286, 15 N. E. 628, the member had distinctly made a creditor his beneficiary, in violation of the statutes of the state and of the by-laws of the association. The court held that whereas the statutes of the state provided that the orphans of a member might be beneficiaries under such certificates, and the certificate itself provided that on the death of the named beneficiaries prior to the death of the member, and the failure of the mem-

ber to name other beneficiaries, the insurance should be for the benefit of the heirs of the member, the administrator could maintain an action on the certificate for the benefit of the heirs. In the case of *Shea v. Massachusetts Ben. Asso.* 160 Mass. 289, 35 N. E. 855, it was held that, where the named beneficiaries cannot take the amount due, the certificate would be payable to claimants who might bring themselves within the classes of beneficiaries named in the by-laws, and, as heirs were within such by-law provisions, an executrix might recover, but only for their benefit. In *Burns v. Ancient Order of United Workmen*, 153 Mass. 173, 26 N. E. 443, the original designation of the beneficiary was invalid. The constitution and by-laws of the defendant provided that in case of death of all the beneficiaries the money should be paid to the heirs at law of the insured, and therefore it was held that an action could be maintained upon the certificate to recover the amount due thereon for such heirs. It will thus be seen that, in all cases where a recovery has been had under circumstances similar to those in the case at bar, there has been someone in existence who might have been designated as a beneficiary under the by-laws of the association and the statutes under which it was organized. According to the plaintiff's petition, the deceased designated in his benefit certificate that his legal heirs should be the beneficiaries; that at the time of his death he was unmarried; that he left no children, relatives, or kindred, or others sustaining such relation to him as would entitle them to become beneficiaries under the by-laws of the defendant association. There being no one competent to become beneficiary, and the deceased having failed to execute the power of designation, there was a total lapse of the power. The certificate in this case was neither payable to the deceased, nor to anyone, except as named by him. He had named his legal heirs as beneficiaries. It is not alleged in the petition that no persons were in existence who could have become Richardson's legal heirs at the time he made his designation and the certificate was issued. The allegation is that at the time of his death no such heirs could be found. It is not claimed that he named any other beneficiary, and why he did not do so, it is unnecessary to inquire. He may have intended that his associate members should not be called upon to contribute the sum required to fulfill the contract. As we have before stated, it could not go to the administrator, nor be subject to the payment of the debts of the member. Where there is a failure to designate a beneficiary, or there is a void designation, or the death of the beneficiary occurs before that of the insured, and no new beneficiary is named, the association is not liable; and, if no disposition of the fund is provided for in the contract with the association, it reverts to the society. *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580; *McEluce v. New York L. Ins. Co.* 47 Fed. 798; *Mary-61 L. R. A.*

land Mut. Benev. Soc. I. O. of B. M. v. Olen-dinon, 44 Md. 429, 22 Am. Rep. 52; *Skil-lings v. Massachusetts Ben. Asso.* 140 Mass. 217, 15 N. E. 506; *Highland v. Highland*, 109 Ill. 306; *Daniels v. Pratt*, 143 Mass. 221, 10 N. E. 186; *Eastman v. Provident Mut. Relief Asso.* 62 N. H. 555; *Swift v. San Francisco Stock & Exchange Board*, 67 Cal. 569, 8 Pac. 94. In the case of *National Mut. Aid Asso. v. Gonser*, 43 Ohio St. 1, 1 N. E. 11, where a certificate of membership was issued by an association organized under the statute of the state of Ohio for the purposes of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased member, and the petition failed to bring Gonser within the operation of the terms of the certificate, or the statutes under which the association was organized, and the certificate failed for want of a proper designation, it was held that the plaintiff could not recover, and the court would leave the parties to the contract where it found them.

We must not forget that, as a matter of fact, there was no trust fund actually in the hands of the association, with which to pay the certificate, at the time of Richardson's death. It is true that equity will presume that that is done which ought to be done, but this is an action at law to recover on a contract of parties, and, if a recovery is had at all, it must be authorized thereby,—either by operation of law, or by the express terms thereof. It is provided therein that, after the death of the insured member, the fund to pay the beneficiary shall be raised by an assessment of the members of the association; that neither the estate of the deceased, his administrator, nor his creditors, have any interest in the contemplated fund; nor can any of them become the beneficiaries under the contract, the laws of the state of Illinois, where the association was formed, or the laws of this state, where this action is pending. Therefore equitable principles cannot be invoked to set aside the contract rights of the parties, and authorize a recovery which is prohibited by law, as well as by the certificate itself.

For the foregoing reasons, we hold that the plaintiff as administrator of Richardson's estate, has no cause of action against the association on the certificate in question, and that the judgment of the trial court, sustaining the defendant's demurrer and dismissing the action, was right, and we therefore recommend that said judgment be affirmed.

Oldham and Pound, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Laura H. PASSMAN, Admr., etc., of William Passman, Deceased, Plff. in Err.,
v.

WEST JERSEY & SEASHORE RAILROAD CO.

(.....N. J.....)

- *1. A traveler on a highway, about to pass over a railroad track, must make reasonable use of his senses to ascertain if such crossing can be safely made, before attempting it. If his failure to do so contributes to his injuries, he cannot recover damages therefor.
2. The cutting of a train of cars on a side track, leaving some on one side and some on the other of a highway, where the view of the other tracks is partially obscured thereby, is not an invitation to the public to cross without using ordinary precaution to ascertain if such crossing can be safely made.
3. A traveler on a bicycle is required to use the same care and prudence before passing over a railroad as is required of a pedestrian.

(March 9, 1903.)

ERROR to the Circuit Court for Atlantic County to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Mr. John W. Wescott for plaintiff in error.

Mr. Joseph H. Gaskill, for defendant in error:

If a person receiving an injury has, by his own negligent conduct, partly aided in occasioning the injury, he cannot recover from the other party whose act also assisted thereto.

Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; *Moore v. Central R. Co.* 24 N. J. L. 284; *Runyon v. Central R. Co.* 25 N. J. L. 556; *Telfer v. Northern R. Co.* 30 N. J. L. 188; *Harper v. Erie R. Co.* 32 N. J. L. 88; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Delaware, L. & W. R. Co. v. Toffey*, 38 N. J. L. 525; *Bonnell v. Delaware, L. & W. R. Co.* 39 N. J. L. 189; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126; *Rochat v. North Hudson County R. Co.* 49 N. J. L. 445, 9 Atl. 688; *Menger v. Laur*, 55 N. J. L. 205, 20 L. R. A. 61, 26 Atl. 180; *Pennsylvania R. Co. v. Leary*, 56 N. J. L. 705, 29 Atl. 678; *Delaware, L. & W. R. Co. v. Hef-*

*Headnotes by VOORHEES, J.

NOTE.—As to liability of railroad company for injury to bicyclist at crossing, see also cases in note to *Jones v. Williamsburg (Va.)* 47 L. R. A. 301.

As to failure to give signals at crossing, see *Rupard v. Chesapeake & O. R. Co.* (Ky.) 7 L. R. A. 316, and cases in note thereto; also *Illinois C. R. Co. v. Slater* (Ill.) 6 L. R. A. 418; *Becke v. Missouri P. R. Co.* (Mo.) 9 L. R. A. 157; *Lyman v. Boston & M. R. Co.* (N. H.) 11 61 L. R. A.

feran, 57 N. J. L. 149, 30 Atl. 578; *Pennsylvania R. Co. v. Middleton*, 57 N. J. L. 154, 31 Atl. 616; *New York & G. L. R. Co. v. New Jersey Electric R. Co.* 60 N. J. L. 52, 38 L. R. A. 516, 37 Atl. 627; *Pennsylvania R. Co. v. Pfuelfb*, 60 N. J. L. 278, 37 Atl. 1100; *Conkling v. Erie R. Co.* 63 N. J. L. 339, 43 Atl. 666.

It is necessary to look and listen, and if it is necessary to stop in order to make the looking and the listening effective, the neglect to stop will bar the right of action of the person to whom injury so results.

Delaware, L. & W. R. Co. v. Hefferan, 57 N. J. L. 149, 30 Atl. 578; *Pennsylvania R. Co. v. Pfuelfb*, 60 N. J. L. 278, 37 Atl. 1100; *West Jersey R. Co. v. Ewan*, 55 N. J. L. 574, 27 Atl. 1064. See also *Conkling v. Erie R. Co.* 63 N. J. L. 339, 43 Atl. 666; *Swanson v. Central R. Co.* 63 N. J. L. 605, 44 Atl. 852; *Merkle v. New York, L. E. & W. R. Co.* 49 N. J. L. 473, 9 Atl. 680; *Central R. Co. v. Smalley*, 61 N. J. L. 277, 39 Atl. 695; *Hoopes v. West Jersey & S. R. Co.* 65 N. J. L. 89, 47 Atl. 27; *Keyley v. Central R. Co.* 64 N. J. L. 355, 45 Atl. 811.

A bicyclist must, under all ordinary circumstances, be treated as subject to the same rules as a pedestrian.

Robertson v. Pennsylvania R. Co. 180 Pa. 43, 36 Atl. 403; *Lau v. Lake Shore & M. S. R. Co.* 120 Mich. 115, 79 N. W. 13. See also *McCracken v. Chicago, R. I. & P. R. Co.* 91 Iowa, 711, 58 N. W. 1085; *Bennett v. Detroit Citizens' Street R. Co.* 123 Mich. 692, 82 N. W. 518.

Mr. Nelson B. Gaskill also for defendant in error.

Voorhees, J., delivered the opinion of the court:

It is necessary in the decision of this case to consider only the assignment of error directed to the instruction of the court to the jury to find a verdict for the defendant. The action was brought by the administratrix of William Passman to recover damages for his death, which was caused by one of the engines of the defendant company colliding with him as he was attempting to cross its tracks on Ohio avenue, in Atlantic City, on a bicycle. The testimony developed the fact that the deceased had for several months prior to the accident been employed by a lumber dealer whose office was less than 100 feet from the crossing, and that in the ordinary business of his employment, and in going to and coming from his home, which was in the southern part of the city.

L. R. A. 364; *Butcher v. West Virginia & P. R. Co.* (W. Va.) 18 L. R. A. 519; *Vandewater v. New York & N. E. R. Co.* (N. Y.) 18 L. R. A. 771; *Chicago, B. & Q. R. Co. v. Metcalf* (Neb.) 28 L. R. A. 824; *Wragge v. South Carolina & G. R. Co.* (S. C.) 33 L. R. A. 191; *Mack v. South Bound R. Co.* (S. C.) 40 L. R. A. 679; *Mason v. Southern R. Co.* (S. C.) 53 L. R. A. 913; and *Gahagan v. Boston & M. R. Co.* (N. H.) 55 L. R. A. 426.

on the opposite side of the track from the place of his employment, he necessarily passed over this crossing several times a day, and was presumably acquainted with the times and manner of running trains thereover. The railroad and Ohio avenue cross each other at this point at nearly a right angle; the avenue extending north and south, and the railroad east and west. At the time of the accident the railroad had four tracks across the avenue. The two nearest the deceased's place of employment were sidings or tracks used for the shifting and storing of cars. The two furthest were the regular express or incoming and outgoing tracks. Just prior to the accident a train of empty cars had been drilled upon the siding tracks, and it was in evidence, although denied by some of the witnesses, that this train had been cut, leaving some cars to the east and some to the west of the avenue; thus permitting passage over the avenue for vehicles and pedestrians. A witness who was walking on the avenue in a southerly direction, toward the crossing, saw the deceased just before the accident standing with his bicycle at the door of the office where he was employed, talking with someone. This witness proceeded on his way towards the crossing, and when between the empty cars, or on approaching the lower track, seeing the regular evening express of the defendant company coming at a high rate of speed on the southerly or incoming track, turned and shouted to the deceased to warn him of the danger, and then tried to "grab" him, and, if possible, prevent by force his proceeding in front of the train. In this he was unsuccessful. He says the deceased was almost upon him when he turned; was riding on his bicycle at a moderate rate of speed, and going directly in front of the train, by which he was struck and instantly killed.

It was contended by the counsel of the plaintiff that the empty cars left on the side track obstructed the view of the incoming train; that the cutting of this train of empty cars was an implied invitation to the public and to the plaintiff's intestate that the tracks could be crossed in safety; and also that none of the statutory signals were given by the defendant of the approach of its train, and therefore it was liable in damages for his death. No negligence, however, on the part of the railroad employees, would excuse the plaintiff's intestate from exercising reasonable and ordinary care in approaching this crossing, which was a place of obvious and known danger, so that his failure to observe such care would preclude the plaintiff's right of recovery. The cutting of the train was not an invitation to cross without exercising reasonable care. It was only for the purpose of furnishing an opportunity to those who might desire to cross while using the ordinary prudence required by the law under the circumstances apparent from the condition of the crossing. The absence of the statutory signals did not justify the deceased in assuming that it was safe for him to cross. He should

have used reasonable care for his own preservation, and, failing therein, he cannot shift the sole responsibility upon the company. If by taking ordinary care he could have avoided the danger, his failure to do so negatives the plaintiff's right of recovery. One cannot recover for the breach of duty of another when he is lacking in ordinary prudence himself.

The respective rights of railroad companies and persons attempting to pass over their tracks at regular crossings are reciprocal. The company has the right of way. It must, however, give the statutory signals of the approach of its trains. A person about to cross a railroad track on a highway is presumed to know the danger, and, while he may reasonably expect to be warned by the prescribed signals of an approaching train, he cannot justify himself in risking the danger unless he has exercised the senses nature has given to protect him from harm; and he must exercise such faculties in the manner that an ordinarily prudent person would exercise them under similar circumstances. The greater the difficulty of discovering the danger, as apparent from the surroundings, the greater is the care required; and, if the circumstances are such that one sense is rendered less reliable, the others must be used to a correspondingly greater extent. As early as 1854, in *Moore v. Central R. Co.* 24 N. J. L. 268, Justice Potts, in speaking for the supreme court, said: "I am clearly of opinion that the plaintiff was bound to show that he used all ordinary care, all reasonable caution, to avoid the collision." This was a crossing case. The plaintiff was seriously injured. On the trial he did not prove any negligence on the part of the defendant, or the exercise of ordinary prudence on his own part. This case was before the supreme court on a rule to show cause, and was afterwards affirmed by this court, on a writ of error, in 24 N. J. L. 824, wherein Justice Haines said the court intended to adopt the principle laid down by the supreme court. Negligence is a fault, and will not be presumed against either litigant in the absence of proof. *Pennsylvania R. Co. v. Middleton*, 57 N. J. L. 154, 31 Atl. 616. The proper caution to be exercised before attempting to pass over a railroad crossing has been clearly defined in this state by a large number of decisions. A few only are cited here: *Morris & E. R. Co. v. Haslan*, 33 N. J. L. 147; *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180; *Central R. Co. v. Smalley*, 61 N. J. L. 277, 39 Atl. 695; *Green v. Erie R. Co.* 65 N. J. L. 301, 47 Atl. 418.

The plaintiff's intestate in this case was riding on a bicycle,—a vehicle propelled by his own power, over which he had personal control. The general rule to be applied requires a bicyclist, on approaching a railroad crossing, where the view of the track is in any way obscured, to dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen before attempting to cross; and, while his acts may vary in certain details, the law

requires of him practically the same reasonable care as is required of a pedestrian. *Robertson v. Pennsylvania R. Co.* 180 Pa. 43, 36 Atl. 403.

The deceased was guilty of contributory negligence. There was no error in the order directing a verdict for the defendant, and the judgment thereon should be affirmed.

PENNSYLVANIA SUPREME COURT.

Howard KESSLER, by Next Friend, *Appt.*,
v.

Gustav BERGER.

(205 Pa. 289.)

A boy does not become, as matter of law, a loungeer by stopping in a street on his way home to rest and cool off, after finishing a game which he had been playing in a vacant lot, so as to prevent his recovering for injuries by the fall upon him of lumber illegally piled in the highway.

(April 20, 1903.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Charles E. Mees and D. Webster Dougherty, for appellant:

That the defendant had negligently maintained a dangerous obstruction in the highway for over a month prior to the accident is clear from the evidence.

North Manheim Twp. v. Arnold, 119 Pa. 380, 13 Atl. 444; *Piollet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 406; *Com. v. Allen*, 148 Pa. 303, 16 L. R. A. 148, 23 Atl. 1115; *Angell & D. Highways*, 255, § 223; 4 Bl. Com. 167; *Com. v. Milliman*, 13 Serg. & R. 404; *Gates v. Pennsylvania R. Co.* 150 Pa. 54, 16 L. R. A. 554, 24 Atl. 638; *Pennsylvania R. Co. v. McTighe*, 46 Pa. 316; *Beatty v. Gilmore*, 16 Pa. 463, 55 Am. Dec. 514; *Dickson v. Hollister*, 123 Pa. 421, 16 Atl. 484; *McVerney v. Reading City*, 150 Pa. 611, 25 Atl. 57.

The plaintiff was lawfully on the highway and using it for a lawful purpose.

Varney v. Manchester, 58 N. H. 430, 42 Am. Rep. 592; *Gillis v. Pennsylvania R. Co.* 50 Pa. 129, 98 Am. Dec. 317; *Com. v. Milliman*, 13 Serg. & R. 403; *Fairbanks v. Kerr*, 70 Pa. 88, 10 Am. Rep. 664; *Valto v. United States Exp. Co.* 147 Pa. 405, 14 L. R. A. 743, 23 Atl. 594.

Where there is a question whether a child is of sufficient age and discretion to be capable of exercising care for his own safe-

ty the question of his capacity and its degree is for the jury.

2 *Thomp. Neg.* 1182; *Nagle v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413; *West Philadelphia Pass. R. Co. v. Gallagher*, 108 Pa. 528; *Kehler v. Schwenk*, 144 Pa. 348, 13 L. R. A. 374, 22 Atl. 910; *Greenway v. Conroy*, 160 Pa. 185, 28 Atl. 692.

Messrs. Thomas R. Elcock and Charles Knittel for appellee.

Mestrezat, J., delivered the opinion of the court:

This action was tried before Judge Audenried and a jury in the common pleas No. 4 of Philadelphia county, and at the conclusion of plaintiff's testimony the defendant's counsel moved the court for a nonsuit. This motion was denied. The defendant declined to offer any evidence, and presented a point to the court that "under all the evidence the verdict should be for the defendant." The record discloses no ruling on the point, but the court charged the jury as follows: "This case is withdrawn from your consideration, and upon the law I direct you to find a verdict for the defendant." What legal principles applicable to the facts of the case controlled the learned judge in his summary disposition of the cause do not appear in the record brought to this court. His refusal to grant a nonsuit, and his action in directing a verdict for the defendant on the same evidence shortly thereafter, are inconsistent positions. The defeated party has taken this appeal.

The appellee is not in a position to raise the question here as to whether or not Bodine is a city street, if we correctly understand the colloquy which took place between the court and counsel during the trial. The record shows, as we interpret it, that Bodine was conceded to be a street by the court as well as by appellee's counsel, and for the purpose of this appeal we must, therefore, assume it to be a fact. If it was an open question in the court below, it should have gone to the jury.

The case as thus presented is one in which, if the testimony is taken as verity, the jury would have been justified in finding that a child in the lawful use of a public street had been injured by an unreasonable and a dangerous obstruction placed on the street by the defendant. In *Com. v. Monaghan*, 131 Pa. 55, 18 Atl. 934, it is said, quoting from Wood on Nuisances: "Every actual encroachment upon a highway by the erection of a fence or building thereon, or any other permanent or habitual obstruction thereof, may fairly be said to be a nui-

NOTE.—As to liability for injury to child by fall of railroad ties piled in unused portion of street, see, in this series, *Kramer v. Southern R. Co.* (N. C.) 52 L. R. A. 359.

As to obstruction of street by placing building materials therein, see *Flynn v. Taylor* (N. Y.) 14 L. R. A. 556, and *Raymond v. Kiseberg* (Wis.) 19 L. R. A. 643, and *note*. 61 L. R. A.

sance, even though it does not operate as an actual obstruction of public travel. It is an encroachment upon a public right, and as such is clearly a purpresture and a nuisance." The evidence tended to show that the pile of lumber was of sufficient size and so carelessly and irregularly placed as to make it dangerous. It does not appear to have been placed on the street temporarily for any purpose authorized by law. Nor was there any denial that the defendant placed the obstruction on the street, nor that it had been there for at least a month prior to the time it fell on the boy. Pertinent to the facts of this case is the observation of Mr. Justice Clark in *North Manheim Twp. v. Arnold*, 119 Pa. 380, 13 Atl. 444, that "the owners of this lumber might, perhaps, have been privileged to use the street for the temporary purpose of loading or unloading their lumber. This would, perhaps, depend upon circumstances, but it is plain that they had no right to use the highway for the purpose of a board yard."

It was for the jury, under the evidence and instructions of the court, to determine whether the plaintiff was using the street for a lawful purpose at the time he was injured. He and several other boys had been playing ball in a vacant lot near the place of the accident. After they had finished their game, and had left the lot for home, the boys seated themselves on some boards in the street about 1 foot distant from the lumber pile, "to get cooled off." Shortly thereafter the board pile fell, and quite seriously injured the plaintiff. The contention of the appellee is that the boy was a lounge, and was, therefore, not making a legitimate use of the street at the time he was injured. The boys who were called as witnesses testified that they had finished the game of ball before they took their seats near the board pile to "cool off." They evidently had then left the lot, and the inference may well be drawn that at the time of the accident they were *en route*

home, and had made a brief stop to rest from the fatigue incident to the game in which they had just been engaged. If such were the fact, it would, indeed, be a very harsh and rigid rule of law that would declare that the boy was not, under the circumstances, entitled to the rights and protection accorded a traveler on the streets. But such a rule is not supported by reason, and therefore should not exist. The use of a highway, it is true, is for passage, but that does not prevent the pedestrian from making such stops thereon "as business, necessity, accident, or the ordinary exigencies of travel may require." He may not use it as a playground, or for any similar purpose, to the extent that it would deny the public the right of transit over it; but that does not deprive him of the right to stop on the street for a reasonable time when illness or fatigue requires it, and his stopping does not interfere with or inconvenience other persons in the use of the street. The plaintiff was not injured by another person or a vehicle using the highway. His act in stopping for a few minutes to rest in the shadow of the board pile did not inconvenience any other person in the use of the street. He was injured while lawfully using the street by an illegal obstruction placed there by the defendant. So far as the testimony discloses, he did not cause the board pile to fall, nor did he in any way contribute to the accident. In such a case, where the facts are disputed, it is for the jury, under proper instructions, to determine whether the traveler is making a lawful use of the highway at the time he is injured.

It follows that the learned trial judge should have submitted the case to the jury with instructions as to the rights and duties of each of the parties on Bodine street at the time the plaintiff received his injuries.

The judgment is reversed, and a venire facias de novo is awarded.

RHODE ISLAND SUPREME COURT.

Re TEN-HOUR LAW FOR STREET RAILWAY CORPORATIONS.

(.....R. I.....)

1. The legislature may, under its police power, properly limit the hours of labor of employees of a public-service corporation, such as a street railway company, to not more than ten out of twenty-

four, to be performed within twelve consecutive hours.

2. The exemption of existing written contracts from the operation of a statute limiting the hours of labor of employees of a public-service corporation is not on its face so arbitrary, partial, or oppressive as to render it unconstitutional.

3. Voluntary service for excessive hours is forbidden by a statute which

NOTE.—As to validity of statutory limitation of hours of labor, see also, in this series, note to *State v. Loomis* (Mo.) 21 L. R. A. 796; *People v. Phyfe* (N. Y.) 19 L. R. A. 141, and note; *Low v. Rees Printing Co.* (Neb.) 24 L. R. A. 702; *Ritchie v. People* (Ill.) 29 L. R. A. 79; *State v. McNally* (Ia.) 36 L. R. A. 533; *Holden v. Hardy* (Utah) 37 L. R. A. 103; (Affirmed in 42 L. ed. U. S. 780); *State v. Holden* (Utah), 61 L. R. A.

37 L. R. A. 108; *Short v. Bullion, B. & C. Min. Co.* (Utah) 45 L. R. A. 603; *Re Morgan* (Colo.) 47 L. R. A. 62; and *Wenham v. State* (Neb.) 58 L. R. A. 825.

As to constitutionality of eight-hour law as affecting municipal corporations, see, in this series, *Re Dalton* (Kan.) 47 L. R. A. 380, and *Cleveland v. Clements Bros. Constr. Co.* (Ohio) 59 L. R. A. 775.

expressly states that its purpose is to limit the usual hours of labor of street-car employees, although it merely forbids officers of the corporation to exact more than a certain number of hours per day.

(*Blodgett, J., dissents.*)

(June 27, 1902.)

THE GOVERNOR having submitted to the judges for their opinion certain questions relating to the validity of a statute, the following opinions were returned to him:

Providence, June 24, 1902.

To His Excellency, Charles Dean Kimball, Governor of the State of Rhode Island and Providence Plantations:

We have received from your excellency the following questions, viz.:

"First. Are the provisions of chapter 1004 of the Public Laws, passed April 4, 1902, entitled 'An Act to Regulate the Hours of Labor of Certain Employees of Street Railway Corporations,' or any of such provisions, in violation of the Constitution of the state of Rhode Island?

"Second. If not, is there anything in the provisions of said chapter 1004 to make it illegal for a street railway corporation to make a contract with its employees to labor more than ten hours within the twenty-four hours of the natural day, and within twelve consecutive hours, except as provided in said chapter?"

In response to these questions, we have the honor to submit the following opinion:

Chapter 1004 of the Public Laws relates to the hours of labor on street railways. It therefore relates, also, to the exercise of public franchises upon public streets for public accommodation. When a law is made to affect corporations created by and subject to the legislative authority, it is held to be an amendment to the several charters and sustainable on that ground. A notable instance of this sort is found in the weekly payment law of 1891. The case of *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246, so fully and carefully covered the scope and authority of such laws that we need not here repeat its reasoning. It was there decided that the law was not in violation of any of the constitutional provisions of the United States or of this state. The same reasoning is applicable to the statute in question, so far as it relates to corporations.

There is also a common assent that the legislature has the right of control in all matters affecting public safety, health, and welfare, on the ground that these are within the indefinable but unquestioned purview of what is known as the police power. It is indefinable, because none can foresee the ever-changing conditions which may call for its exercise; and it is unquestioned, because it is a necessary function of government to provide for the safety and welfare of the people. Private rights are often involved in its exercise, but a law is not on that ac-

count rendered invalid or unconstitutional. The first inquiry is whether the subject of the law is within the power; for, if it is, the legislature has jurisdiction to enact it, and its terms are subject to a reasonable legislative discretion.

The constitutionality of the law under consideration may also be sustained as an exercise of the police power of the legislature. In *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, the Supreme Court of the United States held that a statute of Utah which limited the hours of labor in mines to eight hours per day, except in cases of emergency, was a valid exercise of the police power, and not in conflict with the 14th Amendment to the Constitution of the United States. That decision goes much farther than the question here presented, because the law affected cases based primarily on private contracts. The law before us is more clearly within such power, for the triple reason that it deals with public corporations, the use of a public franchise, and a provision for public safety. It has been held, in many cases, that any one of these grounds is sufficient to sustain an exercise of the police power. In answering your question, therefore, we have to look to possible objections to the details of the law, rather than to the affirmative authority of its scope.

It may be objected that it infringes the right of contract; but that objection is answered, by the decision above quoted, on the ground that the police power stands above private rights in matters affecting the public welfare. Also, as stated by this court in *State v. Dalton*, 22 R. I. 77, 48 L. R. A. 775, 46 Atl. 234: "This inalienable right is treasured upon and impaired whenever the legislature prohibits a man from carrying on his own business in his own way, provided always, of course, that the business and the mode of carrying it on are not injurious to the public, and provided, also, that it is not a business which is affected with a public use or interest." The law in question is clearly within the latter proviso.

It may also be objected that this law is not a proper exercise of the power, because it exempts from its operation cases of existing written contracts. Granting that the legislature has jurisdiction of the subject-matter, it must also be granted that it has reasonable discretion in acting upon it. All intendments will be made in favor of a law not obviously void upon its face. As said by Mr. Justice Brewer in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609: "It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole; and the courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power." Both this court, in *State v. Peckham*, 3 R. I. 289, and the Supreme Court of the United States, in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, have de-

clared that the legislature is the exclusive judge of the propriety and necessity of legislative interference within the scope of legislative power. If a state of facts could exist which would justify legislation, it is to be presumed that it did exist. To the same effect is the statement of Chief Justice Duffee in *State v. Narragansett*, 16 R. I. 424, 3 L. R. A. 295, 16 Atl. 901: "The rule generally laid down is that statutes should be sustained unless their unconstitutionality is clear beyond a reasonable doubt. A reasonable doubt is to be resolved in favor of the legislative action, and the act sustained." Nevertheless, as held in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, a law may be invalid if it makes discriminations which are clearly unreasonable, arbitrary, oppressive, or partial.

If, however, intendments are presumed in favor of a law under the former rule, they can only be overcome under the latter rule when the vice of the law is apparent on its face. A law need not state its purpose, and it seldom does. Courts are usually able to see the purpose from the terms of the act itself, and so, also, to see therein its arbitrary or unlawful provisions, if such there be.

While there may be no obvious reason for exempting from the operation of the present statute cases of existing written contracts under which there might be as great danger to the public from the strain of excessive labor as in cases where there is no such contract, so, on the other hand, such exemption is not obviously arbitrary, partial, or oppressive. Assuming knowledge of the facts on the part of the legislature, it may be that written contracts were so few, or held by men of such experience and skill, or applicable to such conditions of labor, as to make the exemption reasonable and proper so far as the public are concerned.

It is a general rule that a law must apply equally to all of the class affected by it, and this law applies to all contracts for labor on street railroads other than those under existing written contracts. It is prospective in its operation, and as the written contracts expire it will embrace all. The mere fact that one class is not embraced in a law when it might be is not enough of itself to render the law invalid. An example of this is found in *State ex rel. Scheffer v. Justus*, 85 Minn. 279, 56 L. R. A. 757, 88 N. W. 759, where the supreme court of Minnesota declared an act constitutional which forbade the blacklisting of discharged employees by corporations or partnerships. It was claimed that the law was unequal because it exempted individuals, and that the mischief of blacklisting by an individual was as great as that done by a corporation or partnership. But the court held that the act, being applicable to all members of the class, was not invalid because limited to that class.

It is a common thing for laws to take effect at a future date, when acts done before that date would be as great a menace to pub-

lic safety as those done after it; but evidently that would not vitiate the law.

Statutes limiting the hours of labor for women and children have been very generally adopted in this country.

The statute relating to the practice of medicine exempts those who were honorably engaged in practice prior to January, 1892, from producing a diploma from a medical college or submitting to an examination, one of which forms of evidence of qualification is required from all others. Yet the constitutionality of the act has not been questioned on that ground.

Very many cases might be cited in which there has been considerable difference of opinion upon questions closely allied to that here presented, but we do not think it would serve a useful purpose to discuss them nor to point out differences which might tend to distinguish them. The general rules which we have quoted are sufficient to give the reasons for our conclusion, which is that the law in question does not violate any provision of the Constitution of this state or of the United States in its scope and character, nor by reason of violating rights of contract, nor by reason of an apparent and arbitrary exercise of power in the exception to which we have referred. If there is any other ground upon which it may be claimed to be unconstitutional, it does not now occur to us.

The second question calls for a construction of the act with reference to the right to contract under it.

The 1st section forbids an officer of a company to exact more than ten hours' work, from which an inference might arise that it could accept it if rendered voluntarily, as by contract. The 2d section, however, rebuts such an inference, for in that section the intent is explained as follows: "The true intent and purpose of this act is to limit the usual hours of labor of the employees of street railway corporations, as aforesaid, to ten hours' actual work a day, to be performed within a period of twelve consecutive hours." This express intention to limit the hours is quite inconsistent with an inference to permit it by contract. If such an inference could stand, it would be possible for parties to avoid the act by their simple consent, and thus to render it a nullity. The apparent purpose of the act is not to create a right in favor of the employees, which they might waive, so much as to guard the public safety from service too prolonged for alertness in the exercise of reasonable care. If this be so, the public safety cannot be made dependent upon private contracts.

We therefore reply to the second question of your excellency that it is illegal for a street railway company to make a contract with its employees to labor more than ten hours within the twenty-four hours of the natural day, and within twelve hours, except as provided in said chapter.

Mr. Justice Douglas, being interested in one of the companies to which the act ap-

plies deems it proper that he should not express an opinion.

[Signed]

JOHN H. STINESS.
 PARDON E. TILLINGHAST.
 GEORGE A. WILBUR.
 HORATIO ROGERS.
 EDWARD CHURCH DUBOIS.

To His Excellency, Charles Dean Kimball,
 Governor of the State of Rhode Island and
 Providence Plantations:

The request of your excellency for an opinion upon the constitutionality of chapter 1004 of the Public Laws entitled "An act to Regulate the Hours of Labor of Certain Employees of Street Railway Corporations," calls for a critical examination of the provisions of a penal statute enacted on April 4, 1902, to take effect on June 1, 1902.

The corporations referred to in the act are quasi public corporations, and their property is in a large measure impressed with a public use. And it is indisputable, as a general proposition, that, where peculiar privileges are granted by the state, peculiar responsibilities supervene and special regulations may be prescribed; for the bestowal and reception of special privileges beget legitimately the right to impose special burdens. But the right to restrict is not an unlimited right. The restrictions must apply equally to all under the same conditions, since otherwise there is a denial of that equal protection of the laws which is guaranteed by the Constitution of the United States (art. 14 of Amendments, § 1), which, being by its own terms the supreme law of the land, is, in a sense, also incorporated into the Constitution of this state; for article 6 of the Constitution of the United States provides as follows: "This Constitution . . . shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Upon the question of the right to restrict the liberty of contract in a lawful calling, as between employers and employees, the decisions of the courts of different states are in conflict. When these restrictions fall equally upon all in the same circumstances, there are authorities which sustain the right of the legislature to impose them. But even this right is not universally conceded. Judge Cooley, in his great work on Constitutional Limitations, 6th ed. p. 484, says: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown by the law, could be sustained notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts . . . or to build such houses as others were allowed to erect, or in any other way to make such use of their property as

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was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it must come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness,' and those who shall claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived." *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071; *Low v. Rees Printing Co.* 41 Neb. 137, 24 L. R. A. 702, 59 N. W. 362.

The act itself contains no explanation of the exigency for its passage, but it is contended that it is fully justified as a valid exercise of the police power of the state, and, if that contention be made good, the act must unquestionably be upheld. Two grounds only are urged, or, indeed, exist, in support of the act as a police regulation, viz., the public safety and the somewhat more doubtful ground of the health of the employees; and if either or both of these are found upon examination to be the uniform and controlling objects to be subserved, and if its provisions bear alike under the same conditions upon all who are within its terms, and if, in its classifications, it includes all who are under the same conditions, and excludes none of those whose conditions or needs render such legislation necessary or appropriate to them as a class, sufficient justification for the enactment may be found.

But the validity or invalidity of such an act as this may, and often does, depend upon the facts disclosed in the particular case before the court. This not being an adversary proceeding, such facts only can be properly considered as are of common knowledge or of public record, or, it may be, such as have come to our notice in the course of judicial proceedings before us. Nor is precedent wanting for considering other matters than the express provisions of the act; for in the case of *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, the Supreme Court of the United States, approving *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1664, says: "In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carrying on the laundry business, was adjudged void. This court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and said that under the guise of regulation an arbitrary classification was intended and accomplished."

While the language of the act is not entirely clear in all its parts, it may fairly be said that it prohibits in its terms all offi-

cers and agents of street railway corporations from "exacting" from certain classes of their employees, *viz.*, conductors, gripmen, and motormen, more than ten hours' labor in twelve consecutive hours in any day of twenty-four hours, with certain exceptions. And it undoubtedly follows that, if the corporation cannot require, as of right, from the employee longer service than this, the employee cannot make a valid contract with the corporation for such longer service; for a contract must be mutually enforceable to be binding on the parties to it.

It will not be questioned that the act is to be strictly construed, since it is penal in its nature, and it is therefore to be noted:

First. That it is restricted in its application to and includes only street railway corporations and three classes of persons in their employ, namely, conductors, gripmen, and motormen. And thus our first inquiry is as to the necessity for thus restricting the natural liberty of contract between the employer and the man of full age whom he employs. This freedom of contract is still left unrestricted in the other avocations of our people, and this statute constitutes a unique exception to the otherwise universal rule. Has the policy hitherto pursued in this respect proved detrimental to the public welfare, or are these employees so many in point of numbers as to properly require special legislation as a class, or is the operation of street railways so related to the public safety that the dangers arising therefrom require, and therefore justify, these restrictions on the liberty of contract between these companies and their employees, or is the act found to be not justified by any of these considerations?

If evidence be desired of the prosperity which has resulted to our people under the relations which have heretofore existed between employer and employee, it may be found in the records of the United States census of 1900 (Bulletin 93, pp. 3, 5), summarized in these words: "In the percentage of the total population employed in manufacturing, in the variety and importance of products, . . . Rhode Island is not surpassed. . . . It is doubtful whether so large a share of the material wealth and resources of any other commonwealth can be attributed to the enterprise and skill of its citizens in the enlargement and extension of old and established industries and the development of new forms of productive industry." It therein appears (table 6) that out of the total population of 428,556 people of this state there were 64,508 wage-earning male employees over sixteen years of age employed in the mechanical and manufacturing industries of the state alone, without reference to those employed in agricultural or other pursuits, to no one of whom does any law restricting his right to contract as to his hours of labor apply.

The act in question was passed on April 4, 1902, which was the last day of the January session of the general assembly. The official report of the state railroad commissioner for the year 1901, concerning "the

condition and proceedings of the several railroad corporations" of the state, which is required by chapter 809 of the Public Laws to be made to the general assembly at its January session, had therefore been in its possession for the maximum period, and that body is chargeable with notice of its contents. It therefore becomes especially appropriate to consider that report, in order, if possible, that it may be seen in what manner and to what degree it may show that the public safety was endangered by the operation of the street railway companies in the state; for when actual knowledge is shown the legal presumption of knowledge no longer obtains. It there appears (page 74) that there are nine street railway companies, operating within the limits of the state 753 motor cars and 93 other cars (such as construction and sand cars, etc.), or 846 cars of all descriptions. The danger to public safety arising from the operating of street railways, and arising otherwise than from defective construction or repair of roadbed or equipment, with which motormen, gripmen, and conductors are in no wise concerned, must, therefore, be caused by these 846 cars; and the total number of persons subject to the provisions of the act is the number required to operate them, which is evidently a very small percentage of the total population of the state. Now, if special and peculiar dangers affecting the public safety attend upon the operation of street railways, and these dangers will be remedied by restricting the liberty of contract between the companies and the three classes of employees above mentioned, in manner and form as contained in this act, such dangers will doubtless constitute sufficient justification for so doing; but otherwise the exigency for such special and class legislation is not apparent. Fortunately, exact statistics showing the degree of danger to the public safety are at hand; for on page 75 of this report it appears that there were transported in the year ending June 30, 1901, on all the street railroads in the state, the great number of 58,924,846 passengers, and that, in so doing (p. 77), 12 persons were killed from all causes, and 204 were injured more or less seriously,—these figures including employees, passengers, and the general public. Of those killed only 7, and of those injured only 147, were killed or injured, respectively, by collision or while crossing tracks; other deaths and injuries being caused by leaving or boarding the cars while in motion, derailments, and other causes, or a total of 154 persons in all. It is impossible to escape the conclusion that the greater or less degree of injury sustained by 147 persons and the loss of 7 lives, within the period of one year, while transporting 58,924,846 passengers on the 316 miles of track in this state (p. 74) by the nine street railway corporations, constitutes the exact measure of danger to the public safety for one year which arises from the operation of all the street railway companies within the limits of the state.

Second. But the act is still further re-

stricted in its application, in this: that it does not include all conductors and motormen generally, but applies to and includes only those who are employed in operating street railways. But there are others of these classes in the state who are not employed in operating street railways. In a recent hearing before the undersigned, it appeared from the testimony that the Providence, Warren, & Bristol Railroad is now operated by the New York, New Haven, & Hartford Railroad Company, a steam railroad company, by means of electricity supplied by the overhead trolley system, and it employs in its operation conductors and motormen whose duties are similar to the duties of the conductors and motormen engaged in operating street railways. But their cars run over their own roadbed, and not through the streets in the towns through which they pass; neither is the rate of speed of their cars subject to local regulation; that 98 trains are operated on that road in a day of eighteen hours, carrying on an average about 8,000 passengers per day, or at the rate of nearly 3,000,000 per annum,—the number carried on July 4, 1901, being 57,000, and on Labor Day, 1901, over 65,000. But this act does not apply to conductors or motormen or protect the passengers, on that road. And, while the danger of collision is less than on a street railway, the high and unlimited rate of speed which is maintained and the dangers and consequences thereof are far greater. So that it is not amiss to inquire the reason for neglecting to extend these provisions for the health of employees and the safety of passengers to this road also.

It is also a matter of common and general knowledge and public record, to which it does not seem improper to refer, that the Bristol Branch of the Rhode Island Suburban Railroad Company operates a parallel electric street railway from a point a few rods distant from the latter road in Providence, through the highways in the towns of East Providence, Barrington, and Warren, to a point a few rods distant at its Bristol terminus, and this road is undoubtedly within the provisions of this act. But it is also a matter of common and general knowledge and of public record that the same Rhode Island Suburban Railroad Company has recently extended its operations by the electric trolley system upon the tracks and roadbed of the former Warwick & Oakland Beach Railroad Company, and is undoubtedly not a street railway as to such branch, and its motormen and conductors and the public generally are not in the least affected by the act under consideration. Thus this anomaly is presented: that the same corporation is liable to the penalties prescribed in this act if it "exact" more than ten hours' daily service on its road in the town of Bristol, but is not so liable on its road in the town of Warwick. Substantially similar conditions exist on the Sea View Railroad, running to Narragansett Pier, which is also operated by electricity in the same manner, and employs conductors

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and motormen, but operates its cars on its own roadbed, and not upon the public highway, except at occasional intervals and for very short distances, and which, according to the same report (p. 90), transported 433,315 passengers in 1901.

Having thus described the existing conditions attendant upon the operation of the act, we are now better prepared to consider the language of the act itself.

And here another exception appears, for the act does not include in its provisions even all those conductors and motormen who are engaged in operating street railways; since, by the express proviso to § 1, "nothing herein contained shall affect existing contracts." That is to say, if a motorman or conductor in the employ of a street railway company had a "written contract" with the company on June 1, 1902, for a greater number of hours of labor than ten per day, it is still lawful for the company to "exact" more than ten hours' labor per day from such persons; while in the case of a conductor or motorman operating on the same route, and it may be on the same car, but then having only an oral contract with the company, though made on the same day and calling for the same length of service, and made upon the same consideration, the company is liable to a fine of \$500.

This act was passed on April 4, 1902, and it is, of course, not known to us how many "written contracts" with employees were thereafter made or were in existence on June 1, 1902, and it is, therefore, not within our knowledge how many of these classes of employees who were originally required to operate the 846 cars aforesaid are still exempt from its operation. But to exempt from the operation of the act solely because of having a written contract with the corporation is wholly indefensible, and is purely an arbitrary classification, for no reason germane to the public safety or the health of the employees; for nothing is more clearly settled than that a valid exercise of the police power is not subject to the constitutional provision prohibiting legislation which impairs the obligation of contracts, since all contracts are made, as all property is held, subject to the paramount requirements of the police power of the state. The Supreme Court of the United States in *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 672, 29 L. ed. 516, 6 Sup. Ct. Rep. 264, says: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts." So that the question here presented is not as to the scope of the police power in general, but is limited to an inquiry, in the first place, as to whether existing conditions are such as to justify its exercise at all because of some sufficient danger to the public safety; and, if that be so, in the next place to an inquiry whether it can be exercised in manner and form as expressed in the provisions

of the penal statute before us; or, in other words, is the act intended to protect the public safety, and, then, do its provisions accomplish that intent? Unless both these inquiries can be answered in the affirmative, the act fails of justification; for even if the danger to the public safety is shown to be a real and substantial danger, nevertheless, if the means adopted for its removal do not accomplish its removal, the public safety still remains impaired, society is not protected, and the real and effective power of the police power has not been effectively applied. But in what manner is the public safety preserved or the health of the employees protected by these exceptions to the provisions of the act? Or will it be seriously contended that the obligation of the oral contract is not protected by the Constitution, while the obligation of a written contract is so protected?

Third. But these are not the only exceptions, since the act is periodically suspended in its application to even those motormen and conductors who have not been exempted from its terms by the exceptions already considered; for, in addition to cases of unexpected contingency which need not be further mentioned, it is provided "that on legal holidays . . . extra labor may be performed for extra compensation." Section 36 of chapter 809 of the Public Laws prescribes the legal holidays in this state, and includes, together with eight other days, "the first day of every week, commonly called Sunday," of which, of course, there are fifty-two in the year, thus leaving the act operative as to those motormen and conductors on only three hundred and five days out of three hundred and sixty-five days in the year. With the religious and moral issues involved in thus authorizing unlimited exactions of service to be made on that day we are not now concerned, for the legal question would be the same if the law were periodically inoperative by arbitrary enactment for one sixth of the total number of weekdays in the year. But it is needless to say that neither the public safety nor the health of the employee is conserved thereby. And this is especially true when it is considered that the very days when the law does not apply are precisely those days when the largest crowds are upon the cars and upon the streets, and when the dangers of transportation and collision are at the maximum.

In *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, the Supreme Court of the United States thus defines the limits of the police power: "It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. On the other hand, it is also true that the equal protection guaranteed by the Constitution 61 L. R. A.

forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. . . . Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even when the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

Says Mr. Justice Field in *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 757, 28 L. ed. 585, 4 Sup. Ct. Rep. 661, citing with approval Adam Smith's *Wealth of Nations*, book 1, chap. 10: "It has been well said that 'the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders one from working at what he thinks proper, so it hinders the others from employing whom they think proper.'"

Under the provisions of this act certain motormen and conductors, by virtue of the "written contracts" in existence on June 1, 1902, are permitted to contract without restriction for such hours of labor as they may see fit, while all others in the same class have unlimited freedom of contract in this behalf on only sixty days in the year, and are restricted for the remaining three hundred and five days in the year.

In *Carr v. Brown*, 20 R. I. 215, 38 L. R. A. 294, 38 Atl. 9, the court decided that a certain statute operated to deprive the plaintiff of property "contrary to the law of the land, or, as it is ordinarily said, without due process of law, and hence is in violation of article 1, § 10, of the Constitution of this state, and also of article 14 of the Amendments to the Constitution of the United States." In *Mitchell v. People's Sav. Bank*, 20 R. I. 507, 40 Atl. 505, the court construed the provisions of article 1, § 10, of the Constitution of this state, as follows: "That which the constitutional provision is intended to perpetuate is the substance of the individual right of property;" and to my mind this constitutional guaranty is directly broken by the act under consideration; and see *State v. Dalton*, 22 R. I. 79, 48 L. R. A. 775, 46 Atl. 234.

Fourth. But the act not only restricts the hours of labor to ten in a day of twenty-four hours, but it requires that those ten hours of labor shall be performed within twelve consecutive hours. In the case of those cars which are operated at night, a motorman or conductor who begins his ten

hours of labor at 6 P. M. must therefore work all night until at the earliest 4 A. M., or at the latest until 6 A. M. In what way can it be said that the health of the employee is preserved by such a requirement, as against a schedule permitting the same employee to work for five hours from 6 P. M. to 11 P. M., and then resuming at 8 A. M., and working the remaining five hours until 1 P. M., thus affording nine hours for sleep and morning meal, and ending in time for the midday meal? Or is the public safety in any wise conserved by thus requiring a motorman to be on what is practically continuous duty throughout the darkness of every night without opportunity for enjoyment of the natural hours for rest and sleep? But to "exact" of the motorman under this act the latter schedule is made a penal offense, and is punishable under the act in precisely the same manner as it is punishable to "exact" more than a total of ten hours' labor in a day of twenty-four hours, to wit, by a fine of from \$100 to \$500. If it be urged that the latter schedule does not provide for the operation of the car during the whole night, as is provided in the former schedule, it may be replied that the maximum car service possible is continuous operation day and night for twenty-four hours; that, under a requirement limiting the hours of labor of any one employee to ten hours within such twenty-four, three reliefs or changes of employees are obviously required. After deducting the ten hours during which the first motorman was employed, this leaves the fourteen hours remaining from 11 P. M. to 8 A. M. and from 1 P. M. to 6 P. M. to be divided between the two who succeed him, either seven hours to each, or in any other manner not exceeding ten hours in all to either one, in such manner as must necessarily afford opportunity for rest and sleep at night to both, and without detriment to their health or to the public safety. But if the motorman who has this opportunity for sleep until 11 P. M. when he comes on duty, should work for ten hours, he would work nine of those hours until 8 A. M., when the first motorman returns, and his tenth hour would be after 1 P. M., when the first motorman ceases. But since the second motorman began labor at 11 P. M. the night before, his ten hours of labor would not have been "exact" within twelve consecutive hours, and the penalty of a fine of from \$100 to \$500 imposed in the act is a second time incurred. This would seem incredible if it were not literally true. To my mind such restrictions seem wholly arbitrary and unwarrantable by any considerations affecting the public safety or otherwise.

To restrict the right to labor to the twelve hours of day or night next succeeding the commencement of such labor is, in effect, to prescribe arbitrarily by law the hours of the day or night in which a man may work and those in which he may not do the same work. Under this act he can only contract for ten hours' labor in twenty-four, and he is thus restricted and deprived of the right to labor on any day, if he will, for fourteen 61 L. R. A.

hours of the twenty-four, or for more than half of his whole lifetime. But this last restriction makes it a penal offense if, having entered upon his ten hours of labor, he rests for more than two hours before he is required to complete his day's work.

Again, the same hours of day or night are not prescribed for all; nor does this statutory work period necessarily recur daily on the same hours for the same man. To apply the test to the motorman above supposed this act prohibits the first, who begins labor at 6 P. M., from making a contract to labor after 6 A. M., and literally deprives him of the right to labor at his calling by day, and restricts his right to labor to the hours of the night; while his successor, who does not begin labor until 11 P. M., cannot labor after 11 A. M., and must labor partly by day and partly by night. Thus, under this act, it is clear that no valid contract can be made for even ten hours' daily labor, unless those ten hours are to fall within the period of twelve consecutive hours.

To impose restrictions such as these is clearly a deprivation both of liberty and of property, within the provisions of article 1, § 10, of the Constitution.

Fifth. But in the event that labor for the period supposed has been "exact" of the street railway motorman in question, he not having a "written contract" with the company on June 1, 1902, and the labor is "exact" on some day on which the law is in force, and not on Sunday or any other legal holiday, what is the penalty therefor provided by the act, and on whom does it fall?

Unquestionably this is a penal statute, and as such it must be construed strictly. It seeks to make a statutory offense out of an act not hitherto unlawful and not *malum in se*. It is elementary that statutory offenses are not to be enlarged by implication, and that, unless the terms of the statute specifically include the exact offense, there can be no violation of it.

The 2d clause of § 1 contains the only prohibition to be found in the act, and it is as follows: "No officer or agent of any corporation operating street cars of whatever motive power shall, on any day, exact from any of its employees more than the said ten hours' work within the twenty-four hours of the natural day, and within twelve consecutive hours. Provided," etc.

The expression "natural day," which is here used, is defined in Bouvier's Law Dict., *sub nom.*, to be "the period of time elapsing between sunrise to sunset." Though the words are used in a penal statute, if it be assumed that they are intended to mean a period of twenty-four consecutive hours, whether beginning at midnight, as in the civil day, at sunrise, at noon, or at any other time (although the crime of burglary cannot be committed in the hours of the "natural day" as above defined by the authority cited), then the officers and agents of these companies are forbidden to exact labor contrary to the provisions of the statute. "Exact" labor, and "exact" labor only, is that which is prohibited. But what is it

to "exact" labor? In a sense, labor cannot be "exacted" of a free man. It at least and of necessity implies a demand and a compliance with that demand in some way, whether that demand be made lawfully or unlawfully, by virtue of the terms of an existing contract or by superior force. But can it be said that that which a man freely volunteers, or, it may be, even desires, is, in any criminal sense, "exacted" from him? But, without further consideration of this point, it may be assumed that there has been an "exaction" of labor in any manner or by any act which the statute makes an exaction. What, then, is the consequence?

The only penalty therefor is contained in § 3, which is as follows: "Any street railway corporation violating the provisions of the preceding sections of this act shall be fined not less than \$100 nor more than \$500, one half thereof to the use of the complainant and the other half to the use of the state." Pub. Laws, chap. 1004.

It will be observed, first, that there is no penalty for the employee who works longer than the specified term; and, second, that there is no penalty imposed upon the "officer or agent" who "exact" the labor, the statute differing in this respect very materially from the Massachusetts statute (Rev. Laws 1902, chap. 106, § 70) on which the act in question is apparently modeled in part, and which is as follows: "Whoever violates a provision of this chapter for which no specific penalty is provided, shall be punished by a fine of not more than \$100." And the New Jersey act of 1887, upon the same subject, from which other parts of the act under consideration are evidently drawn, provides, in § 2 thereof, "that it shall be a misdemeanor for any officer or agent of any such corporation to exact," etc. Laws 1887, p. 145, chap. 112.

Unquestionably, under either of these acts, the officer or agent could be personally punished; but in this act, while the officer or agent is prohibited, there is no penalty provided for the punishment of the individual who so violates the act, but the penalty is visited upon the corporation only.

If it be replied that a corporation acts only through its officers and agents, and that their acts are the acts of the corporation, it may be rejoined that such is the case only when they are clothed with corporate power, and are acting within the sphere of their authority, and not otherwise, and that they are not presumed to so act when the statute prohibits such act to be done. But this statute always imposes a penalty upon the corporation, and never upon the individual offender, whether he acts by, without, or against the corporate power and instruction. And this penalty is a fine which is to be paid by the corporation, and which, of course, deprives 61 L. R. A.

the stockholders therein of their property by that amount. In so far as this act thus visits a penalty upon the stockholders, it is unquestionably in contravention of article 1, § 10, of the Constitution. But inasmuch as no fine can, in any event, ever be imposed upon the agent or officer who violates the provisions of the act, the real offender always goes unpunished, and the real punishment always falls on the stockholders, even when the act has been violated in contravention of their express authority.

To the constitutionality of such legislation I cannot assent, whether it is sought to be justified as a valid exercise of the police power or as an exercise of the reserved right to alter and amend the charters of incorporation of the several companies affected thereby.

Section 2 of the act provides "that it is the true intent and purpose of this act to limit the usual hours of labor of the employees of street railway corporations, as aforesaid, to ten hours' actual work a day, to be performed within a period of twelve consecutive hours, as aforesaid, whether such employees be employed by the trip, the job, the hour, the day, the week, or any other manner." Pub. Laws, chap. 1004.

If the hours of labor in any lawful calling may be thus limited by law to ten in each day, beyond the power of either party to increase, if not to diminish, them, it follows that they may be limited to eight or to twelve, or to any other number of hours, in like manner and with like effect; thus substituting for the constitutional right of individual liberty of contract the transient and fluctuating will of a legislative majority, which, both plutocrat and demagogue, will unceasingly strive to control, and against which the individual will be powerless to defend,—alike helpless, whether the legislative spoliation of the employer or the industrial servitude of the employee shall for the hour prevail.

And if the foregoing observations shall seem to have been directed less to the limits of the legislative power over quasi public corporations than to the limits of the same power over the citizen, it is sufficient to reply that the latter is the graver and higher question by as much as the man is above the dollar.

For the reasons above set forth, I am of the opinion that the act in question is unconstitutional in the particulars enumerated, and is wholly void. It follows from the unconstitutionality of the act, and as a necessary conclusion, that a street railway conductor, gripman, or motorman may freely contract for such hours of labor with his company as may be agreed upon between them.

JOHN TAGGARD BLODGETT.

ALABAMA SUPREME COURT.

J. L. HALL *et al.*, Trustees, etc.,
v.

Fox HENDERSON *et al.*

(126 Ala. 449.)

1. A sale, by an officer of a corporation, of stock therein, nominally made to other officers, but in reality made, as he knew, to the corporation itself, and paid for, as he knew, out of the assets of the company, is void as against its creditors, as a gift to him of the company's assets, whether it is insolvent or not.
2. It will be presumed, in support of a judgment, when questioned in another proceeding, that the instruments sued on were negotiable, if that fact is essential to the judgment.
3. A judgment in favor of a receiver cannot be attacked collaterally when it is not void on its face, on the ground that he had been discharged as receiver before the rendition of the judgment, since, if he had no right or capacity to maintain the suit, that should have been set up in defense.

4. A complaint by trustees is not demurrable for failure to state who the *cestui que trust* are, or that they have authorized the suit by the trustees in their own names.
5. Trustees are entitled to bring suits as such in their own names, without joining or naming the *cestui que trust*.
6. An estoppel as to liability for receiving assets of a corporation cannot be set up by a defendant who at the same time denies that he has received any such assets.
7. The treasurer of a corporation cannot escape the probative effect of entries in books which it is his duty to keep, showing that a sale of stock which he claims to have made to other officers of the company was in fact made to the corporation itself,—especially where he was acting for the company in the acceptance of drafts which were paid out of its assets, and the checks which he received for his stock were drawn by other officers of the corporation against its funds.

(May 10, 1900.)

NOTE.—*Right of corporation to purchase its own shares of stock.*

- I. *Introductory*, 621.
- II. *In the absence of statutory authority.*
 - a. *In general*, 621.
 - b. *Taking shares in payment of indebtedness due corporation*, 629.
- III. *Statutory grant of power*, 630.
- IV. *Statutes forbidding purchase*, 631.
- V. *Rights of creditors.*
 - a. *In general*, 632.
 - b. *Creditors who are entitled to protection*, 632.
- VI. *What constitutes a purchase within meaning of rule forbidding same*, 633.

1. *Introductory.*

The courts of this country are divided on the question involved in this note. In some of the jurisdictions they hold that a corporation, unless forbidden by statute, may purchase its own shares of stock without an express or implied statutory grant of power. In other states the existence of such power is denied. The English authorities are also against the recognition of such a corporate power. It will be noted, however, that both sides of the controversy recognize the existence of exceptions to their particular doctrine. The rule that corporations have this power is universally accepted as subject to the condition that the transaction must be free from fraud, and not prejudicial to the rights of stockholders or creditors. On the other hand, the courts which deny the existence of this power concede the validity of such a transaction, where it is made in good faith to prevent the loss of an indebtedness due the corporation.

The existence of these exceptions to the general rules necessitates a somewhat detailed presentation of the facts of each case, for, if these exceptions exist, others may be recognized by the courts whenever a suitable case arises.

It will be noted that, in many of the cases sustaining this corporate power, the court, while laying down a broad, comprehensive rule, in fact shows an intention to limit its application by calling attention to the particular facts involved which justify the application.

It will also be noted that the discussion has

been somewhat confused by the fact that the cases which only pass on the right of a corporation to take its shares in payment of a debt, or under particular statutory authority, have been cited in support of the broad proposition that the general right to purchase exists. As said in a case arising in Illinois,—a state which recognizes the existence of the broad corporate power to purchase,—each case must depend upon, and be determined by, its own circumstances. *Fraser v. Ritchie*, 8 Ill. App. 559.

The fact that the court, in passing on a case of limited facts, uses broad and comprehensive language, does not render that case authority for a doctrine broader than its facts.

The tendency of the courts to attempt to enunciate rules broader than the facts of the particular cases they are passing upon has so manifested itself in the cases presented here that it may not be out of place to refer to the maxim expounded by Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheat. 399, 5 L. ed. 290: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Interpreted in the light of this maxim, the language of the court, that a corporation may purchase its own shares of stock, means nothing more than that, under the particular facts of the case involved, it may do so.

II. *In the absence of statutory authority.*

a. *In general.*

In the following presentation of the authorities the cases upholding the corporate power are first presented, and are followed by those of the contrary holding:

The question has been passed upon in the United States Supreme Court, in the case of

CCROSS-APPEALS from a decree of the Montgomery City Court in an action brought to hold defendant Henderson liable for assets of the Alabama Terminal & Improvement Company which were alleged to have been paid to him for stock which he held in the corporation; the plaintiffs appealing from so much of the decree as rejected a portion of their claims, and defendant Henderson appealing from so much as held him liable for a part thereof. *Reversed on plaintiffs' appeal.*

The bill was filed by J. L. Hall and L. B. Farley as trustees, against Fox Henderson, the Alabama Terminal & Improvement Company, and the Farley National Bank, and averred that the improvement company opened an account with the bank and commenced doing business until it was indebted to the bank in the sum of \$151,000, failure

to pay which caused the bank to suspend. H. M. Hall was appointed receiver of the bank, and took possession of its assets, and instituted a suit against the improvement company to recover the indebtedness, which resulted in a judgment. Execution was issued and returned no property found. On February 15, 1892, the bank was restored to possession, and authorized to resume business. It assigned to complainants the debt of the improvement company. Defendant Henderson subscribed for \$30,000 worth of the stock of the improvement company, giving his note therefor, conditioned upon the completion of a certain portion of the Alabama Midland Railroad, which condition was complied with. The bill averred that he claimed that, after paying for the stock, he had transferred it to J. W. Woolfolk and A. C. Saportas, who were respectively president

Johnson County v. Thayer, 94 U. S. 631, 24 L. ed. 133, which was an action on railroad-aid bonds issued by the county in exchange for capital stock of a railroad company. The court there held that an agreement made by the county, that it would sell and deliver to the railroad company its interest in the latter's capital stock, in consideration of the completion of the road at an earlier time than that required in the original proposition, was valid. The court said that, unless prohibited by law, a corporation may become a holder of a portion of its own shares, and cited *City Bank v. Bruce*, 17 N. Y. 507, *infra*, III., which case only involved the right of a corporation to take its shares in payment of a debt.

It will be noted that the purchase in the *Johnson County Case* did not work a depletion of the capital of the company, as no part of it was expended in purchasing the shares.

In *Chicago, P. & S. W. R. Co. v. Marselles*, 84 Ill. 145, Affirmed on Rehearing in 84 Ill. 645, it was held that a railroad corporation might purchase its own shares of stock if the transaction did not operate to the injury of creditors, or defeat the end for which the body was created, and was without fraudulent purpose, and did not promote the interests of a portion of the stockholders as against others. In that case, after the defendant, a municipal corporation, had subscribed and paid for a portion of the plaintiff's stock, the latter entered into a contract whereby it agreed to purchase back the stock in case of its failure to complete a portion of its road within a specified time.

In *Fraser v. Ritchie*, 8 Ill. App. 554, it was held that the purchase of stock involved was not subject to attack by the complainant creditors. The stock of the corporation was about \$270,000, and was owned mostly by its president; the portion purchased by the company was of the par value of \$17,500, and was paid for by it with personal property. The purchase was made in good faith, at a time when the company was solvent and had assets sufficient to pay all its liabilities, leaving a large surplus. It was not for the purpose of winding up the company, and no winding up was contemplated until at least a year after the purchase of the stock during which time the company continued doing a prosperous business. The court said that a corporation has power to purchase its own stock, except where the circumstances are such as to show that the purchase is fraudulent in fact, or that the corporation is insolvent, or in process or contemplation of dissolution at the time of the purchase.

The rule in Wisconsin, as laid down in *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 228, 61 L. R. A.

is that solvent corporations having power to purchase and sell property may purchase shares of stock when not prohibited by constitutional or statutory provision. In that case the corporation purchased five shares of its capital stock of the par value of \$100 each, of a stockholder who desired to retire at a time when it was solvent (though it became insolvent two years later), and conveyed to him property to the value of about \$1,025, and \$225 in cash, the stockholder transferring his stock, and satisfying a claim which he held against the corporation for labor and services amounting to \$800. The court, without discussing the question, stated that it had several times passed upon it, and cited *Shoemaker v. Washburn Lumber Co.* 97 Wis. 585, 73 N. W. 833, and *Calteaux v. Mueller*, 102 Wis. 525, 78 N. W. 1082. The decision in this case was, undoubtedly, influenced by the broad scope of the powers given corporations in that state, as will be seen by a reference to the two cases which the court cites.

In the *Shoemaker Case*, the only one of the two in which the question was actually involved, a *dictum* will be found that, in the absence of any statute to the contrary, a corporation may purchase shares of stock. The decision was actually based upon the statutes of Wisconsin. The statute authorized the corporation to amend its articles of organization so as to increase or diminish its capital stock; and the court said that, while it did not appear that in purchasing the shares involved the corporation diminished its capital stock in the particular manner prescribed by the statute, yet its authority to do so existed. The court further stated that the corporation was expressly authorized by statute to purchase and sell at pleasure such property of whatever kind as should be necessary for its business or purposes, but that it should not take or hold stock in any other corporation.

This decision is also colored by another fact, that the action did not directly involve the contract of purchase of the shares, but was an action by subsequent creditors against the officer for wrongfully disposing of corporate assets in making such purchase; and the court said that the action was not on contract, but in tort; that the purchase was made in good faith, and that, upon the facts found and stated, it was constrained to hold that the officers were not liable to the plaintiff for any wrongful diversion of the corporate assets. So that, all it can be said that this case holds is that the officers of a solvent corporation are not liable in an action of tort to subsequent creditors for a wrongful dispo-

and director of the improvement company. Defendant was himself a director and treasurer of the company, and knew that Woolfolk, at the time of the transfer, was largely indebted upon his own stock subscription, and that he was at the time buying up large amounts of stock with assets of the company without authority. That Woolfolk proposed to Henderson that he could get rid of his stock and supply the company with needed cash by paying his stock subscription, which Woolfolk should repurchase with assets of the company, consisting, principally, of bonds of the Alabama Midland Railroad, at 85 cents on the dollar. That this proposition was complied with by the turning over of the stock and the giving of notes therefor by Woolfolk and Saportas, which were paid out of assets of the company to the amount of \$25,000. It was further averred

that defendant's stock was not fully paid, but that a credit was allowed thereon, to which he was not entitled. The bill prayed that the amount due complainants might be ascertained, and that defendant might be decreed to pay all such sums as he may be liable for on his stock subscription, and for money and assets of the company improperly turned over to him. A decree sustaining demurrers to the bill was reversed, and the case remanded, whereupon the bill was amended by an averment relating to the transfer and assignment by the Farley National Bank of its claim against the company, and by making the receiver a party complainant.

Henderson, in his answer, alleged the payment of his subscription to the full amount, and that he sold the stock which was fully paid, to Woolfolk and Saportas, taking in

sition of corporate assets in purchasing for the corporation shares of its stock.

In the Calteaux Case cited in the Marvin Case, 111 Wis. 387, 87 N. W. 226, the question was not actually involved, as the court held the contract of purchase invalid, on the ground that it should have been made by the board of directors, and not by the managing officers who made it, though the court said that the question, whether the corporation could purchase its shares of stock when not concluded by its charter, was decided in the affirmative in the Shoemaker Case.

In New England Trust Co. v. Abbott, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432, it was held that a corporation might make a valid agreement with purchasers of its shares to repurchase the same at an appraised value, on the death of such purchasers, for the purpose of reselling them to persons whom it might select; that the agreement was not against public policy; and that a corporation had a right to control in this manner the selection of its members. The court pointed out the fact that the shares were not taken for the purpose of investment.

The facts referred to by the court limit the scope of the holding to the proposition that a corporation may legally purchase shares of its stock which are about to pass into the hands of a new holder, for the purpose of again selling them to persons whom it may select, and thereby prevent such shares from passing into the ownership of unfriendly persons.

In Dupee v. Boston Water Power Co. 114 Mass. 37, the court denied the application of minority stockholders to restrain the defendant water company, whose business could no longer be properly confined to the use of its water privileges, which privileges had, by contract, been extinguished, and whose only assets consisted of valuable tracts of land, from selling at public auction a portion of such lands to the highest bidder, and accepting, as part of the purchase price, shares of its capital stock, coupled with an agreement on the part of the corporation to fill up and grade the lands sold; the court saying that, "In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers."

It will be noticed that the real purpose of the transaction was not to purchase the shares, but to sell the land, which was no longer of use to the company, and all that the court held was that it might receive some of its shares of stock in payment. The court cited as authority for its decisions Leland v. Hayden, 61 L. R. A.

102 Mass. 542; American Railway-Frog Co. v. Haven, 101 Mass. 308, 3 Am. Rep. 377; Nesmith v. Washington Bank, 6 Pick. 324, 325; Coleman v. Columbia Oil Co. 51 Pa. 74; City Bank v. Bruce, 17 N. Y. 507; *Ex parte* Holmes, 5 Cow. 426.

An examination of these cases will show the weakness of the authorities on which the court based its decision:

In Leland v. Hayden, 102 Mass. 542, the question involved was whether the shares of its own stock, purchased by a railroad corporation out of its accumulated earnings, constituted income or principal, as between one entitled under a will to the income from certain of the shares of stock and the remainder-man entitled to the principal; the court, in speaking of the action of the corporation in investing its accumulated earnings in its own shares of stock, said that this they might legally do.

The most that this case can be considered as passing upon is the power of a corporation to invest its surplus earnings in its own shares, which is an entirely different proposition from the right to purchase such shares with its capital. The surplus earnings belong to the stockholders, and to permit them to authorize the corporation to invest such earnings in its own shares, instead of distributing them in dividends, injures no one, and is not subject to the same objections that apply to the purchases made with the capital of the company.

In American Railway-Frog Co. v. Haven, 101 Mass. 308, 3 Am. Rep. 377, it was held that a corporation could not vote on shares of its stock purchased by it; but nothing was said by the court relating to the right of the corporation to take such shares of stock, either in its own name, or through the intervention of a trustee, the only question involved being whether it could vote such stock.

In Nesmith v. Washington Bank, 6 Pick. 324, the question was not involved or passed upon.

In Coleman v. Columbia Oil Co. 51 Pa. 77, the court held that the complaining stockholder had, by his conduct, affirmed the action of the corporation defendant in purchasing shares of its own stock; and it refused to pass upon the merits of the case.

In both City Bank v. Bruce, 17 N. Y. 507, and *Ex parte* Holmes, 5 Cow. 426, *infra*, II. b, the shares of stock were taken to save a debt.

It will thus be seen that in only one of the cases cited by the court in the Dupee Case was the question of the corporate power involved, and in that it was only collaterally brought in question, and then related solely to the right to purchase shares with surplus earnings.

In Hartridge v. Rockwell, R. M. Charlt.

payment therefore their note, for which he had 150 shares of stock as collateral security; that the company had nothing to do with the transaction, and that there was no agreement to pay for the stock out of the company's assets; that the company was entirely solvent, that he did not consent to the sale of the stock to the company, and that he did not receive any money or other thing of value from the company in payment of it. He further averred that, on March 31, 1891, he, upon the request of Woolfolk, upon the delivery to him of the 300 shares of stock, assigned the same to the Farley National Bank as collateral security for the debt on which this action was founded, and that the bank retained said stock up to and until the time when the same was delivered to complainants in this suit as trustees, and that complainants as such trustees now have

said stock in their possession and under their control, holding it for their use and benefit. That complainants, with full knowledge of the facts on which a recovery in this suit is sought, if such facts exist, have never surrendered, or offered to surrender, said stock or any part thereof, but retain the same and claim a right and interest therein. Wherefore, respondent avers that said complainants should not recover in this case the moneys which were paid to this respondent, if any money was so paid by Woolfolk and Saportas for said stock out of the assets of the Alabama Terminal & Improvement Company while complainants retain the fruits of the transaction. He averred that he was merely nominal treasurer of the company, and did not have control of the books, which were kept in Montgomery under the control of Woolfolk. He further averred that, if

(Ga.) 260, it was held that, where the capital of a bank cannot be usefully employed in loans, it may use such capital in purchasing shares of its own stock. This case was decided before the adoption of the Penal Code of 1833, which declared such a purchase to be a misdemeanor.

In *Robison v. Beall*, 28 Ga. 17, *infra*, III., the court, in reply to the objection that a bank could not purchase its own shares of stock, said: "No law was read to us prohibiting banks from acquiring title in their own stock. And we do not know of any such law." The court evidently assumed that the absence of such prohibitory law was sufficient to enable the bank to make such a purchase, though it decided the case on the ground that the bank involved had such power under its charter.

In *Farmers' & M. Bank v. Champlain Transp. Co.* 18 Vt. 131, it was held that a shareholder in a bank, who had sold his shares of stock to the bank, ceased to be a stockholder, and was a competent witness in an action instituted by the bank; the court said that the power to purchase and hold property is one of the ordinary incidents of the corporation, and was expressly given this corporation by its charter. It evidently assumed that the power to purchase property was sufficient to authorize it to purchase its own shares.

In *State ex rel. Page v. Smith*, 48 Vt. 266, where it was held that shares of its own stock purchased by a corporation were not necessarily thereby extinguished, and that the company might sell the same, the question as to the power of the company to purchase such shares was not raised or discussed by the court, except where it said: "For certain reasons (we have no right to assume that such reasons were inadequate or improper), the corporation purchased 2,350 shares of such stock."

In *Dock v. Schlichter Jute Cordage Co.* 187 Pa. 370, 31 Atl. 656, *infra*, II. b, the court, in holding that a corporation might take shares of its own stock in payment of an indebtedness, used language broader than the facts involved, and said that a corporation has the right to acquire stock of its own, where the transaction is not prohibited by statute, and is bona fide.

In *Fremont Carriage Mfg. Co. v. Thomsen* (Neb.) 91 N. W. 376, it was held that a contract wherein one, about to become an employee of the defendant corporation, agreed to purchase a certain number of shares of the defendant's stock, the defendant agreeing to repurchase the stock if at any time the defendant desired to discharge the plaintiff and terminate the contract, was valid, and the defendant was liable in damages for failure to purchase such stock upon discharging the 61 L. R. A.

plaintiff. The court based its decision upon the ground that a corporation has power to purchase its own shares of stock at a reasonable amount and for a legitimate purpose, unless prohibited by statute.

In *Howe Grain & Mercantile Co. v. Jones*, 21 Tex. Civ. App. 198, 51 S. W. 24, it was held that a by-law of a solvent corporation having on hand a large surplus, which authorized the surrender of shares of stock upon the death of the holder, and the payment of their value to his legal representative, is valid and constitutes a binding contract which may be enforced during the solvency of the company, there being no statute expressly prohibiting a corporation from purchasing its shares of stock. The court also quoted the language used in *City Bank v. Bruce*, 17 N. Y. 507, *infra*, III., to the effect that there is no principle of common law which prohibits such a purchase. This decision has been cited in many cases as upholding the general right of corporations to purchase their own shares of stock; but in that case the court was not discussing this general right, but the right as involved in that case, which was the right to take such shares in payment of a debt.

In the absence of a statutory provision to the contrary, a corporation may purchase its own shares of stock subject to the rights of its creditors. *Blalock v. Kernersville Mfg. Co.* 110 N. C. 99, 14 S. E. 501.

In *Cooper v. Frederick*, 9 Ala. 736, it was held that a resolution of the board of directors, authorizing the members of the company to relinquish a portion of their stock, on condition of paying all the claims which the company might make on the residue, was valid. It appears that the resolution was adopted by the company while in great financial distress, and when it was apprehended that many of the subscribers would forfeit their stock; and the resolution was passed for the purpose of preventing this.

In *Chapman v. Iron Clad Rheostat Co.* 62 N. J. L. 497, 41 Atl. 600, where it was held that corporations were impliedly given power by statute to purchase shares of their own stock, the court said that for this reason it was not necessary for it to pass upon the question as to whether a corporation might purchase such shares in the absence of an express or implied grant of such power, and that such question had not been judicially decided in New Jersey.

In *Jefferson v. Burford*, 13 Ky. L. Rep. 650, 17 S. W. 855, an attempt was made to cancel a sale of certain shares of stock, made by a corporation upon the ground that those shares had been previously purchased by the corporation

any money of the improvement company had been paid to him, it was on a note of Woolfolk and Saportas given in payment for the stock sold, which note was sent to the Farley National Bank for collection in due course of business; and that if, in collecting said note, the bank received from Woolfolk any of the assets of the improvement company, it did so without respondent's authority, and that the bank delivered the notes, after payment, to Woolfolk, together with the collateral securing them, and that, if the money belonged to the improvement company, the bank exceeded its authority in receiving it, and that complainants, who claimed through the bank with full knowledge of the facts, are not entitled to take advantage of their own wrong and breach of duty to defendant on account of said transaction. As part of his defense Henderson

demurred to the bill upon the following grounds:

"(1) Said bill is filed in the alternative, or in a double aspect, presenting inconsistent and repugnant claims for relief. The relief that could be granted in one aspect would be materially variant from the relief that could be granted in the other, in this: Said bill, in one of its aspects, charges that respondent has never in fact made any bona fide payment of his said subscription to the capital stock of the Alabama Terminal & Improvement Company, but still owes the same; and in the other aspect it charges that, if the bona fide payment of the stock subscribed for was made, then he is liable for the assets of the company, with interest thereon, received by him knowingly without proper or legal consideration to said company.

from some of its shareholders, and that such purchase was unauthorized and invalid; but the court did not pass on the point, holding that, even if the purchase was unauthorized, that would not be sufficient ground for setting aside a subsequent sale made by it for value, the purchase price for which had been received by the corporation.

In *Price v. Pine Mountain Iron & Coal Co.* 17 Ky. L. Rep. 885, 32 S. W. 267, it was held that a corporation might repudiate a contract made by it for the purchase of shares of its stock, where the contract, if enforced, would be disastrous to the main body of the stockholders; and the court said that, while it might not always be illegal for corporations to purchase their own shares, such a purchase, to be valid, must be in entire good faith, free from all fraud, actual or constructive, and must be made while the corporation is neither insolvent nor in process of dissolution, and in such a manner as not injuriously to affect the rights of creditors.

In *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84, which was a bill by stockholders to restrain the further operations of a corporation, and for the appointment of a receiver, on the ground, among others, that it had purchased shares of its own stock, a transaction which was not forbidden by statute, the court denied the plaintiff relief, upon the ground that there was no evidence that the purchase of the stock was with the intention of defrauding the stockholders, or that such purchase had been detrimental to their interests; and, that even if such facts had been proved, the remedy would not be against the company, but against the directors on their personal liability.

In *Barton v. Port Jackson & U. F. Pl. Road Co.* 17 Barb. 397, *infra*, III., it seemed to be assumed that the defendant corporation could not purchase its own shares of stock unless authorized to do so by statute, as the only question discussed by the court was whether or not the statutes fixing the powers of such corporation granted to it such power, which, it held, they did not.

In *State ex rel. Clapp v. Minnesota Thresher Mfg. Co.* 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 10, which was a proceeding in the nature of quo warranto to have the defendant corporation's franchises forfeited and the corporation dissolved, on the ground, among others, that the corporation had unlawfully purchased and retired part of its own stock, the court, without passing upon the merits of the controversy, rendered judgment against the state, on the ground that no public mischief had been done or threatened, entitling the state to interfere. 61 L. R. A.

In *Browne v. St. Paul Plow Works*, 62 Minn. 90, 64 N. W. 66, and in *Vent v. Duluth Coffee & Spice Co.* 64 Minn. 307, 67 N. W. 70, it was held that a contract for the sale of corporate stock, which gave the purchaser the option of returning the stock at the end of a specified period, and receiving back the purchase price, was a conditional sale; and the clause authorizing the return of the stock and the receipts of the purchase money back was therefore valid.

In neither of these cases did the court pass upon the power of the corporation to make an independent separate agreement to purchase back the shares of stock. In fact, the court, in the *Vent Case*, said it was unnecessary to determine whether or not the corporation could purchase its own stock; that the case in hand was not such a case; but that the original contract was but a conditional sale, giving the purchaser the option to revoke or rescind.

In *Lowe v. Pioneer Threshing Co.* 70 Fed. 646, which arose in Minnesota, the court restrained the directors of the defendant corporation from complying with a resolution adopted at a stockholders' meeting directing them to buy from certain shareholders the stock issued on account of a removal of the business; the court saying that while, in the absence of a charter prohibition or a statute forbidding it, no reason existed why a corporation should not purchase its own stock, at least with the profits derived from its business, where all the stockholders assent thereto, that in the case at bar the purchase of the stock was to be made by the transfer of nearly all the assets and property of the corporation to a few stockholders, which would be a fraud on the minority stockholders, who protested against the adoption of the resolution.

It has been held in another Federal case, which arose in Oregon, that the action of a corporation in purchasing its shares of stock, held by dissatisfied members, was not *ultra vires* unless prohibited by statute, where it was made in good faith, and did not injuriously affect the interest of creditors. *First Nat. Bank v. Salem Capital Flour-Mills Co.* 39 Fed. 89.

In *Hamor v. Taylor-Rice Engineering Co.* 84 Fed. 392, a Delaware case, it was held that a corporation could not purchase its own shares of stock; though the court said that, under certain circumstances, the corporation might buy shares of its own stock with its surplus or profits, such power being coupled with the legal duty on its part to resell such shares for value. This decision was based on the ground that the capital stock is a trust fund. The fact that the corporation became

"(2) Said bill is filed in a double aspect upon antagonistic rights. The relief prayed for in one phase—of no bona fide settlement having been made—is to hold the respondent liable under his contract of subscription, and the relief prayed for in the phase of respondent being a trustee *in invitum* is to hold him liable for his tort in converting the assets of the company.

"(3) Because there is a misjoinder of causes of action in this: That the bill of complaint seeks to recover an amount alleged to be due by the respondent on his contract for the subscription to the shares of stock in the Alabama Terminal & Improvement Company, and also seeks to recover of respondent money or assets of the Alabama Terminal & Improvement Company, alleged to have been wrongfully received and converted by him, and held by him as a trustee

in invitum, which said several causes of action call for decrees of separate and distinct natures.

"(4) Said bill is multifarious, in this: That it seeks to recover an amount alleged to be due by respondent on his note or contract for subscription for shares of stock in the Alabama Terminal & Improvement Company, and also seeks to recover of the respondent for moneys or assets of the Alabama Terminal & Improvement Company alleged to have been wrongfully received and converted by the respondent, which two causes of action call for decrees which are inconsistent, or of different nature.

"(5) Said bill is without equity, in this: It is not shown by said bill that the judgment against the Alabama Terminal & Improvement Company in favor of H. M. Hall, Jr., receiver, was ever transferred to com-

insolvent four months after the purchase, and that creditors' rights were affected, was referred to by the court, though it said: "But, whether a corporation be solvent or insolvent, the fund represented by its capital stock must remain inviolate for the protection of its creditors."

In Ohio, where the doctrine that a corporation possesses no powers except such as are conferred upon it, either by express grant, or by necessary implication, is strictly adhered to, it was held, in *Copplin v. Greenlees & R. Co.* 38 Ohio St. 275, 43 Am. Rep. 425, that the mere absence of a statutory or charter provision forbidding a corporation to purchase its own stock is not sufficient to vest such power, but that it exists only when given by either an express or implied grant.

A corporation is prevented from purchasing its own stock, by a constitutional provision imposing a double liability on stockholders, as the effect of such purchase, without regard to whether the stock be canceled or held subject to reissuance, is to deprive creditors of a portion of their security. *Ibid.*

In *State ex rel. Colburn v. Oberlin Bldg. & L. Asso.* 35 Ohio St. 258, it was held that a building and loan association is without power to purchase its own shares of stock, for the purpose of disposing of them to persons not intending to become members of the association, with a view of making such shares the basis of loans to such persons.

And the act of a corporation in purchasing its shares of stock from dissatisfied members is void; and such members remain stockholders, and are liable for debts afterwards incurred. *Willis v. Reed*, 3 Ohio Dec. Reprint, 20.

And notes given by a corporation in purchasing its own shares of stock, in compliance with an agreement made by it at the time of its original sale of stock, whereby it agreed to repurchase them in case the subscriber was not satisfied, are void. *Hubbard v. Riley*, 7 Ohio Dec. Reprint, 473.

In *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560, the officers of a corporation, at a time when the actual value of its shares of stock was about 75 per cent of their par value, were authorized by the stockholders to purchase shares of its stock, in making which purchase about \$40,000 of the funds of the corporation were expended. In a little less than three years the corporation was declared insolvent, and receivers appointed, who brought an action to recover from the stockholders the funds paid them in the purchase of their shares of stock. The court held that the capital of the company was a trust fund, and the

stockholders must restore the portion received by them. The court in so holding said: "We do not intend to say that under no circumstances can a corporation legally become the owner of its own stock. Should it loan money to a stockholder, and be obliged to take its own stock in payment, that would not be illegal *per se*. So, too, it may be allowable for a company to purchase stock temporarily with its surplus earnings; but stock should not be held indefinitely: it should be disposed of in a reasonable time. . . . Nor do we intend to say that a direct purchase would be declared illegal at the instance of a party to the transaction. If the stock is reissued, and creditors are not prejudiced, probably the courts would not interfere."

In *Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655, 34 Pac. 444, the question involved was the right of a bank to reissue its shares which had been purchased by it. The court in deciding the question in the affirmative said that the purchase by the bank was *ultra vires*, and resulted in an illegal withdrawal of its capital. It does not appear whether these remarks were based upon a statute forbidding the purchase, or whether they amounted to a recognition by the court of the doctrine that corporations cannot purchase their stock unless expressly or impliedly given such power.

In *German Sav. Bank v. Wulfekubler*, 19 Kan. 60, where the court held that a bank was prohibited from purchasing its own stock, by a statute which forbids its using its assets or property for any other purpose than to accomplish the legitimate objects of its creation, the court said that such a purchase is not one of the objects for which banks are created, and is not legitimate banking business; that for a bank to use its funds in the purchase of stock is to withdraw that much of its capital from business, and that much of its stock from actual existence, and thereby reduces its capital stock below the amount required by law, and impairs, or even destroys, all security given by law to the creditors.

The above case was subsequently cited in *Abeles v. Cochran*, 22 Kan. 405, 31 Am. Rep. 194, where it was also held that a banking corporation had no power to purchase its own stock.

In *St. Louis Carriage Mfg. Co. v. Hilbert*, 24 Mo. App. 338, it was held that a purchase by a corporation of its shares of stock is invalid, as it constitutes a reduction of its capital stock in a method different from that prescribed by statute, and that, even outside of the statute, the better reason is that a trading corporation should not be permitted to traffic in its

plainants, either by said H. M. Hall, as receiver, or by the Farley National Bank, prior to the filing of the bill of complaint in said cause.

"(6) Said bill of complaint is without equity, in this: It is shown by said bill that the judgment obtained against the Alabama Terminal & Improvement Company, the foundation of complainants' cause of action, was obtained in a suit commenced by and in favor of H. M. Hall, Jr., as receiver of the Farley National Bank, in the city court of Montgomery, Alabama, and it is shown by said bill that after the commencement of said suit, and prior to the rendition of said judgment, on, to wit, the 23d day of October, 1892, the said H. M. Hall was discharged as such receiver, and his right to maintain said suit against the said Alabama Terminal & Improvement Company termi-

nated on, to wit, 15th day of February, 1892, and it is not shown by said bill that said judgment was rendered in favor of any existing party plaintiff.

"(7) Said bill of complaint is without equity, in this: It is shown on the face of said bill that the judgment, the foundation of complainants' cause of action, was obtained in favor of H. M. Hall, Jr., as receiver of the Farley National Bank of Montgomery, Alabama, against the Alabama Terminal & Improvement Company, and it is shown on the face of said bill of complaint that the right of said H. M. Hall, as said receiver, to maintain said suit against the Alabama Terminal & Improvement Company, terminated on, to wit, the 15th day of February, 1892, prior to the rendition of said judgment, and it is shown by said bill that the Farley National Bank parted with

own stock, where, by so doing, it decreases the security which all parties dealing with it have in the individual liability of the stockholders for the unpaid part of the stock. It affirmatively appeared that the shares of stock involved were not fully paid.

But in *Eggmann v. Blanke*, 40 Mo. App. 318, it was held, applying the law of Illinois, that, under the decisions of that state, a corporation has power to purchase its own shares of stock.

In *Kassler v. Kyle*, 28 Colo. 374, 65 Pac. 34, the court, after holding that the action of a bank in reducing its capital stock one half, and issuing to each stockholder a certificate of deposit for the half surrendered, was, in effect, a purchase by the bank of one half of its capital stock, which the statutes of the state expressly prohibited, went on to say that, "independent of statute, except in the instances thereby expressly permitted, banking corporations are inhibited from purchasing their own stock. To the holders of bank stock, certain liabilities attach in favor of general creditors."

In *Herring v. Ruskin Co-operative Assn.* (Tenn. Ch. App.) 52 S. W. 327, the plaintiff withdrew from the defendant association, and attempted to make it take back his shares of stock, under a by-law of the association inhibiting the transfer of shares by members except to the association. The court held that such by-law, so far as it attempted to prevent the alienation of such shares, was absolutely void, and, consequently, imposed no legal obligation upon the defendant to take the stock of complainants. So that the question as to the power of the association to take back such shares was not actually essential to the decision of the case; however, the court, while saying that it might be deemed unnecessary to decide such question, proceeded to discuss it, and expressed the opinion that, in the absence of express or implied charter or statutory power, the wiser and better public policy upholds the rule that corporations have no power to traffic in their own stock. And that seemed to be the view entertained by the Tennessee supreme court in the case of *Cartwright v. Dickinson*, 88 Tenn. 479, 7 L. R. A. 706, 12 S. W. 1030.

The *Cartwright Case* involved the validity of the action of a corporation in attempting to release a shareholder from payment of a stock subscription. The court, in holding such attempt invalid and ineffectual, said: "If the transaction be looked at as a purchase of these shares by the corporation, then it is equally ineffective. Whatever power a corporation may have to deal in its own shares for purposes of

sale or to secure a debt, it is too clear for argument that it cannot reduce its authorized capital by purchasing its shares for cancellation."

The action of a corporation in taking back shares of stock partially paid for, and giving its note to the shareholder in payment therefor, thereby practically releasing him from his subscription, and returning to him the amount paid for them, is invalid. *Currier v. Lebanon Slate Co.* 56 N. H. 262.

The English Cases.

In *Re London, H. & C. Exch. Bank*, L. R. 5 Ch. 444, 30 L. J. Ch. N. S. 598, 18 Week. Rep. 778, it was held that the action of the bank in purchasing its shares of stock, for the purpose of supporting the market and keeping up the price of the shares, was invalid, and its broker, who made the purchase, was not entitled to reimbursement.

A contract with an employee to accept, upon his retiring from the company, a surrender of his paid-up shares of stock, paying him full value therefor, is *ultra vires*. *Re Walker*, 57 L. T. N. S. 763.

In *Re Marseilles Extension R. Co.* L. R. 7 Ch. 161, 41 L. J. Ch. N. S. 345, 25 L. T. N. S. 858, 20 Week. Rep. 254, where a claim presented against a company, in winding up proceedings, was attacked on the ground that the money, to the knowledge of the lender, was borrowed by the company for the purpose of purchasing on the stock exchange shares of its own stock. It seemed to be assumed that the purchase of the shares of stock was unauthorized, in the absence of a grant of authority; and the decision sustaining the claim was based on the ground that the lender was without notice of the illegal purpose to which the funds were to be devoted.

In *Re County Palatine Loan & Discount Co.* L. R. 9 Ch. 54, 43 L. J. Ch. N. S. 578, 20 L. T. N. S. 707, 22 Week. Rep. 288, where it was held that a company might alter its articles of association, so as to give it power to accept a surrender of its shares of stock in exchange for new shares, it was said by James, Lord Justice, that there is no doubt that a company may give itself power to purchase its own shares of stock, or to take a surrender of shares. This language was cited in *Hoppe v. International Financial Soc.* L. R. 4 Ch. Div. 333, 46 L. J. Ch. N. S. 200, 35 L. T. N. S. 924, 25 Week. Rep. 203, *infra*, as upholding the proposition that a company might, by resolution, give its directors power to purchase its own shares of stock; but the lord justice said that his re-

all right, title, and interest to the subject-matter of said suit by transferring and disposing of the debt which was the foundation of said suit on, to wit, the 23d day of February, 1892; and it is not shown by said bill that said suit against the Alabama Terminal & Improvement Company was prosecuted for the use of or in the name of the complainants, and it is not shown, by said bill that said judgment against the said Alabama Terminal & Improvement Company has ever been transferred or assigned to plaintiffs, or that they are in any manner connected therewith in such manner as to have the right to prosecute the right of action in this case as judgment creditors of the Alabama Terminal & Improvement Company.

"(8) Said bill of complaint fails to show by what authority the complainants, as trustees, have the right to sue and maintain the

bill of complaint against the respondent Fox Henderson in this case.

"(9) The bill of complaint fails to show for whom the complainants are trustees, and fails to give the names of the *cestuis que trust* of the complainants, for whose benefit this cause is prosecuted, and fails to show who are the stockholders, or give the names of the stockholders of the Farley National Bank, for whose benefit this suit is prosecuted by the complainants as trustees.

"(10) The bill of complaint fails to show that the stockholders of the Farley National Bank or *cestuis que trust* of the complainants have ever vested the complainants with any equitable or legal right to sue and maintain a bill of complaint in this case in their own names as trustees.

"(11) This respondent demurs to so much of the bill of complaint as seeks to recover

marks in *Re County Palatine Loan & Discount Co.* were not necessary for the determination of that case, and that that decision was not authority on the question.

In *Hope v. International Financial Soc.* L. R. 4 Ch. Div. 327, 46 L. J. Ch. N. S. 200, 35 L. T. N. S. 924, 25 Week. Rep. 203, it was held that a special resolution of a company, having no power by its memorandum of association to deal in its own shares, which authorized its directors to apply the company's assets in purchasing from shareholders any number of shares not exceeding 100,000 of the 150,000 into which its capital stock was divided, which shares were not to be reissued without the authority of the stockholders granted at a general meeting, was *ultra vires*. Lord Justice James, in delivering his opinion, said: "Either this is a purchase of shares in the sense of trafficking in shares, which is a purchase not authorized by the memorandum of association, or it is an extinguishment of the shares, and therefore a reduction of the capital of the company. But it appears to me . . . that, looking at the transactions and the substance of them, it is really—however honestly it may have been intended by these parties, who, I dare say, thought no harm would come of it—a scheme to divide the assets between the shareholders, under the guise of the company's purchase of the shares,—a device, in fact, to evade the provisions of the law regulating the reduction of capital." Brett, J. A., agreed with the lord justice that the transaction amounted to, either a scheme to traffic in the shares of the company, or to reduce its capital stock, and said that, "if you assume that there was to be a reissue of these shares, the shares are not canceled, they are existing shares; and the only way of getting rid of them again is to sell them. It is said that a selling of shares is not, of itself, a trafficking in shares. Well, that may be quite true. If I make a present of a horse, I cannot be said to be dealing in horses; but I apprehend if I buy a horse for the purpose of selling it again, I do deal in a horse. So here, if you take that to be the reasonable meaning of the resolution, then the resolution is this, that the company are to buy the shares for the purpose of reissuing them, that is, for the purpose of selling them again. They do not say so in terms, but that is the necessary effect of what they intend to do by the resolution. That seems to be a trafficking in shares, and a carrying on of the business which is not within the terms of the memorandum of association. . . . But if it was not intended to reissue these shares, then it seems to me to follow that the amount of

capital represented by them was necessarily extinguished."

In *Re Dronfield Silkstone Coal Co.* L. R. 17 Ch. Div. 76, 50 L. J. Ch. N. S. 387, 44 L. T. N. S. 361, 29 Week. Rep. 768, differences had arisen between the company and one of its directors as to the mode of conducting its business, which resulted in the retirement of the director and the purchase by the company of his shares of stock. The memorandum of association contained no clause authorizing the company to purchase its shares of stock, but the articles of association contained a broad provision authorizing the company so to do; and, while the court held that such article could not validly authorize the company to embark in a traffic in its own shares of stock, a business not authorized by the memorandum, it could validly authorize the company to purchase its own shares under the circumstances arising in this case, as such purchase was not made with the intention of trafficking in its shares, though profit might incidentally arise in a resale of the shares.

In *Re Balgooley Distillery Co. Ir.* L. R. 17 Eq. 239, it was held that the distillery company did not act *ultra vires* in selling a quantity of whisky to one of its shareholders, and taking in payment part of the purchase price in cash and the balance in shares of its stock. It appeared that the company had accumulated a large stock of whisky which it was unable to sell, and that, unless disposed of, storage dues would ultimately exceed its value. The court reached its decision reluctantly, saying that it decided the case entirely under the authority of the *Dronfield Case*. Lord Justice Barry said that he might give a different opinion if the matter was *res integra*. While Lord Justice Fitz Gibbon said that, although the exigencies of the company might make it of vital moment, in the opinion of prudent and honest directors, to carry out a mercantile transaction involving, as an incident, the acquisition of shares in trust for the company, he was inclined to the opinion that an absolute prohibition would be the better rule; but that he did not feel warranted, under the circumstances of the case, in setting up his own views against the authority of a court of co-ordinate jurisdiction.

In *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43, 25 L. T. N. S. 636, where plaintiff sued the defendants for money lent, the defense was a satisfaction by surrender of shares of the plaintiff's stock held by the defendants, which surrender the plaintiff claimed was *ultra vires* as violating a provision of the plaintiff's articles of association, forbidding it to pur-

from this respondent the alleged amount, to wit, \$15,000 due by him on his alleged subscription note for stock to the Alabama Terminal & Improvement Company, upon the ground that it is not shown by said bill of complaint that the complainants are judgment creditors of the Alabama Terminal & Improvement Company, and it is shown by said bill of complaint that the complainants have a plain and adequate remedy at law for the collection of the amount due by this respondent on his said subscription note for shares of stock to the Alabama Terminal & Improvement Company.

"(12) This respondent demurs to so much of said bill of complaint as seeks to recover from this respondent the alleged amount of, to wit, \$25,000, alleged in said bill to have been received by this respondent of moneys or assets of said Alabama Terminal & Im-

provement Company, and held by this respondent, upon the ground that it is not shown by said bill that this respondent received any of said money or assets of the Alabama Terminal & Improvement Company sought to be recovered of this respondent in this suit prior to the date of the filing of the bill of complaint in this cause."

The material averments of the bill were sustained by the evidence, including the fact that the entries for the renewal and extension of the notes executed by Woolfolk and Saportas, as well as all the payments made by the corporation to Henderson, were made upon the cash book of the Alabama Terminal & Improvement Company, which book it was the duty of the treasurer of the corporation to keep. It was further shown that during the time covered by the transactions involved in the suit, Henderson had

chase its own shares of stock. The court held that, even though the transaction be considered a purchase by the plaintiff of its shares of stock, it had been subsequently ratified by the action of its shareholders.

In *Trevor v. Whitworth*, L. R. 12 App. Cas. 409, 57 L. J. Ch. N. S. 28, 57 L. T. N. S. 457, 36 Week. Rep. 145, *infra*, Lord Herschell, in referring to the above case, said that no question was raised in the argument, or determined, as to the powers conferred by the memorandum of association; and that it is to be observed that, at that time, it was not so clearly settled as it has since been, that a transaction not within the scope of the memorandum is incapable of ratification.

In *Re Natal Investment Co.* L. R. 5 Ch. 22, 21 L. T. N. S. 445, 18 Week. Rep. 30, where the articles of association authorized the directors to accept a surrender of shares, it was held that the company might accept the surrender of shares, cancel the application for the shares, and return the deposit paid thereon.

The question was finally passed upon by the House of Lords in *Trevor v. Whitworth*, L. R. 12 App. Cas. 409, 57 L. J. Ch. N. S. 28, 57 L. T. N. S. 457, 36 Week. Rep. 145. In this case a company, incorporated for the purpose of acquiring and carrying on a manufacturing business, and any other businesses and transactions that it might consider to be in any way conducive or auxiliary thereto, purchased more than 4,000 of its 15,000 shares of its capital stock; and, upon its going into liquidation, a former shareholder presented a claim for the balance of the purchase price of his shares sold by him to the company. It was held that the transaction was *ultra vires*, on the ground that, if the shares were purchased for the purpose of selling them again, it constituted a trafficking in shares; and if they were purchased for the purpose of retaining them, it constituted an indirect method for reducing the capital of the company. Lord Herschell, in addressing the House of Lords, said that the purpose of the statute in requiring that the memorandum shall contain the amount of its capital, in providing a method for increasing its capital, and in declaring that, save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association, was "to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities. The capital may, no doubt, be diminished by expenditure upon, and reasonably in-

cidental to, all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this, all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders. . . . By the act of 1867, provision was made enabling a company, under strictly defined conditions, to reduce its capital. Nothing can be stronger than these carefully worded provisions to show how inconsistent with the very constitution of a joint-stock company with limited liability, the right to reduce its capital was considered to be." In the same case, Lord Watson said, in regard to the power of companies to diminish or reduce the amount of their capital, that "paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to, a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company, has been subsequently paid out except in the legitimate course of its business."

b. Taking shares in payment of indebtedness due corporation.

In the following cases it was held that a corporation may take its own shares of stock in payment of a debt due it: *Chillicothe Branch of State Bank v. Fox*, 3 Blatchf. 431, Fed. Cas. No. 2,083; *Dock v. Schlichter Jute Cordage Co.* 167 Pa. 370, 31 Atl. 656; *Barto v. Nix*, 15 Wash. 563, 46 Pac. 1033.

And in *Taylor v. Miami Exporting Co.* 6 Ohio, 177, it was held that a corporation may do so although the stockholder be solvent at the time.

In *City Bank v. Bruce*, 17 N. Y. 507, involving a transaction governed by the laws of Ohio, the court held that the action of the plaintiff corporation in permitting its stockholders, who were indebted to it on their stock notes, to pay such notes by the surrender of their shares of stock, violated no rule of the common law or of the statutory law of Ohio. In so holding, it cited *Taylor v. Miami Exporting Co.* 6 Ohio, 177, saying that that case held that a bank might receive its own stock in payment of a debt.

no funds in his hands as treasurer of the company, but allowed Woolfolk to draw on him as such treasurer for the purpose of obtaining the use of money from the Farley National Bank. That the money obtained from the discount of such drafts was used in part in the purchase of stock of the Alabama Terminal & Improvement Company, and that they were in each case taken up by larger drafts of the same kind. That it was the result of this "kiting" operation that caused the bank to suspend.

The chancellor held that Henderson was responsible to complainants for the amount of two notes which were sent by him to the Farley National Bank for collection, and were paid by checks on said bank, and rendered a decree against him for their amount with interest. From this decree the plaintiff appealed on the ground that it was error to refuse to charge Henderson with the

amount which had been paid with the assets of the improvement company for the purchase of stock. A cross-appeal was prosecuted by Henderson from so much of the decree as permitted any recovery against him.

Further facts appear in the opinion.

Messrs. Gunter & Gunter, Watts, Troy, & Caffey, and J. M. Chilton, for plaintiffs:

The only reasonable deduction that can be drawn from the evidence is that the respondent Henderson had actual knowledge of the condition of the company's affairs at the time he sold his stock; that the sale, while in form a sale to Woolfolk and Saportas, was, in substance, a sale to the company; and that the company's funds were used to pay the purchase price of the stock.

American Preserves Co. v. Columbia In-

It will thus be seen that this case does not involve the general right of corporations to purchase their own shares of stock, but merely that they may take such shares in payment of debts due them.

The right of a corporation to take its own stock in satisfaction of a debt due to it was recognized, though not involved, in *Copplin v. Greenlees & R. Co.* 38 Ohio St. 275, 43 Am. Rep. 425, *supra*, II. a.

And in *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560, *supra*, II. a., where the purchase of stock involved was declared invalid, the court said that the act of a corporation in taking its shares of stock in payment of a debt would not be illegal *per se*.

And so in *State ex rel. Colburn v. Oberlin Bldg. & L. Asso.* 35 Ohio St. 258, the court, in holding against the power of a corporation to traffic in its shares of stock, said that it did not deny that a corporation has power to receive shares of its stock as security for a debt, or other similar purpose.

And in *Barton v. Port Jackson & U. F. Pl. Road Co.* 17 Barb. 397, it was said that, while the purchase of its own shares of stock made by defendant company was unauthorized, corporations might, perhaps, have authority to take shares of their stock in payment of the debts due them.

In *Ex parte Holmes*, 5 Cow. 426, where the court held that a corporation cannot vote its shares of stock transferred to it in payment of a debt, it did not deny the right of the corporation to take such transfer. In fact, it expressly stated that it might do so, but that neither the corporation nor its directors could vote such shares of stock.

III. Statutory grant of power.

In *Iowa Lumber Co. v. Foster*, 49 Iowa, 25, 31 Am. Rep. 140, the court, in holding that the plaintiff corporation might purchase its own stock, based its decision on the ground that in that state corporations were organized under a general law, and might assume such powers, and define and limit the extent thereof as is deemed advisable; that the plaintiff's articles of incorporation authorized it to purchase and hold, sell or exchange, any real estate or other property that it might deem desirable; and that the word "property" was sufficient to authorize it to purchase its own stock, there being no pretense of fraud or bad faith in the transaction, or that the rights of creditors were injuriously affected.

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In *Rollins v. Shaver Wagon & Carriage Co.* 80 Iowa, 350, 43 N. W. 1037, it was held that a corporation was authorized to accept a surrender of shares of its stock, and return to the stockholder in exchange therefor bonds of another corporation which had been given in payment for the stock. This decision was based on the authority of *Iowa Lumber Co. v. Foster*, 49 Iowa, 25, 31 Am. Rep. 140, and *City Bank v. Bruce*, 17 N. Y. 510, *supra*, II. b; *Johnson County v. Thayer*, 94 U. S. 631, 24 L. ed. 133, *supra*, II. a.

In the above case the court cited *Iowa Lumber Co. v. Foster*, 49 Iowa, 25, 31 Am. Rep. 140, *supra*, holding that the defendant corporation had power to purchase its own shares of stock, under its articles of incorporation authorizing it to acquire by deed, lease, assignment, or otherwise, any property, both real and personal, and to transfer the same at its pleasure, and do all other acts, and exercise all other powers, necessary to be done or performed in, about, or in carrying on the business for which it was organized.

And in *Robison v. Beall*, 26 Ga. 17, it was held that a bank could purchase its own shares of stock under a charter granting it power to purchase and sell every kind of "goods, chattels, and effects."

A statute vesting a corporation with power to purchase such personal estate as the purposes of the corporation shall require, except certain designated sorts of personal property, which exception does not embrace shares of its own stock, coupled with other provisions which recognize the power of a corporation to own such shares, constitutes a grant of power to corporations to purchase their own shares of stock, where the purposes of the corporations require it. *Chapman v. Iron Clad Rheostat Co.* 62 N. J. L. 497, 41 Atl. 690; *Berger v. United States Steel Corp.* 63 N. J. Eq. 809, 53 Atl. 68.

In *Davis v. Second Universalist Meeting House*, 8 Met. 821, it was held that defendant corporation, which, by its charter, was authorized, not only to build a meeting house, but to hold property, a yearly income of which should not exceed a stated amount, and should constitute a fund for parochial purposes, had the power to issue shares of stock which were to be redeemable at par value, upon the holder moving away and becoming a nonresident.

A statute authorizing a corporation to purchase shares of its own stock from its surplus profits will not justify a corporation in borrowing money for the purpose of purchasing

vestment Co. 7 Misc. 509, 28 N. Y. Supp. 782; *Wolfe v. State*, 79 Ala. 201, 58 Am. Rep. 590; *Loring v. Brodie*, 134 Mass. 453.

Henderson, as an officer of the company, is chargeable with knowledge of what appeared on its books.

Merchants' Bank v. Taylor, 21 Ga. 334; *Merchants' Bank v. Rudolf*, 5 Neb. 527; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915; *First Nat. Bank v. Tisdale*, 84 N. Y. 655; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *Bedford v. Sherman*, 68 Hun, 317, 22 N. Y. Supp. 892; *Koechl v. Leibinger & O. Brewing Co.* 26 App. Div. 573, 50 N. Y. Supp. 568; *Spellier Electric Time Co. v. Geiger*, 147 Pa. 399, 23 Atl. 547; *Olney v. Chadsey*, 7 R. I. 224; *Lane v. Bank of West Tennessee*, 9 Heisk. 419; *Humphrey v. People*, 18 Hun, 393; *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428.

While a corporation may purchase shares

such shares while in contemplation of insolvency; and a note given for money borrowed for such purpose, to one who knew of the purpose, is invalid as to creditors. *Adams & W. Co. v. Deyette*, 8 S. D. 119, 31 L. R. A. 497, 65 N. W. 471.

In *Taylor v. Miami Exporting Co.* 6 Ohio, 177, where it was held that a corporation might receive its shares of stock in payment of a debt due it by a stockholder, the court said that the corporation involved, the ostensible purpose of which was the exportation of goods, while its real object was that of carrying on a banking business, was authorized to traffic in its own shares of stock, by the provisions of its charter giving its directors extensive powers over its funds, and authorizing them to dispose of the funds in such manner as they should think most advantageous to the company.

This decision was rendered in 1833, long prior to the following decision in the case of *Coppin v. Greenlees & R. Co.* 38 Ohio St. 275, 43 Am. Rep. 425, and was referred to in that case as holding that a corporation might receive its shares of stock in payment of a debt; and nothing was said as to the construction placed by the court upon the charter of the company.

The power to traffic in its own stock is not conferred upon a corporation organized for manufacturing purposes, by a statute conferring the power to acquire and convey, at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of its incorporation. *Coppin v. Greenlees & R. Co.* 38 Ohio St. 275, 43 Am. Rep. 425.

A plank-road company is not given power to purchase its own shares of stock, by the statute giving it power to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require. *Barton v. Port Jackson & U. F. Pl. Road Co.* 17 Barb. 397.

A company is not authorized to purchase its own shares of stock by a memorandum of association empowering it to do all things which it may deem conducive to the attainment of the objects for which it was established. *Re Dronfield Silkstone Coal Co. L. R. 17 Ch. Div. 76*, 50 L. J. Ch. N. S. 387, 44 L. T. N. S. 361, 29 Week. Rep. 768.

In *Re London, H. & C. Exch. Bank*, L. R. 5 Ch. 444, 39 L. J. Ch. N. S. 508, 18 Week. Rep. 778, it was held that a bank was not authorized to purchase its own shares of stock, by a memorandum of association which authorized it to do a general banking and exchange busi-

ness, and purchase and sell enumerated securities, among them bank shares, and to do all other matters and things which may appear to the company incidental or conducive to those objects. In so holding the court said "that the company may do everything that they think is fairly incidental to the carrying on of the particular business specified; but I do not find a syllable in that memorandum which authorizes the purchase of their own shares; and unless there is, in plain terms, a direct authority to purchase their own shares, it is clear in point of law, and I have no hesitation in saying it is clearly understood among all men of business who give their minds to the subject, that they cannot do so. There must be a clear and distinct power for that purpose."

A provision in the memorandum of association of a bank, giving the board of directors full power to manage its business as they think fit, is not sufficient to authorize the bank to purchase its own shares of stock. *Ibid.*

A provision in the memorandum of association of a bank, authorizing it to mortgage or sell any of its property, and to accept payment or satisfaction for it in fully paid-up or other shares, even if construed to mean its own shares, will not authorize the company to go into the market and purchase its own shares, for the purpose of keeping up the price, and paying for them out of their own funds. *Ibid.*

The act of a corporation in going into the market and purchasing its own shares of stock does not constitute an acceptance of the surrender and forfeiture of its shares, within the meaning of its memorandum of association which authorizes it to accept a surrender and forfeiture of any shares, from and by any member desirous of surrendering and forfeiting it. *Ibid.*

IV. Statutes forbidding purchase.

In *Farmers' & M. Bank v. Champlain Transp. Co.* 18 Vt. 131, it was held that a statute prohibiting banks from buying or selling any goods, wares, or merchandise must be strictly construed, and did not prevent the bank from purchasing its own shares.

A moneyed corporation is forbidden to purchase, for the purpose of extinguishment, shares of its capital stock, by a statute declaring it unlawful for the directors of any such corporation to divide, withdraw, or, in any manner, pay to the stockholders or any of them, any part of the capital stock of the corporation, without the consent of the legislature. *John-*

628, 25 L. ed. 448; *Bowden v. Johnson*, 107 U. S. 251, sub nom. *Adams v. Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 246; *Stuart v. Hayden*, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 402; *Foster v. Lincoln*, 24 C. C. A. 470, 45 U. S. App. 623, 79 Fed. 170; *National Carriage Mfg. Co. v. Story & I. Commercial Co.* 111 Cal. 531, 44 Pac. 157; *Aultman's Appeal*, 98 Pa. 505; *Nenny v. Waddill*, 6 Tex. Civ. App. 244, 25 S. W. 308; *Burt v. Real Estate Exchange*, 175 Pa. 619, 34 Atl. 923.

The use of corporate assets to pay the private debt of an officer of a corporation can confer no valid title upon the recipient, irrespective of the question of his good faith.

Rogers v. Batchelor, 12 Pet. 221, 9 L. ed. 1063; *Rogers v. Betterton*, 93 Tenn. 630, 27 S. W. 1017; *Moriarty v. Bailey*, 46 Conn. 592; *Davies v. Atkinson*, 124 Ill. 474, 16 N. E. 899; *St. Louis Type Foundry Co. v.*

Wisdom, 4 Lea, 699; *Mt. Verd Mills Co. v. McElwee* (Tenn. Ch. App.) 42 S. W. 465; *Germania Safety Vault & T. Co. v. Boynton*, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797.

If these quasi trustees have been guilty of a misappropriation of that which has been committed to their trust, the quasi cestui que trust has the same right to follow the trust fund into the hands of its recipient as he would have in the case of a regular trust.

Evangelical Synod of N. A. v. Schaeleich, 143 Mo. 652, 45 S. W. 647; *Snorgrass v. Moore*, 30 Mo. App. 232; *Clark v. First Nat. Bank*, 57 Mo. App. 281; *First Nat. Bank v. Sanford*, 62 Mo. App. 394; *I. X. L. Pressed Brick Co. v. Schaeleich*, 65 Mo. App. 283; *Leonard v. Latimer*, 67 Mo. App. 138; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; *Thompson v. Gloucester City Sav.*

son v. Bush, 3 Barb. Ch. 207; *Gillet v. Moody*, 3 N. Y. 479, Reversing 5 Barb. 185.

And, in *Tait v. Pigott* (Wash.) 73 Pac. 364, it was held that a purchase of shares, made with a portion of the capital of the company with the intention of canceling them, was invalid in view of a statute prescribing a particular method for reducing the capital stock of corporations and another statute which declared it to be unlawful to "in any way pay to the stockholders or any of them any part of the capital stock of the company."

In *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60, it was held that a banking corporation is prohibited from purchasing its own shares of stock, by the statute which forbids it to employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation.

V. Rights of creditors.

a. In general.

In *Clapp v. Peterson*, 104 Ill. 26, a judgment creditor of the corporation filed a bill in chancery to subject to the payment of her judgment property which the corporation had transferred to a stockholder in payment of stock which it purchased from him. It was held that, although the purchase of stock was made in good faith and without fraud, with nothing in the apparent condition of the company to interfere with its making the purchase, it was invalid if it injuriously affected the interest of creditors.

This case was followed in *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 31 N. E. 420, affirming 40 Ill. App. 505, where it was held that the stockholder cannot retain, as against corporate creditors, the funds received by him in payment of the shares.

An agreement by which a corporation agrees with one purchasing its stock at par to purchase back the same at the end of a specified period is void and unenforceable as against creditors. This is upon the ground that the capital stock of a corporation is a trust fund for the security of its creditors. *Olmstead v. Vance & J. Co.* 196 Ill. 236, 63 N. E. 634.

A shareholder who has sold his shares of stock to the corporation, and received in payment orders on its treasurer, cannot subject the funds or the property of the corporation to the payment of such orders as against creditors. *Heggie v. People's Bldg. & L. Asso.* 107 N. C. 581, 12 S. E. 275.
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And, on the distribution of the assets of a bank, a shareholder is not entitled, as against creditors, to a dividend on the certificate of deposit received by him from the bank in part payment for his stock. *Columbian Bank's Estate*, 147 Pa. 422, 23 Atl. 625, 626, 628.

An insolvent corporation cannot purchase its shares of stock, where, by reason of the fact that its capital has not been fully paid in, its stockholders are individually liable for all its debts. *Currier v. Lebanon Slate Co.* 56 N. H. 262.

In *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560, *supra*, II. a, it was held that the act of a corporation in purchasing shares of its stock at a time when they were below par was invalid as against creditors, and, on a subsequent appointment of a receiver, he could recover from the selling stockholders the amount paid to them.

The fact that a stockholder in selling his shares of stock did not know that the corporation was the purchaser does not render the transaction valid as against creditors. *Ibid.*

And in *Tait v. Pigott* (Wash.) 73 Pac. 364, it was held that a receiver of a corporation might recover back the funds paid by it in purchasing its shares, although the corporation was not insolvent at the time of the purchase, as such purchase, which was rendered unlawful by reason of a statute which forbade the payment to the stockholders of any part of the capital of the company, deprived the company of funds which otherwise would have been available for the benefit of creditors on its subsequent insolvency.

b. Creditors who are entitled to protection.

One is a creditor of a corporation, within the rule making its purchase of its stock invalid where it injuriously affects a creditor, where, at the time of the purchase of the stock, a cause of action had accrued in favor of such person against the corporation for the fraudulent purchase of personal property from him, although suit was not commenced on such cause of action until after the purchase of the stock. *Clapp v. Peterson*, 104 Ill. 26.

A contract, made by a corporation on the sale of shares of its stock, to purchase back the same at the end of a prescribed period, will not be enforced to the injury of creditors existing at the time of the attempt to compel its enforcement, although the corporation was not indebted to such creditors at the time of the making of the contract. *Olmstead v. Vance &*

Inst. (N. J. Eq.) 6 Cent. Rep. 328, 8 Atl. 97; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049.

Respondent is not entitled to the protection accorded to a bona fide purchaser for value, without notice, because he had actual knowledge of the circumstances attending the transaction; or, at least, if he had no such actual knowledge, he was chargeable with notice thereof from his official position, as has been shown above, as well as from the fact that he knew that corporate funds were used to some extent in payment for the stock purchased of him.

Jonathan Mills Mfg. Co. v. Whitehurst, 19 C. C. A. 130, 37 U. S. App. 664, 72 Fed. 496; *Standish v. Babcock*, 52 N. J. Eq. 628, 29 Atl. 327; *McClellan v. Pyeatt*, 14 C. C. A. 140, 32 U. S. App. 104, 66 Fed. 843; *National Exp. Co. v. Hough*, 3 Ohio Dec. 169; *Otis v. Otis*, 167 Mass. 245, 45 N. E.

737; *Shryock v. Waggoner*, 28 Pa. 430; *Chesbrough v. Wright*, 41 Barb. 28; *Burnett v. First Nat. Bank*, 38 Mich. 630.

A check drawn officially on the account of the Alabama Terminal & Improvement Company was notice to the taker of the fraud.

Shaw v. Spencer, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Wolfe v. State*, 79 Ala. 201, 58 Am. Rep. 590; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693.

It takes but slight circumstances of consent and collusion to make the acts of one joint operator the act of all.

2 Wharton, Ev. § 1205; 4 Am. & Eng. Enc. Law, pp. 629, 856; *Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 383; *Lincoln v. Clafin*, 7 Wall. 137, 19 L. ed. 108; *Holmes v. Willard*, 125 N. Y. 75, 11 L. R. A. 171, 25 N. E. 1083.

The books kept by Shellhorn were part of

J. Co. 196 Ill. 236, 63 N. E. 634, Affirming 92 Ill. App. 237.

Subsequent creditors cannot complain of the action of the corporation in purchasing its shares of stock. *Shoemaker v. Washburn Lumber Co.* 97 Wis. 585, 73 N. W. 333.

Persons who did not become creditors of a corporation until subsequent to the depletion of its funds by a purchase by it of shares of its capital cannot complain of such purchase, as the trust-fund doctrine, upon which the right of creditors to complain of such purchase is based, applies only to those creditors who have equitable rights in the fund at the time of its depletion. *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226.

VI. What constitutes a purchase within meaning of rule forbidding same.

A banking corporation is not deprived of the right to accept a pledge of its own stock as security for a present loan of money, by the rule of law forbidding corporations to purchase their own shares of stock. *Dalzell v. Commercial Bank*, 82 Mo. App. 264.

In *Chetilan v. Republic L. Ins. Co.* 86 Ill. 220, where it was contended that the act of the corporation issuing certificates of paid-up stock to those who had paid 20 per cent on their subscription, for an amount equal to the sum thus paid, and canceling the balance of the subscription, was *ultra vires*, as reducing the capital stock of the corporation. The court held that, by such act, the corporation did not purchase its own stock; that the title to the stock remained in it until paid for, and the purchaser received his certificate.

A corporation is not trafficking in its own shares of stock, where it purchases a note made by one of its officers, and thereby secures possession of shares of stock which had been fraudulently issued by such officer as collateral. *Cincinnati, H. & D. R. Co. v. Duckworth*, 2 Ohio C. C. 518.

A contract by a corporation to take back shares of its stock from a subscriber and surrender to him his note given for part of the purchase price is valid, and does not come within the rule forbidding corporations to purchase their own shares of stock, where, at the same time, the corporation entered into an agreement with another to sell the shares of stock to another at par, for a total amount greater than the amount of the unpaid subscription note. *St. Louis Rawhide Co. v. Hill*, 72 Mo. App. 142.
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In *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432, it was held that, even though the plaintiff corporation's charter be construed as forbidding it to invest in its own shares of stock, such charter would not render invalid an agreement contained in a subscription to its stock, wherein a subscriber agrees that, at his death, the shares of stock be transferred to the corporation at an appraised value, to be subsequently resold by it to such persons as shall appear to its directors most likely to promote confidence in its stability, as such a transfer of stock is not for the purpose of an investment.

In *Re Denver Hotel Co.* 62 L. J. Ch. N. S. 450, [1893] 1 Ch. 495, 2 Reports, 330, 68 L. T. N. S. 8, 41 Week. Rep. 339, it was held that a company did not purchase its own shares of stock, but merely accepted a surrender of them, which it was authorized to do in its articles of association, where it, having two hotels, one an available asset and the other held under an onerous lease, sold the lease, good will, and furniture of the leased hotel, in consideration of the payment of £3,000 and an agreement by the purchasing shareholders to assume the obligations of the lease, coupled with a surrender by such shareholders of their shares to the company. Lord Justice Lindley distinguished the case from *Trevor v. Whitworth*, L. R. 12 App. Cas. 409, 57 L. J. Ch. N. S. 28, 57 L. T. N. S. 457, 36 Week. Rep. 145, *supra*, II. a, by saying: "The company is giving nothing in the shape of money and other available assets for the shares which it acquires. The assets it parts with are the consideration for the release of the company from the heavy obligations and liabilities involved in the retention of the onerous lease of the hotel, and, on the other hand, the company is compromising a dispute with its managing director. . . . The bargain would be a good one for the company, even if the shares were not surrendered. The surrender of them is pure gain to the company. . . . Under these circumstances the transaction is not really a purchase by the company of its own shares."

A corporation cannot make a valid contract with the promoter, to whom it had agreed to give a certain number of shares of its stock, to accept a surrender of such shares, and pay him a specified amount of the net earnings of the company, as it amounts to a purchase of the shares of the stock. *Shaw v. Ohio Edison Installation Co.* 10 Ohio Dec. Reprint, 233.

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the *res gestæ* of the operations, and, being the act of one of the confederates, in furtherance of the common design, are evidence of notice at least, however the law might regard them in other cases having no such feature.

Montgomery v. Exchange Bank (Pa.) 5 Cent. Rep. 261, 6 Atl. 133; 1 Greenl. Ev. § 493.

There is no higher degree of proof, nor any other form of proof, required to establish fraud than any other fact of a civil nature.

Gatter v. Norman, 107 Ala. 594, 10 So. 56; *Thames v. Reinbert*, 63 Ala. 567; 1 Bigelow. Fr. p. 142; *Adams v. Thornton*, 78 Ala. 489, 56 Am. Rep. 49.

When a party has notice of such facts as ought to put an ordinarily prudent man on inquiry, a failure to make inquiry is visited with all the consequences of actual notice.

Wood v. Rayburn, 18 Or. 3, 22 Pac. 521; 16 Am. & Eng. Enc. Law, p. 795; *Foster v. Stallworth*, 62 Ala. 547.

Those directors whose business it is to transact the business cannot plead ignorance of what the officials do by their express or implied consent and direction.

Montgomery v. Exchange Bank (Pa.) 5 Cent. Rep. 261, 6 Atl. 133; *Orandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 500; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162, 36 Am. Rep. 595.

Messrs. Harmon, Dent, & Weil, A. A. Wiley, and W. S. Thorington, for defendants:

When a bill is filed in the alternative, each alternative phase of the bill must state a good cause of action.

Moore v. Alvis, 54 Ala. 356; *Lucas v. Oliver*, 34 Ala. 626; *David v. Shepard*, 40 Ala. 587; *Scals v. Robinson*, 75 Ala. 363; *Andrews v. McCoy*, 8 Ala. 920, 42 Am. Dec. 669.

All of the complainants must recover, or none can.

Wilkins v. Judge, 14 Ala. 135; *Butler v. Gatzam*, 81 Ala. 491, 1 So. 16; *Jones v. Reese*, 65 Ala. 134.

Henderson received the checks for value, and, unless he had notice or knowledge of the fact that it was the money of the Alabama Terminal & Improvement Company, paid to him on these checks, he is not liable. The checks were not sufficient to charge Henderson with notice.

Mobile & M. R. Co. v. Felrath, 67 Ala. 189; *Thomp. Corp.* §§ 5125, 5129, 5137, 5141; *Morse, Banks & Banking*, p. 292; *Randolph, Com. Paper*, §§ 131, 133, 137; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; 1 Am. & Eng. Enc. Law, 2d ed. pp. 1043, 1046, 1053, 1056; *Richmond Locomotive & Mach. Works v. Moragne*, 119 Ala. 80, 24 So. 834; *Drake v. Fleucellen*, 33 Ala. 106; *Mechem. Agency*, § 438; *Castleberry v. Fennell*, 4 Ala. 642; *Tate v. Shackelford*, 24 Ala. 510, 60 Am. Dec. 488; *Westmoreland v. Foster*, 60 Ala. 448.

The check being commercial paper, the question as to who is liable thereon as drawer, and in what capacity he is liable, 61 L. R. A.

must in all cases be determined from the instrument itself.

Morse, Banks & Banking, 2d ed. p. 292; *Thomp. Corp.* § 5126; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Pentz v. Stanton*, 10 Wend. 276, 25 Am. Dec. 558; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; 1 Am. & Eng. Enc. Law, 2d ed. pp. 1051-1054, and note; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829, 8 N. E. 583; *Webster v. Wray*, 10 Neb. 558, 56 Am. Rep. 754, 27 N. W. 644; *Drake v. Fleucellen*, 33 Ala. 106.

Where one of two innocent parties must suffer on account of the fraud or misconduct of a third person, he who is negligent, or puts it in the power of the person perpetrating the fraud to commit wrong, must sustain the loss.

3 Brickell, Dig. 448, § 30; *Morse, Banks & Banking*, 2d ed. pp. 292, 293; *Tryon v. Oxley*, 3 G. Greene, 289; *Ihl v. Bank of St. Joseph*, 26 Mo. App. 129; *Serrell v. Derbyshire S. & W. Junction R. Co.* 9 C. B. 811, 19 L. J. C. P. N. S. 371; *Coote, use of Jones v. Bank of United States*, 3 Cranch C. C. 50, Fed. Cas. No. 3,203.

The complainants are mere transferees of the Farley National Bank, and, at most, stand in the shoes of the bank. They certainly have no higher or better position than the bank would have if complainant in this suit.

Sayre v. Weil, 94 Ala. 406, 15 L. R. A. 544, 10 So. 546; *Walker v. Miller*, 11 Ala. 1067; *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 346; *Hayward v. Andrews*, 106 U. S. 672, 27 L. ed. 271, 1 Sup. Ct. Rep. 544.

The law will not charge Henderson with constructive notice of the diversion or misappropriation of the funds of the company by Woolfolk, upon the ground that Henderson was treasurer and one of the directors of the company. He is no more chargeable with notice of Woolfolk's management and conduct of the affairs of the company than any other director of the company.

Rudd v. Robinson, 126 N. Y. 113, 12 L. R. A. 473, 20 N. E. 1046; *Haynes v. Brown*, 36 N. H. 507; *Powell v. Conover*, 75 Hun, 11, 26 N. Y. Supp. 1028; *Lehman v. Glenn*, 87 Ala. 627, 6 So. 44; *Thomp. Corp.* § 4715.

A court of equity will not permit complainants to have a judgment in this case against Henderson, and force Henderson to his suit against the Farley National Bank to recover the damage sustained from the misconduct as his agent in the collection of the notes.

Thames v. Herbert, 61 Ala. 345; *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498; *Sayre v. Weil*, 94 Ala. 475, 15 L. R. A. 544, 10 So. 546.

The Farley National Bank did not notify Henderson that the money collected on the two notes of Woolfolk and Saportas by it for Henderson were collected out of the moneys or funds of the Alabama Terminal & Improvement Company; and upon receipt of said checks they surrendered the notes canceled, together with the order for the

securities. This was a payment of the notes in such manner that it released Woolfolk and Saportas from liability to Henderson.

Morse, Banks & Banking, § 214; *Smith v. Essex County Bank*, 22 Barb. 627; Bigelow, Estoppel, 8th ed. p. 586, and note; 7 Am. & Eng. Enc. Law, p. 22.

Tyson, J., delivered the opinion of the court:

We shall first dispose of the questions raised by the assignments of error on the cross-appeal. When this case was here on former appeal (114 Ala. 601, 21 So. 1020), the equities of the bill were fully discussed and settled. In the opinion delivered the averments of the bill are set out *in extenso*, and the two theories under which relief is sought are pointed out, and shown not to be inconsistent or repugnant the one with the other. The purpose of the bill under the second or alternative aspect presented in it is to seek satisfaction of the complainants' demand out of the debtors' property, which is alleged in effect to have been fraudulently conveyed, or attempted to be placed beyond the reach of execution. Or, to state the proposition in another form, it is to subject to the satisfaction of complainants' debt equitable assets in the hands of Henderson, which have been converted by him. For if it be true, as averred, that Woolfolk and Saportas, as officers of the corporation, the Alabama Terminal & Improvement Company, purchased the stock of Henderson in that corporation for that company, and Henderson was paid for it out of the assets of the corporation, with notice, though perhaps binding *inter partes*,—which, however, we do not here decide,—it is very certain that it was voidable at the instance of creditors of the corporation, as a fraud upon them, if the corporation's ability to pay its debt was impaired by the transaction. This is not upon the principle that the assets of a corporation are trust funds to be held by it as a trustee for the benefit of its creditors, but is rested upon the doctrine that it is a voluntary conveyance or transfer as against creditors by the corporation to its stockholders of its assets. A business corporation primarily has no assets other than those which it derives from the subscription to its capital stock. In organizing it and subscribing for shares of stock, the stockholder acquires simply "a right to participate, according to the amount of his stock, in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts." Cook, Stock, Stockholders, & Corp. Law, § 5, and note 1. A stockholder has no right to demand that the corporation pay to him the value of his stock, nor has the corporation any legal right to do so as against creditors. Its obligation to redeem its stock can never arise until dissolution, and even then it is subordinate to its obligation to pay its creditors. To permit a corporation to purchase without restriction shares of stock issued by it would, in effect, license stockholders, by

resorting to sales of their shares to it, to deplete the assets of the corporation, and give to them a preference over creditors which was never contemplated, and to confer upon them a right which they never contracted for, and to which they were not entitled when they made the contract by which they became the owners of their shares, nor at the time the creditor extended credit to the corporation. A permissive recognition of the unrestricted right of a corporation to purchase the shares of one of its stockholders as against creditors necessarily concedes the same right to the corporation to purchase the entire capital stock. If this right be accorded a corporation, and it is exercised to its full limit, we would have the case of a corporation having distributed its entire capital to its stockholders, leaving it as the owner of its own promises obligatory with which to pay its debts to its creditors. Of these, it would seem, the creditors had a sufficiency. At least, more promises made to the creditors would add no value to those already held by them. Indeed, an examination of the general statutes on the subject of creating corporations and regulating their organization will disclose that they require a certain *per centum* of the proposed capital stock to be paid by the subscribers, and their written obligation executed and delivered to someone for the balance of their subscription, usually denominated "commissioners," before a charter is granted (see chapter 28, Code), distinctly showing that their policy is that no fictitious corporations shall exist in this state; that when a corporation is organized and authorized to do business under our laws, those who deal with it may do so upon the assurance that its capital has been either fully paid up, or the corporation has the written obligation of its subscribers as assets, out of which the money due to it by them may be realized. To say that these subscribers, after paying up their subscription obligations, may make a sale of their stock to the corporation, and withdraw the money paid by them to the corporation, would not only be a fraud upon the creditors of the corporation, but upon the law. Of course, should such a course be adopted by the unanimous consent of all the stockholders, and there are no creditors, there would be no one to complain. We are aware that the courts of this country are divided upon the question as to the power of corporations to acquire and hold their own stock. But in no jurisdiction is the power of a corporation to purchase its own shares sustained if the purchase is made with the intent to injure its creditors, or to defeat them in the collection of their claims, or if it has such effect. 7 Am. & Eng. Enc. Law, pp. 818–820, and notes. We have said this much on the subject of the power of a corporation to acquire and hold its own stock in order that we may clearly have in mind the scope of the bill, and in order that we may deal intelligently with the issues tendered by its averments.

We have made no mention of the first the-

ory presented by the bill, based upon the averment that Henderson has not paid his subscription note executed by him to the Alabama Terminal & Improvement Company for stock. This is unsupported by the testimony in the case, and is not insisted upon as a ground for relief. After the cause was reversed on the former appeal, the bill was amended by incorporating into it the averment that the complainants became the owners of the debt held by the Farley National Bank against the Alabama Terminal & Improvement Company, with the right to collect the same for the benefit of the stockholders of said bank, and also by making H. M. Hall a party complainant, in whose name the indebtedness of the bank against the Alabama Terminal & Improvement Company was reduced to judgment. After these amendments were made, a number of grounds of demurrer was assigned to the bill as amended. It is argued in support of the sixth and seventh grounds that the judgment in favor of Hall as receiver is a nullity, because the averments of the bill show his discharge as receiver before the rendition of the judgment, and the assets of the bank returned to it and transferred to the other complainants, Hall and Farley, as trustees. The argument is that the suit in which the judgment was recovered abated by reason of Hall's discharge as receiver, and therefore the judgment was void. The insistence is that § 26 of the Code requires all suits to be prosecuted in the name of the parties really interested. But the exception made by the statute is that in actions upon bills of exchange and promissory notes payable at a bank or banking house or at a designated place, and other commercial instruments, the suit must be instituted in the name of the person having the legal title. We will presume, in support of the judgment, that such was the character of the instruments sued upon, and evidenced the debt for which the judgment was rendered. If Hall had not the right or capacity to maintain the suit, the defendant corporation should have availed itself of it by proper defenses. It is certainly not void on its face, and therefore not open to an attack collaterally.

The case of *Rice v. Rice*, 106 Ala. 636, 17 So. 628, answers the contention made in support of the eighth, ninth, and tenth grounds of the demurrer that the *cestuis que trust* of Hall and Farley as trustees should be parties to this cause. The making of H. M. Hall a party complainant relieved the necessity of any averment of a formal transfer or assignment of the judgment, or proof of such assignment or transfer. Nor did it bring the case within the application of the general doctrine that all complainants must recover, or none can. These principles are settled in the following cases: *Gunter v. Williams*, 40 Ala. 572; *Blevins v. Buck*, 26 Ala. 292; *Plouman v. Riddle*, 14 Ala. 169, 48 Am. Dec. 92; *McLane v. Riddle*, 19 Ala. 180; and it will serve no purpose to discuss them at length. This disposes of the eleventh and twelfth and first grounds of demurrer 61 L. R. A.

to the bill as amended by making Hall a party.

It is stated, in brief, in support of the first, second, third, and fourth grounds of demurrer to the alternative phase of the bill, that they should be sustained because the averments of the bill are too indefinite and uncertain, in that it fails to show when the assets were received by Henderson; what the assets consisted in; how they were received, —whether as director and treasurer of the company in his official capacity, or whether in his individual capacity; and whether all were received at one time or at different times. These are matters peculiarly within the knowledge of the Alabama Terminal & Improvement Company and Henderson, the respondents to the bill. We do not understand it to be a rule of pleading that the evidential facts upon which the pleader relies shall be set forth in his pleading. The charge is that Henderson, subsequent to January 5, 1891, being a director and treasurer of the company, received assets of said company amounting to \$30,000 or other large sum, knowingly and without proper and legal consideration to said company, which he is liable for, with interest. The preceding averments of the bill sufficiently disclose the relations of all the parties to each other, the liability of Henderson to the company in the sum of \$30,000 on account of his subscription for stock, the sale of the stock by him either directly to the company or indirectly to it through Woolfolk and Saportas; and, indeed, a liability on the part of Henderson in receiving the assets of the corporation in payment for his stock. It is manifest from this statement that there is no merit in these grounds of demurrer. The fact of the insolvency of the Alabama Terminal & Improvement Company is sufficiently proven by the evidence. But this fact is immaterial under the view we take of this case for if it be true that Henderson received the assets of the corporation knowingly, or under such circumstances as to put him upon inquiry that the money paid to him for his stock was the money of the corporation in consideration of a sale by him of the stock to the corporation direct, or through Woolfolk and Saportas to the corporation, or if the consideration inuring to the corporation was his stock, then it is, in effect, a gift by the corporation to him of its assets, which is fraudulent as to creditors, whether the corporation was actually insolvent at the time the bargain for the sale of the stock was made or not. There can be little doubt, if that were important, that it was on the road to financial disaster when the alleged sale was made, and was hopelessly insolvent long before Henderson received many of the payments made to him. *Morawetz, Priv. Corp.* §§ 793, 794. Nor do we understand the fact to be controverted that all the money Henderson received on account of his alleged sale of the stock was paid out of the assets of the corporation. There is no room, under the evidence, for such a disputation, for it points with unerring certainty to this con-

clusion. The chancellor rendered a decree against Henderson for \$8,719.61 and interest, and refused to charge him with the other money, assets of the corporation, received by him. In dealing with Henderson's liability, he did so as though Henderson had no connection with the company as director and as its treasurer. He bases his decree upon the proposition that the checks evidencing the various sums, which aggregate the \$8,719.61, gave actual notice to Henderson that he was receiving assets of the corporation. The contention of Henderson's counsel is that in this there was error. A long and ingenious argument is made to show that many of these checks were drawn by Woolfolk and others as individuals, and were not binding obligations upon the Alabama Terminal & Improvement Company, and therefore they were insufficient to convey notice to Henderson that he was receiving money belonging to the corporation, and not to those persons whose names appeared as drawers. It is sufficient answer to all this to say that these checks were paid out of the funds belonging to the company, and that they bore on their face the appearance of being drawn by officers or agents of some principal upon a deposit,—not the money of the agents, but of their principal. A number of them were signed "J. W. Woolfolk, Prest.," and others were signed "J. W. Dimmick, Vice Prest." Each of these named persons was an officer of the Alabama Terminal & Improvement Company, which was correctly designated by the words following their respective names. As a director and officer of the same corporation, Henderson was bound to know, and did know, that they were acting in that capacity in signing these checks. These indicia on the checks, had he heeded the inquiry which they naturally suggested, would have led him, upon investigation, to a knowledge that it was funds of the corporation upon which they were drawn, and out of which he was being paid for his stock, which he says he sold to Woolfolk and Saportas. *Wolfe v. State*, 79 Ala. 206, 58 Am. Rep. 590, and authorities there cited.

The remaining contention made by Henderson, the cross appellant, is predicated upon an estoppel which is alleged in his answer, and which he insists is supported by the proof in the cause. We quote from his counsel's brief as showing what defense is alleged in the answer: "The answer in this case, filed May 15, 1897, and refiled with the amendment April 16, 1898, in the sixth paragraph, on page 6, sets up as a defense that Henderson transferred his shares of stock to Woolfolk, and Woolfolk, for the company, transferred the same to the Farley National Bank as collateral security for a part of the debt on which this suit is founded, and the Farley National Bank transferred the same to the complainants in this case, and that they hold it, and have never returned or offered to return said stock to Henderson or to Woolfolk, and that they had full knowledge of the facts at the time they received said stock, or that they have

retained the same after obtaining full knowledge of all of the facts." If we treat the insistence, as laid in argument, that the proof sustains the averments of the answer, the whole matter might be disposed of by pointing out the fact that the evidence shows that this stock stands in the name of one John W. Hess, and has never, as a matter of fact, been transferred to these complainants. True, the assignment to Hall and Farley as trustees shows 400 shares of stock are embraced in it. But the record shows that the corporation had purchased quite a large amount of its stock from other stockholders. Whether these 400 shares mentioned in the assignment are the stock bought of Henderson or the other Troy stockholders does not clearly appear from the evidence. But, aside from this in the transaction between Henderson and Woolfolk, which is shown to have taken place about March 13, 1891, by which this stock was surrendered by Henderson to Woolfolk, Henderson got in lieu of it bonds as collateral security. The bank is not shown to have been a party to the negotiations between them which resulted in this exchange of securities, or to have had anything whatever to do with it, except to become the transferee solely for the purpose of becoming a conduit by which the Chatham National Bank of New York City might become its owner as the property of Woolfolk. This purpose is clearly disclosed in Woolfolk's letter to Henderson. But conceding that the Chatham Bank desired and held this stock as collateral security for an indebtedness due it by the Farley Bank, we can perceive no injury to Henderson on that account. He received a *quid pro quo* from Woolfolk for the stock he surrendered. If he afterwards surrendered the bonds to Woolfolk which he got in lieu of the stock, it is not shown that the Farley Bank, by any representation or by any act upon which he relied, induced him to do so. If Woolfolk got the better of him in the exchange of securities, no complaint is made of it in the pleadings or the evidence. Furthermore, as we have said, the bank is not shown to have induced him in any way to make the exchange, or to have derived title to the stock from him. It is further argued in support of the proposition that the averments of the answer are proved by these facts, *viz.*, that on March 23, 1891, Henderson sent to the Farley Bank a note of Woolfolk to him in the sum of \$3,333.33 for collection, and on May 1st a similar note for \$4,000 for the same purpose, which were paid by checks drawn by Woolfolk on that bank signed by him as "president." The evidence discloses that the consideration of these notes, which were ostensibly given, along with others, by Woolfolk and Saportas, was for the purchase of Henderson's stock in the corporation. However, there was nothing on their face indicating this. It is true the bank undertook their collection, and that on presentation of them by it to Woolfolk he gave checks on it signed by him, "President," which were paid by the bank, and the amounts remitted to Henderson. Confessed-

ly, all this does not in the remotest degree, tend to prove that the stock was transferred to the bank, or that the bank transferred the stock to the complainants, as averred in the answer. But it is said that the bank, by honoring these checks out of the deposits of the Alabama Terminal & Improvement Company in payment of notes which showed on their face that they were the individual indebtedness of Woolfolk and Saportas, committed a wrong upon Henderson. This wrong consisted in not informing Henderson that Woolfolk was paying his debt to him out of the funds of the corporation, and not his own. How did the bank know that Woolfolk was misappropriating trust funds? If it can be charged with such knowledge, it must be made to rest upon the fact that the checks were signed "Woolfolk, President,"—a strange and anomalous position for Henderson to assume. He had, prior to this time, received more than \$10,000 upon the sale of his stock, and every dollar of it was money belonging to the corporation. He had himself received checks signed in the same way, which he collected and appropriated and he prosecutes this appeal asserting as one of his grievances that the checks which he received did not carry notice to him that Woolfolk was using funds of the corporation. Had the bank notified him that it had declined to receive the checks from Woolfolk, it is evident he would have instructed it to do so; or had the bank informed him that it had accepted the checks, it is very evident, judging from his conduct prior to that time and afterwards, that he would not have repudiated the transaction. But the bank was under no such duty to him. It was simply under the duty to present the notes for payment, receive the money, and remit it to him. This it did. The deposits of the Alabama Terminal & Improvement Company with it were the money of the corporation, and not his. Whatever may have been its duty to that company with respect to paying these checks, it is a matter of no concern to Henderson. He is not asserting his claim in privity of right of interest through it; on the contrary, he is asserting that he received no money which belonged to the company,—positively denying its title to the money received by him.

Nor are the complainants' rights, under the aspect of the bill under consideration, dependent upon the right of the corporation to assert its title to this money. The transaction, as we have shown, was fraudulent as against these complainants. Being fraudulent, their rights to subject their debtor's property fraudulently conveyed are in no wise dependent upon the right of their debtor to recover the money of Henderson. Upon what principle an estoppel could be said to rest as to the money of the corporation received by Henderson, other than the two sums collected for him by the bank, so as to preclude the rights of these complainants, even if it be conceded that the bank owed Henderson the duty to notify him that Woolfolk had offered to pay these notes by checks

drawn on the deposits with it belonging to the corporation, we are unable to see. Certainly not upon the doctrine of ratification. The bank is not shown to have had any knowledge that Henderson had made the sale of its stock to the corporation, nor is it shown, inferentially or otherwise, that it knew that Henderson had been paid more than \$10,000 of the corporation's funds by Woolfolk prior to March 23d, the date of the collection of the first note by it; and certainly its conduct with respect to receiving these checks had no influence upon Henderson by way of inducing him afterwards to receive from Woolfolk money belonging to the corporation in payment of other notes maturing later. As to payments subsequently made to him, the doctrine of ratification certainly has no application. It is not asserted in the pleadings that as to the two items collected by the bank there is an estoppel. The defense, if it can be said to be asserted at all in the answer, goes to the entire bill, and in bar of all the relief sought under it. Care, however, being taken not to confess the cause of action as laid in the bill, but, on the contrary, to deny it, yet in argument it is insisted, notwithstanding Henderson's refusal to confess, that he should have the benefit of his avoidance of liability,—a benefit entitled to be invoked only by those who are willing to and do confess and seek to avoid by proper averments in their pleadings. An estoppel *in pais*, in general, must be pleaded, and the facts supporting it must be clearly made out by the party relying upon it. Estoppels never arise from ambiguous facts, but must be established by such as are unequivocal, and not susceptible of two constructions. An estoppel must not rest in mere inference or argument, but must be a precise affirmation of that which makes it. 8 Enc. Pl. & Pr. p. 10, and notes. It follows from what we have said that Henderson takes nothing by his appeal.

Of the \$29,102.57 of the Alabama Terminal & Improvement Company's money received by Henderson in payment for his stock, the learned judge in the court below only charged him, as we have said, with \$8,719.61, and refused to charge him with the following items: \$2,500, paid February 24, 1891; \$7,530, paid on the same day; \$3,342.96, paid March 23d; \$4,010 paid May 1st; and \$3,000, paid June 6th,—aggregating the sum of \$20,382.96. From a reading of his opinion it is manifest that he regarded the sale of the stock as one to Woolfolk and Saportas, and not to the corporation, and that he gave little or no weight to the entries upon the books of the corporation introduced in evidence. His reason for his refusal to charge Henderson with these sums is put upon the ground that the evidence is insufficient to put Henderson on notice that these sums were moneys of the corporation. Was the sale of the stock by Henderson to Woolfolk and Saportas a bona fide one to them? Or was the taking of their notes a mere device to cover up a sale by him to the corporation? In solving these questions, it will be well to bear in mind the relation of

these parties to the corporation, the known opposition of Henderson and other Troy stockholders to the project of Woolfolk to construct the Montgomery, Tuscaloosa, & Memphis Railroad out of the funds belonging to the Alabama Terminal & Improvement Company; the kiting operations indulged in by Woolfolk as president of the Alabama Terminal & Improvement Company, by which that company was enabled to get credit from the Farley Bank for an enormous sum of money; the valuable aid rendered by Henderson to Woolfolk in consummating these kiting operations by accepting, as treasurer, hundreds of drafts drawn on him as such for large amounts, which were discounted by the Farley Bank, when he had not one dollar in his possession belonging to the company, notwithstanding Henderson's claim to have been only nominally performing the function of his office as treasurer of the corporation at a salary of \$800 per annum; the absolute want of any necessity for the drawing of these drafts in due course of business, as Woolfolk was clothed with full power to check upon any depository in which the corporation had funds without Henderson's consent; the failure of Henderson to make known to the business world, and especially to the Farley Bank, whom he knew was discounting Woolfolk's drafts upon him, that he had no funds, as treasurer, subject to draft, and that he was simply filling the office in a perfunctory way to accommodate Woolfolk. Also to bear in mind the further fact that Henderson accepted money in part payment of his alleged debt against Woolfolk and Saportas, known to him to be funds belonging to the corporation, of which he was a director and its treasurer, whose duty as an officer required him to protect its assets against the spoliations of Woolfolk; and the fact that Woolfolk and Saportas were insolvent, especially the former, who had been since the organization of the company its debtor in a large sum on account of stock subscriptions, which he never paid. But these facts are not all which legitimately tend strongly to show that the stock was sold by Henderson to the company, and not to Woolfolk and Saportas, and that he knew he was receiving money belonging to the company in payment of their alleged indebtedness to him. The most potent probative evidence tending to establish a sale by Henderson to the corporation, and a knowledge by him that he was being paid out of its assets, is to be found in the books of the corporation,—entries upon the cash book of the company. We repeat, the most potent probative evidence tending to establish these facts is to be found in these books, for the reason that, if the facts disclosed by them stood alone, in connection with the admitted fact that Henderson was a director and treasurer of the corporation at the time the entries were made, the facts as disclosed by those entries would have made at least a *prima facie* sale by him to the corporation of the stock, and of course, notice to him that he was receiving assets of the com-

pany, his vendee, in payment for it. The entries upon the cash book disclose:

Bills Payable.	Dr.
Jany. 5th, 1891. 3 notes acct. of A. C. Saportas and J. W. Woolfolk for the A. T. & I. Co., for \$10,000 each, due as follows:	
One note 30 days after date.....	\$10,000
" " 45 " " "	10,000
" " 60 " " "	10,000
	<hr/> \$30,000

On credit side of cash book:

Investment Account.	Dr.
Bought of Fox Henderson 3,000 shares capital stock of A. T. & I. Co.	
In suspense.....	\$30,000

A record of the renewal and extension notes executed by Woolfolk and Saportas, as well as all payments made by the corporation to Henderson, appear in the entries upon this cash book. Henderson says to all this that he did not keep this book, and had no knowledge of its contents. It was presumptively his duty as treasurer to have kept this book, or to have had someone to do so for him. He cannot, under the facts of this case, avoid, as against creditors of the corporation, the probative effect of these entries by invoking his own dereliction of duty. Especially is this true when taken in connection with the fact that he was accepting drafts drawn upon him as treasurer, known by him to have been discounted upon the faith of his acceptance of them, and that he had funds of the corporation with which to pay them. The doctrine is stated by Thompson on Corporations (§ 5308) to be: "It is a sound view, at least in so far as the question respects the rights of third parties, that the directors of a corporation are in law conclusively presumed to know its condition, its business, its receipts and expenditures, and all the general facts which go to make up that condition and business, as shown by the entries on its regular books. The reason of this is that it is their duty to know these things in the exercise of their official functions. This doctrine is said to be one founded in public policy, essential to the safety of third parties in their dealings with corporations, and to the protection of the stockholders interested in the welfare and safe management of corporations." Justice Brewer, now of the Supreme Court of the United States, while a member of the supreme court of Kansas, in the case of *First Nat. Bank v. Drake*, 29 Kan. 326, 44 Am. Rep. 646, said: "The directory, as has been said, is the visible representative of the bank. Persons dealing with it meet only this visible representative, and have a right to presume that it knows all of the affairs of the bank, all that the bank as a principal ought to know of its condition and business. On the other hand, the stockholders and depositors—the

persons who are pecuniarily interested in the safe management and prosperity of the bank—look to the directors as the chosen guardians of their interests, and have a right to demand of them that they watch over all those interests in their minute details. So that all of these parties have a right to assume that the directors know all the transactions, business, and condition of the bank, because they ought to know them, and because otherwise they do not discharge their full duties to these various parties.” The case of *United Society of Shakers v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731, was several actions of trover brought to recover of directors of an insolvent bank by those who had placed certain bonds in the custody of the bank on naked bailment, as a special deposit. The declarations charged that the bonds so deposited had been converted to the use and emolument of the bank; that they had been abstracted from the package of special deposit by officers of the bank, and sold, and the proceeds used in the business of the bank; that the defendants being directors, had notice of the fact of such conversion, or could, by the most ordinary diligence, have had notice, as well from the ledgers, books, and accounts of the bank as from its correspondence, etc. To the declarations a demurrer was sustained by the lower court. The supreme court, reversing the rulings of the lower court, said: “Bank directors are not mere agents, like cashiers, tellers, and clerks. They are trustees for the stockholders; and as to their dealing with the bank they not only act for it, and in its name, but in a qualified sense, are the bank itself. It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community have the right to assume that the directory does its duty, and to hold them personally liable for neglecting it. . . . Their contract is not alone with the bank. They invite the public to deal with the corporation, and when anyone accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and, if they fail in either, they violate a duty they owe, not only to the stockholders, but to the creditors and patrons of the corporation. *Hodges v. New England Screw Co.* 1 R. I. 312, 53 Am. Dec. 624. . . . It is further objected that the allegation of notice is so far qualified as to render insufficient the averment of its existence. It is stated that appellees, ‘and each of them, had, or could have had by the use of the most ordinary diligence and investigation, ample notice.’ It is also alleged by Davenport that they each ‘had notice, as well from the ledgers, books, and accounts of said bank as from its correspondence, reconciliements, and statements.’ It is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their

duties they may, in controversies with persons transacting business with the bank, be presumed to have. They cannot be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconciliements, and statements of the bank, and which would have come to their knowledge except for their gross neglect or inattention. It is not necessary, in many cases, to show directly that the directors actually had their attention called to the mismanagement of the affairs of the bank, or the misconduct of the subordinate officers. It is sufficient to show that the evidences of the mismanagement or misconduct were such that it must have been brought to their knowledge unless they were grossly negligent or wilfully careless in the discharge of their duties. If it shall turn out upon the trial of these actions that the ledgers, books, etc., of the bank showed that the special deposits of these appellees were being sold and that this fact would have been discovered by appellees by the use of ordinary diligence, then the presumption of actual knowledge will arise. It follows, therefore, that the allegation of notice is sufficient.” These principles are also declared in *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; *Merchants’ Bank v. Rudolf*, 5 Neb. 527; *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Arlington v. Peirce*, 122 Mass. 270; *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. ed. 552. The competency of the entries in the books as evidence against a director is recognized, though the presumption raised is not held to be conclusive or indisputable, in *Merchants’ Bank v. Taylor*, 21 Ga. 334; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915; *First Nat. Bank v. Tisdale*, 84 N. Y. 655; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *Bedford v. Sherman*, 68 Hun, 317, 22 N. Y. Supp. 892; *Spellier Electric Time Co. v. Geiger*, 147 Pa. 399, 23 Atl. 547; *Olney v. Chadsey*, 7 R. I. 224; *Lane v. Bank of West Tennessee*, 9 Heisk. 419.

Under the facts of this case it is unnecessary to go to the length of holding the presumption raised against Henderson conclusive. According to these entries, the force of a disputable presumption of the truth of the facts stated in them, when taken and weighed in connection with the facts we have pointed out above, as shown outside of the book entries, our conclusion is that Henderson’s statement, and that of Woolfolk, that the stock was sold to Woolfolk and Saportas, and not to the corporation, is insufficient to overcome their probative effect. The sale being to the corporation, it follows, as a matter of course, that Henderson knew that he was being paid by it, his vendee.

A decree will be here entered affirming the decree upon the appeal prosecuted by Henderson, and reversing the decree upon the appeal of Hall and Farley. A decree will also be here rendered in favor of Hall and Farley, as trustees, for all the money paid to Henderson on account of this sale.

UTAH SUPREME COURT.

Eugenia PALMER *et al.*, *Respts.*,
v.

Ida M. PALMER, *Appt.*

(.....Utah.....)

1. A contract for a final separation of husband and wife, and procurement of a divorce, will not be enforced by the courts of a state under whose laws it is invalid, although it was valid where made.
2. A contract between husband and wife to secure a divorce a vinculo matrimonii is contrary to public policy, and void.
3. A wife is not barred of her dower rights in her husband's property at his death by having executed a void contract for divorce.

(April 13, 1903.)

A PPEAL by defendant from a judgment of the District Court for Salt Lake County in favor of plaintiffs in an action brought to quiet title to certain real estate. *Reversed.*

Statement by **Bartch, J.:**

This is an action in equity, brought by heirs and the administrator of the estate of W. D. Palmer, deceased, against the defendant, to quiet title to certain property owned by the deceased in his lifetime. Among other things, it is alleged in the complaint that said W. D. Palmer and the defendant on December 27, 1886, intermarried, and cohabited as husband and wife until about April 24, 1899, when irreconcilable differences arose between them; that about August 11, 1899, a contract of separation was made and entered into, and the property rights settled between the parties thereto; that, in accordance with this contract, the wife received real estate situate in the city of Atlanta, state of Georgia, of the value of \$12,000, subject to an encumbrance of \$5,000, and furniture in the house upon the real estate of the value of \$3,000, and cash in the sum of \$6,500; that at the time of the execution of the contract the husband was worth not to exceed \$30,000; that the property in question herein is situate in the state of Utah, where the husband resided from about the time of his permanent separation from his wife; that the defendant was a nonresident until his death; and that the husband carried out the terms of the agreement. The laws of the state of Georgia, under which the contract was claimed to have been made, were also pleaded. To the complaint the defendant filed a demurrer, which was overruled. Thereafter she filed an answer, in which, *inter alia*, she admitted the marriage, the execution of the

contract, the residence of her husband in Utah since then, and her nonresidence. Affirmatively she then alleged that at the time of the death of the husband she became, and still is, the surviving wife and widow of the deceased; that, as such widow, the deceased having left no issue living, she is entitled, under the laws of Utah, to \$5,000 in value of his real and personal property, and to one half of the excess over \$5,000 in value thereof; that after their marriage the husband treated her with kindness and consideration until he became addicted to the use of liquor in excess in "periodic sprees," when he was harsh, cruel, and vindictive to her; that her remonstrances against the drinking habits caused him to be only more harsh and vindictive toward her, until about the latter part of April, 1899, she, at the suggestion of her husband, who furnished her with the funds therefor, made a visit to Indianapolis, in the hope that upon her return he would treat her with his former kindness and consideration; that while so absent he sold out his property in the state of Georgia, left the state with the proceeds, notified her that he would never return while she was in the state, and concealed his whereabouts from her; that, while she was endeavoring to locate her husband, H. L. Culbertson, his cousin and attorney, and the pretended friend of his wife, offered to pay her \$6,500, upon the express condition that she should agree to an absolute divorce, without alimony; that Culbertson refused to disclose where her husband was, but informed her that he had left the state with all his property, and was beyond the jurisdiction of the courts of Georgia, and advised her, as her friend, to accept the offer of \$6,500; that, not knowing the whereabouts of her husband, and relying upon the statements and protestations of friendship of Culbertson, and being without means for her support, she agreed to accept the offer and execute the contract, which was signed and delivered under an express agreement, extorted from her, that she should proceed to procure a divorce from her husband; that on the next day after the execution of the contract a suit for divorce was filed in accordance with the dictations of the attorneys for her husband, which, upon trial, failed; that the contract was the result of fraud and improper influences exerted against her; that it was fraudulently obtained and is void; that the property mentioned in the complaint and in the contract as of the value of \$12,000 was given to her by her husband in 1895, when his drinking habits had not yet estranged him from her, and at a time when her father had

NOTE.—For conflict of laws on the subject of divorce, see also, in this series, *Benton's Succession* (La.) 50 L. R. A. 135, and *note*.

As to validity of separation agreement between husband and wife, see *Winn v. Sanford* (Mass.) 1 L. R. A. 512, and *note*; *Clark v. Fossdick* (N. Y.) 6 L. R. A. 132, and *note*; *Galusha* 61 L. R. A.

v. Galusha (N. Y.) 6 L. R. A. 487, and *note*; *Blank v. Nohl* (Mo.) 18 L. R. A. 350; and *Henderson v. Henderson* (Or.) 48 L. R. A. 768.

As to validity of contract between husband and wife to compromise pending or contemplated divorce suit, see *Oppenheimer v. Collins* (Wis.) 60 L. R. A. 406, and *note*.

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given him great assistance in his then financial embarrassment; that said property was of the value of about \$9,500, subject to a mortgage of \$5,000; and that at the time of the execution of the contract her husband was worth \$50,000 in cash.

From the evidence it appears that on December 27, 1886, Mr. and Mrs. W. D. Palmer were married at Indianapolis, Indiana, her maiden name being Ida Moody. Thereafter they lived at Macon and Atlanta, Georgia, about thirteen years, and had one child born to them, who died in childhood. When they moved to Atlanta, in 1890, Palmer had, in all, about \$6,000, which he invested in stock in a brick plant. Shortly afterwards the other stockholders were about to "freeze him out." Mr. L. D. Moody, Mrs. Palmer's father, learning of this, came to her husband's rescue, advanced him money and credit, and saved him, it appears, from financial ruin. Up to August, 1898, the advancement of Moody to Palmer amounted to \$17,333, and in February, 1899, Moody accepted in satisfaction for that amount the sum of \$14,000. Palmer's business, it seems, was profitable, for in July, 1899, when he sold out, he cleared up about \$42,000, of which about \$30,000 was in cash, and \$12,000 in a note of the purchaser; and this exclusive of the house given to his wife in 1895. In the course of time he developed drinking habits, which met with strong opposition from his wife, and resulted in disagreements between them. In the latter part of April, 1899, Mrs. Palmer made, with the sanction of her husband, who furnished her with the means with which to go, a visit to her parents, at Indianapolis. After she was gone they corresponded together as husband and wife, and she says that, while his drinking habits had become almost unendurable, yet she fully expected to return and live with him. While she was so on the visit, her husband sold out his property without her knowledge, and on July 12, 1899, wrote her what he had done, and that he intended to leave the state of Georgia, never to return so long as she was in it; that he had left her residence undisturbed just as she had left it; that all communications must cease forever; and that he had instructed his cousin, H. L. Culbertson, to render her any assistance he could in securing a divorce, which he thought was the best thing to do, under the circumstances. After receiving this letter, she returned to Atlanta, called on Culbertson, and found that her husband had in fact gone, and taken his property in cash with him, but Culbertson refused to reveal his whereabouts. She then employed attorneys to assist her to obtain her rights by suit or by settlement, and went to New York, where she employed detectives to locate the whereabouts of her husband, in the hope of securing a settlement from him, or service of process, so as to settle the matter in court. Being, after much effort, unable to find him so as to get in direct communication with him, and not knowing or being able to ascertain what his real financial condition was, she finally agreed to ac-

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cept an offer, made by her husband, through his friend, of the \$6,500 mentioned in the contract; fearing, as had been suggested to her, that otherwise she might get nothing at all. Testifying concerning this, after stating that she went to New York, she, in part, said: "After further consultation with my attorneys, I went to New York, where I supposed Mr. Palmer was, and through detectives located him. I did not get to see him. Then I got a letter from Mr. Hanson saying Mr. Palmer had returned to Macon. I returned to Atlanta. After consultation with Tompkins & Alston, Mr. Alston went to Macon, had an interview with Mr. Hanson, and returned with an offer of \$6,500 made by Hanson for Palmer. Judge Tompkins advised me to accept the \$6,500, because it was the best I could do under the circumstances. At first I refused, but the next day, with this mortgage of \$5,000 still hanging over me, and the thought that the foreclosure of it would lose me my home, I agreed to accept the \$6,500, with the agreement that I was to file suit for divorce at once. It was about twelve days between the time I first saw Mr. Culbertson and the time of the signing of the agreement. I was trying all that time to locate Mr. Palmer, and find out the things that were being concealed from me; that is, whether Mr. Palmer's property had been sold, or what it brought, or his whereabouts. I only succeeded in locating him in New York, but he evaded the detectives and got out of there. I did not draw that contract, neither did my attorneys. I first saw the contract the day I signed it. I read it, and read so much of it which says: 'A divorce proceeding is in contemplation, and will be instituted by one or the other of said parties.' Pursuant to that agreement, I filed a divorce proceeding. It was filed the next day. I do not know whether or not the divorce petition was drafted when I signed the agreement, but I know it was to be drafted, and as a part of this settlement." After she accepted the terms and signed the contract, her husband, in response to a telephone message, appeared in the office of his attorney, and, in her absence, also signed the contract. The instrument was executed August 11, 1899, and the next day the divorce proceedings were instituted, but upon trial before a jury the case failed. Soon after the execution of the contract, the husband came to this state, purchased the property involved in this controversy, and resided here until May, 1901, when he died intestate. His wife, it appears, never saw him again after she left home for her visit at Indianapolis. At the trial of the cause the court entered a decree quieting the title to the property in the plaintiffs, and held that the defendant is perpetually estopped and enjoined from setting up any claim to any part thereof. Thereupon the defendant prosecuted this appeal.

Messrs. Pierce, Critchlow, & Barrette, for appellant:

An agreement renouncing marital rights

and obligations is void. Those rights and obligations cannot be renounced without the consent and sanction of the state or its courts; an agreement touching property rights, even though made between a husband and wife who are living separate, and in the light of that separation, may be valid; an agreement wherein both the elements are mingled, each part and parcel of the other, and one a consideration for the other, is void.

Foot v. Nickerson, 70 N. H. 496, 54 L. R. A. 554, 48 Atl. 1088; *McKenna v. Phillips*, 6 Whart. 571, 37 Am. Dec. 438; *Simpson v. Simpson*, 4 Dana, 140; 15 Am. & Eng. Enc. Law, 2d ed. p. 955, *Future separation*, and cases; *Baum v. Baum*, 109 Wis. 47, 53 L. R. A. 652, 85 N. W. 122; *Collins v. Collins*, 62 N. C. (Phill. Eq.) 153, 93 Am. Dec. 606 (until changed by statute); *Andrus v. Randon*, 34 Tex. 536; 1 Bishop. Marr. Div. & Sep. 1260 *et seq.*, 1312.

This court has already declared the policy of the law of this state.

Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660; *Norton v. Tufts*, 19 Utah, 470, 57 Pac. 409.

Assuming, for mere argument's sake, that this contract was drawn in accordance with the laws of Georgia, and is binding there, still, if against the policy of the laws of Utah, it will not be enforced here.

Welling v. Eastern Bldg. & L. Asso. 56 S. C. 280, 34 S. E. 409; *Pope v. Hanke*, 155 Ill. 617, 28 L. R. A. 568, 40 N. E. 839; *Keller v. Paine*, 107 N. Y. 83, 13 N. E. 635; *Hervy v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Seamans v. Temple Co.* 105 Mich. 400, 28 L. R. A. 430, 63 N. W. 408; *Rose v. Kimberly & C. Co.* 89 Wis. 545, 27 L. R. A. 556, 62 N. W. 526; *Mumford v. Cauty*, 50 Ill. 370, 99 Am. Dec. 525; *Faulkner v. Hyman*, 142 Mass. 53, 6 N. E. 846.

A contract between husband and wife having for its object the procurement of a divorce, or facilitating that result, is collusive and void.

Greenhood, Pub. Pol. 490, 491; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801; *Sayles v. Sayles*, 53 Am. Dec. 208, and notes, 21 N. H. 312; 2 Bishop. Marr. Div. & Sep. §§ 249, 251, 252; 15 Am. & Eng. Enc. Law, 2d ed. p. 956 (e); *Adams v. Adams*, 25 Minn. 72; *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; 2 Am. & Eng. Enc. Law, 2d ed. p. 127 (c); *Phillips v. Thorp*, 10 Or. 494; *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 642; *Hamilton v. Hamilton*, 69 Ill. 349; *Seeley's Appeal*, 56 Conn. 202, 14 Atl. 291; *Belden v. Munger*, 5 Minn. 211, Gil. 169, 80 Am. Dec. 407; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Hardy v. Smith*, 136 Mass. 328; *Blank v. Nohl* (Mo.) 20 S. W. 65, 112 Mo. 159, 18 L. R. A. 350, 20 S. W. 477; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Baum v. Baum*, 109 Wis. 47, 53 L. R. A. 653, 85 N. W. 122; 1 Bishop. Marr. Div. & Sep. 72, 73, 76.

An entire contract void in part is void entirely.

Beard v. Beard, 65 Cal. 354, 4 Pac. 229; 61 L. R. A.

Foot v. Nickerson, 70 N. H. 496, 54 L. R. A. 554, 48 Atl. 1088; *Friedman v. Bierman*, 43 Hun, 387.

There are no apt words of conveyance in the contract to cover the wife's inheritance; she does not agree that she will not assert her right as heir.

Smith v. Smith, 57 Ohio St. 27, 48 N. E. 28; *Newton v. Truesdale*, 69 N. H. 634, 45 Atl. 646; *Kistler v. Ernst*, 60 Kan. 243, 56 Pac. 18; *Ireland v. Ireland*, 43 N. J. Eq. 311, 12 Atl. 184.

The contract was not made with reference to this property.

Fuss v. Fuss, 24 Wis. 256, 1 Am. Rep. 180.

The contract cannot by any possible construction have any more force or effect than a mere quitclaim deed. A quitclaim deed, containing no covenants whatever, vests in the grantee only such title or estate as the grantor was possessed of at the time of execution and delivery of the deed; and, if the grantor subsequently acquires title to the property thereby conveyed, that title does not inure to the grantee in the quitclaim deed.

Frank v. Darst, 14 Ill. 304, 58 Am. Dec. 575; *Harden v. Oullins*, 8 Nev. 49; *Jourdain v. Fow*, 90 Wis. 99, 62 N. W. 936; *Cadiz v. Majors*, 33 Cal. 288.

At the common law a mere expectancy cannot be conveyed, either by quitclaim or warranty.

Needles v. Needles, 70 Am. Dec. 85, and note, 7 Ohio St. 432; *Smith v. Smith*, 57 Ohio St. 27, 48 N. E. 28; *Dart v. Dart*, 7 Conn. 254.

In this case there is no covenant of warranty, no covenant for further assurance, no covenant of nonclaim, therefore no reason to place this case in the equity exception to the rule that a mere expectancy cannot be conveyed.

Hart v. Gregg, 32 Ohio St. 502.

Separation agreements, when upheld at all, are subject to even closer scrutiny than are ordinary contracts. The transaction must be untainted by fraud, and must be in all respects fair, reasonable, and just.

Daniels v. Daniels, 9 Colo. 133, 10 Pac. 667; *Garver v. Miller*, 16 Ohio St. 532; *Witbeck v. Witbeck*, 25 Mich. 439.

Messrs. Stephens and Smith and W. B. Willingham, for respondents:

Separation agreements and the settlement of property rights thereby are in accord with public policy of the state of Georgia.

Chapman v. Gray, 8 Ga. 341; *Killiam v. Killiam*, 25 Ga. 186; *Stewart v. Stewart*, 43 Ga. 294; *Lively v. Paschal*, 35 Ga. 218, 89 Am. Dec. 282; *Harris v. Davis*, 115 Ga. 950, 42 S. E. 266.

In England since the case of *Seeling v. Crawley*, 2 Vern. 385, decided in the year 1700, to the present day, there has been an unbroken line of decisions sustaining the validity of these contracts.

Walker v. Walker, 9 Wall. 743, *sub nom. Walker v. Beal*, 19 L. ed. 814; *Hutton v. Hutton*, 3 Pa. St. 100; *Dillinger's Appeal*, 35 Pa. 357; *Randall v. Randall*, 37 Mich. 563;

Where parties enter into articles of separation for cause, the wife for a consideration releasing her dower rights, and the parties act upon this until the husband dies, it is too late for her to complain or seek to repudiate the provision made for her, and claim dower and distribution.

Loud v. Loud, 4 Bush, 453; *King v. Mollohan*, 61 Kan. 683, 60 Pac. 731, 61 Pac. 685; *Henderson v. Henderson*, 37 Or. 141, 48 L. R. A. 766, 60 Pac. 597, 61 Pac. 136; *Clark v. Fosdick*, 118 N. Y. 7, 6 L. R. A. 132, 22 N. E. 1111, 23 N. E. 136; *Galusha v. Galusha*, 116 N. Y. 635, 6 L. R. A. 487, 22 N. E. 1114; *Hilbish v. Hattie*, 145 Ind. 59, 44 N. E. 20; *Daniels v. Benedict*, 38 C. C. A. 592, 97 Fed. 367; *Luttrell v. Boggs*, 168 Ill. 361, 48 N. E. 171.

The contract is presumed to be legal. Where a contract is attacked upon the ground that it was entered into for the purpose of promoting a divorce, and the same is susceptible of two constructions, one legal, the other illegal, it should receive that interpretation which will support it, and give validity to it.

Paul v. Paul, 71 Ill. App. 671.

A contract is governed by the law with a view to which it was made.

Pritchard v. Morton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102.

The laws which exist at the time and place of making a contract enter into it and form a part of it.

Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357.

Defendant entered into the contract with her eyes open, dealing at arms' length in relying upon any representations made to her.

Sackman v. Campbell, 15 Wash. 58, 45 Pac. 895; *Dillman v. Nadlehoffer*, 119 Ill. 575, 7 N. E. 88; *Buchanan v. Lloyd*, 64 Md. 306, 1 Atl. 845, 6 Atl. 171; *Robertson v. Parks*, 76 Md. 119, 24 Atl. 411; 2 Pom. Eq. Jur. 2d ed. 890; *Bump, Fraud. Conv. Am. notes*, pp. 73, 74; 18 Enc. Pl. & Pr. p. 813, note 2; *Pratt v. Philbrook*, 33 Me. 17; *Payne v. Smith*, 20 Ga. 655; *Akin v. Kellogg*, 119 N. Y. 442, 23 N. E. 1046.

Defendant had no right to rely on any such statements as she alleges in her answer were made to her by Mr. Culbertson.

Haycs v. East Tennessee, V. & G. R. Co. 89 Ga. 264, 15 S. E. 361; *Howard v. Georgia Home Ins. Co.* 102 Ga. 137, 29 S. E. 143; *Payne v. Smith*, 20 Ga. 654.

Rescission must be prompt upon the discovery of misrepresentation.

2 Pom. Eq. Jur. 2d ed. 897; 18 Am. & Eng. Enc. Law. 2d ed. p. 874, notes 1, 2; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Schiffer v. Dietz*, 83 N. Y. 300; *Green v. Jackson*, 66 Ga. 251; *Smith v. Estey Organ Co.* 100 Ga. 628, 28 S. E. 392; *German American Mut. Life Asso. v. Farley*, 102 Ga. 720, 29 S. E. 615; *Page v. Dodson Printers' Supply Co.* 106 Ga. 80, 31 S. E. 804; *Eskridge v. Barnwell*, 106 Ga. 589, 32 S. E. 635; *Pearce v. Horn Chewing-Gum Co.* 111 Ga. 847, 36 S. E. 457.

Defendant does not do equity by offering to restore.

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Davis v. Tarwater, 15 Ark. 293; 18 Enc. Pl. & Pr. p. 829, and note 3, p. 830, note 1; *Snow v. Alley*, 144 Mass. 551, 59 Am. Rep. 119, 11 N. E. 764; *O'Callaghan v. Lowndes*, 13 C. C. A. 510, 26 U. S. App. 592, 66 Fed. 357; *Travelers' Ins. Co. v. Redfield*, 6 Colo. App. 190, 40 Pac. 195; *Kelley v. Owens*, 120 Cal. 507, 47 Pac. 369, 52 Pac. 797; *Bailey v. Fox*, 78 Cal. 387, 20 Pac. 868; 2 Pom. Eq. Jur. 2d ed. 897; *Schiffer v. Dietz*, 83 N. Y. 300; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Robinson v. Schly*, 6 Ga. 516; *Lane v. Latimer*, 41 Ga. 171; *Summerall v. Graham*, 62 Ga. 729; *East Tennessee, V. & G. R. Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350; *Bourden v. Achor*, 95 Ga. 245, 22 S. E. 254; *Glover v. Green*, 96 Ga. 127, 22 S. E. 604; *Charleston & W. C. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972; *Petty v. Brunswick & W. R. Co.* 109 Ga. 666, 35 S. E. 82; *Rigdon v. Walcott*, 141 Ill. 649, 31 N. E. 158; *Marson v. Bovet*, 1 Denio, 69, 43 Am. Dec. 651; *Evans v. Gale*, 43 Am. Dec. 614, and note, 17 N. H. 573; *Och v. Missouri, K. & T. R. Co.* 130 Mo. 27, 36 L. R. A. 442, 31 S. W. 962; *Tarkington v. Purvis*, 128 Ind. 182, 9 L. R. A. 607, 25 N. E. 879; *Stull v. Harris*, 51 Ark. 294, 2 L. R. A. 741, 11 S. W. 104; *Frink v. Thomas*, 20 Or. 265, 12 L. R. A. 239, 25 Pac. 717; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163, 13 L. R. A. 299, 9 So. 143.

Bartch, J., delivered the opinion of the court:

The principal and decisive question in this case is whether the contract pleaded and relied upon by the plaintiffs is valid and bars the widow's right of inheritance. So far as material here, it reads: "Whereas, irreconcilable differences have arisen between W. D. Palmer and his wife, Ida M. Palmer, and in consequence thereof a permanent separation between them is desirable, and a divorce proceeding is in contemplation and will be instituted by one or the other of said parties, for the legal dissolution of the marriage tie existing; and, whereas, the said W. D. Palmer is willing to make a satisfactory settlement upon and with the said Ida M. Palmer in lieu of all claims for alimony against him, either temporary or permanent." And then, after mentioning the property the wife was to have, which is the same as that described in the pleadings, and making some stipulations in respect thereof, it concludes: "Now, therefore, this instrument of writing witnesseth the mutual agreement, contract, and settlement above described, and the said Ida M. Palmer hereby acknowledges the receipt of said sum of money cash in hand paid by him, the said W. D. Palmer, and in consideration thereof as well as the amounts heretofore received, hereby acknowledges full and satisfactory payment by him of all claims she has against him, and agrees in consideration thereof to, and does hereby, release him from all liability, past, present or future, for her support, maintenance, or comfort, and they both hereby contract and agree so far as they are

by law permitted to do, each for the other, to full and final separation and dissolution of the marriage relation, and all responsibility of every character of the one for the other is hereby forever ended."

The appellant, among other things, contends that this is a contract between husband and wife, entered into for the purpose of procuring a divorce, or of facilitating such a result, and is therefore collusive and void. The respondents insist that it amounts merely to a separation agreement, settling the property rights of the parties, and that it is authorized by the laws of the state of Georgia, where it was made and executed, and should be enforced, through comity, in this state.

Whether or not the contract is valid and enforceable under the laws and decisions of the state of Georgia, it is not necessary to decide, for it clearly appears from the face of the instrument that it is invalid under our laws and decisions; and, when read in the light of the facts and circumstances disclosed by the evidence, the conclusion becomes irresistible that it ought not to and cannot be enforced in this state, even if enforceable in the state where made. The principle of comity cannot be invoked to enforce the laws of a foreign state which are inimical to the interests of the state where their enforcement is sought. Nor will a contract executed in one state be enforced in another if it is in contravention of the public policy of the latter state. Comity between different states requires no state to uphold or enforce contracts which injuriously affect the welfare of its subjects, or contravene its own laws, institutions, or policy. In such cases, when the *lex loci contractus* comes in conflict with the *lex fori*, comity must yield to the positive law and policy of the forum. Story, Conf. L. § 327; *Pope v. Hanke*, 155 Ill. 617, 28 L. R. A. 568, 40 N. E. 839; *Scamans v. Temple Co.* 105 Mich. 400, 28 L. R. A. 430, 63 N. W. 408.

We are clearly of the opinion that the contention of the appellant is sound. That the contracting parties contemplated a divorce *a vinculo matrimonii* seems apparent. Differences had arisen between husband and wife which appeared to them irreconcilable, and in the very first sentence of the instrument it is stated expressly that "a permanent separation between them is desirable, and a divorce proceeding is in contemplation and will be instituted by one or the other of said parties, for the legal dissolution of the marriage ties existing." This language is plain, unambiguous, and clearly shows that the design of the parties was to dissolve all marital relations existing between them; and, if there is any doubt that the contemplated divorce was a moving cause for the contract, such doubt would seem to be removed upon perusing and considering the concluding paragraph of the instrument, where they say "they both hereby contract and agree so far as they are permitted to do, each for the other, to full and final separation and dissolution of the marriage relation, and all responsibility of every charac-

ter of the one for the other is hereby forever ended." In the face of such language, is it not idle to say or contend, as do counsel for the respondents, that this is a mere contract for separation, and cannot be construed into an agreement to facilitate a divorce? The parties to the instrument say "a divorce proceeding is in contemplation," and that they agree, so far as they think the law permits them to do, "to full and final separation and dissolution of the marriage relation." They, in effect, stipulate that all their marital responsibilities shall be forever ended. It is difficult to see by what process of reasoning such a contract can be construed to be anything else than an agreement to facilitate a divorce, or an attempt to put an end to the marriage status by mutual agreement of the parties. It is true it was not stipulated in the instrument which one of the parties was to institute the divorce proceedings in court, but that appears from the testimony. So the consideration and motive which induced the parties to enter into and execute the contract appears from the evidence, as well as upon the face of the instrument itself.

The wife, in substance, testified that before the execution of the contract she was unwilling to have a divorce; that when given to understand that a divorce was the consideration in order for her to get anything from her husband, who was keeping himself concealed from her, she refused to apply for one; that she then employed Tompkins & Alston, as her attorneys, to assist her in procuring a settlement; that finally, through a mutual friend, her husband offered her the \$6,500 mentioned in the contract, in addition to the other property referred to therein; that upon the advice of her counsel to accept it, as the best she could do under the circumstances, and fearing the mortgage of \$5,000, which was hanging over her, and which might lose her her home, she accepted the offer, with the agreement that she was to file suit for divorce at once, although she had at first refused to do so; and that the next day after the execution of the contract, pursuant to and in fulfillment of the agreement, the divorce proceedings were instituted by her, the papers for which had been prepared as a part of the settlement. The witness further stated: "The reasons Judge Tompkins assigned for advising me to accept the offer of settlement were that there was no property belonging to Mr. Palmer in the state that we could attach; that he had the cash, and he could get out of the state, and I couldn't get service of him; therefore he had put himself in a position where it was thought, if I let that offer go, I wouldn't get anything at all." As to much of this and other similar testimony, the wife is corroborated by that of other witnesses. The witness Alston, speaking with reference to the preparation of the papers for the divorce proceeding before the consummation of the contract, said: "I did that because I knew there would be no opposition to the divorce, as both sides wanted it;" and then, in reference to the question of the settle-

ment, or of fighting the case in the courts, the witness said, "We would have fought it if we had been out in the open, and if he had been where we could have served him." That a divorce was in the mind of at least the husband before the consummation of the contract also appears from a letter in evidence, written by him to his wife, dated July 14, 1899, wherein, after informing her that he had disposed of all his property and would leave the state, he said: "With this letter let all communication cease forever. My cousin Hubert will represent me during my absence. I have instructed him to render any assistance he can in securing a divorce, which seems to be the best thing to do under the existing circumstances." It is true, the witness Culberson, who was the "cousin Hubert" mentioned in this letter, and the husband's attorney, at first testified that his client had left him "no instructions relative to a divorce proceeding to be instituted by his wife or himself," but when confronted with a letter dated July 19, 1899, written by the witness to Mrs. Palmer, wherein he had said, "He [meaning the husband] gave me no instructions to sue for a divorce, but seemed to think that was what you'd do, and asked me to aid you in all ways possible in event you did," and in another letter to her, dated June 3, 1899, had said, "Of course a divorce is inevitable, and after the settlement is made, if it can be made, the next question would be where the divorce proceedings should be instituted,"—he admitted that his client had instructed him to assist in all ways possible to secure a divorce.

Further reference to the evidence in detail would be useless, for, like upon the face of the contract, it is clearly shown by the proof that the procuring of a divorce was in the minds of the parties before and at the time the instrument was executed, and was a moving consideration. The fact that the very next day after the execution of the instrument the wife instituted the divorce proceedings is significant, as tending to show that she endeavored in good faith to comply with her understanding of the agreement, although, as seems evident, from a careful perusal and consideration of the evidence, she never entered into the contract voluntarily, but simply as the victim of circumstances, over which she was led to believe she had no control. The record is quite convincing to the mind that the intention of the husband was to sever all marital relations existing between him and his wife, and that the wife was induced through unfair means to sign the agreement. Such being the case, the contract must be regarded as one executed for the purpose of facilitating the procuring of a divorce, and not as a mere separation agreement. It amounts to a mutual agreement, in writing, of the husband and wife, to dissolve the marriage and absolve themselves from all marital obligations. The agreement, therefore, being one calculated or intended to facilitate the securing of a divorce *a vinculo matrimonii*, is contrary to the policy of the law and is 61 L. R. A.

void. The law is well settled that courts will refuse to enforce any contract, as against public policy, which is intended to promote the dissolution of the marriage status. *Greenhood*, Pub. Pol. 490-491. When that status is created the rights involved are not merely private, but they are also of public concern. The social system and welfare of the state having their foundation in the family, the state is an interested party, and therefore the marriage relations cannot be dissolved except through the sovereign power. It is true, either the husband, or wife, or both, may violate the terms and obligations of the contract; but neither one, nor both combined, can rescind or modify it except as provided by the laws of the land. This subject was discussed in *Hilton v. Roylance*, 25 Utah, 129, 139, 58 L. R. A. 723, 69 Pac. 660, and it was there said: "Marriage, strictly speaking, is not a mere civil contract, but a status created by contract. 1 Bishop, Marr. & Div. § 34. It is true, it is founded in consent of the parties, but the consent is the contract because of which the status is created. Marriage differs from ordinary contracts, in that it can only exist where one man and one woman are legally united for life, whereas ordinary civil contracts may exist between two or more of either or both sexes for any stipulated time. So the marriage relation differs from other contractual relations, in that, when the status is once created, the state becomes an interested party, and thereafter the marriage, with the rights and duties assigned by the law of matrimony, is not subject, as to its continuance, dissolution, or effects, to the mere intention and pleasure of the contracting parties. The marriage, with its privileges, obligations, rights, and duties, which are or may be assigned by the law of matrimony for the establishment of families and the multiplication and education of human kind, continues during the life of the parties, and no dissolution of the status can be effected simply by the mutual consent or agreement of the parties. It is regulated and controlled and can be dissolved only through the sovereign power of the state whenever justice to either or both parties or the welfare of the public demands it." *Norton v. Tufts*, 19 Utah, 470, 57 Pac. 409.

Moreover, where, as appears in this instance, the parties agree that the one shall bring a suit to dissolve the marriage, and that the other will make no defense, or a mere nominal defense, which is indicated by the context, the agreement becomes collusive and fraudulent, and is without validity. A contract of this character may be regarded, not only as conceived in fraud, but as a fraud upon the court, and it comes within the reason of the maxim, *Ex turpi causa non oritur actio*. Mutual agreement of a male and female who are of the requisite age and capacity may create the marriage relation, but it can never dissolve it. The state being founded upon the family, so high is the marriage status regarded by mankind, so necessary is its permanency to promote

the public welfare and private morals, that the state, to every marriage contract entered into within its jurisdiction, makes itself a party, in the sense that it will not permit its rescission or dissolution except for a cause provided by law, the existence of which is to be ascertained by a court of competent jurisdiction, upon evidence regularly submitted, in a proper proceeding instituted in good faith for that purpose. The parties cannot even consent to a decree in open court, nor stipulate as to the facts. The decree must be based on absolute proof. The welfare of humanity, the intelligence and progress of the human race, high moral and social ethics, alike demand this. Any other method or device by which the contracting parties attempt to sever or to facilitate the severing of the bonds of matrimony, in the eye of the law, contravenes public policy, is regarded as *contra bonos mores*, and is void and ineffectual. Therefore a contract which is designed to facilitate the procurement of a divorce, to put an end to the marriage status, and absolve the parties from all their marital obligations, imposed upon them by the law of matrimony, cannot be enforced. "As the policy of the law is to preserve intact the marriage, if possible, all requirements which have for their object, or which contemplate, a future separation between husband and wife are universally held illegal." 15 Am. & Eng. Enc. Law, 2d ed. p. 955. In 1 Bishop, Marr. Div. & Sep. § 1261, the author says: "Since the law makes the public a party to every suit for dissolution or separation, and forbids either form of divorce on the mutual agreement of the parties, or on the connivance of one of them to the other's wrong, any bargaining between them for a future separation or for the procuring of a divorce, or tending to the like end, being contrary to the law and legal policy, is void." In *Seeley's Appeal*, 56 Conn. 202, 14 Atl. 291, it was said: "The law requires husband and wife, in their relation to each other, to perform certain duties and refrain from committing certain wrongs. Taking note of human infirmity, and of certain failure of some to do as it requires, or to refrain from doing what it forbids, it makes possible a method of release from the marriage contract upon proof that its purpose must entirely fail of accomplishment. Every decree of divorce must rest upon proof of such facts as have been by the legislature declared to be sufficient to uphold it; not at all upon considerations as to rights of property; not at all upon the wishes or agreements of the parties. Courts will not enforce any contract which is the price of consent by one party to the marriage relation to the procurement of a divorce by the other. The court is entitled to know in every case whether the particular marriage tie in question is or is not of sufficient strength to bear the strain to which the law has subjected it." So, in *Adams v. Adams*, 25 Minn. 72, it was stated: "That authorities are uniform in holding that any contract between the parties having for its object the dissolution

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of the marriage contract, or facilitating that result, such as an agreement by the defendant, in a pending action for divorce, to withdraw his or her opposition and to make no defense, is void, as *contra bonos mores*." Likewise, in *Phillips v. Thorp*, 10 Or. 494, it was said: "So strict and careful are courts in the administration of this justice, out of regard for the public morals and the general welfare of society, that they will esteem it their duty to interfere upon their own motion whenever it appears the dissolution is sought to be effected by the connivance or collusion of the parties; and all contrivances or agreements having for their object the termination of the marriage contract, or designed to facilitate or procure it, will be declared illegal and void, as against public policy." And again in the same case: "An unlawful agreement, it is said, can convey no rights in any court to either party, and will not be enforced, in law or in equity, in favor of one against the other of two persons equally culpable." In *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345, it was observed: "The law favors marriage, and cannot, therefore, sanction contracts intended to promote its dissolution, by lending itself to their enforcement. We know of no case in the books in which such an appeal to any court to compel the fulfillment of such a contract, or to award damages for its breach, has been successfully made." 1 Bishop, Marr. Div. & Sep. §§ 76, 1312; 2 Am. & Eng. Enc. Law, 2d ed. p. 127; *Footie v. Nickerson*, 70 N. H. 496, 54 L. R. A. 554, 48 Atl. 1088; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801; *Hamilton v. Hamilton*, 89 Ill. 349; *Sayles v. Sayles*, 21 N. H. 312, 53 Am. Dec. 208; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Baum v. Baum*, 109 Wis. 47, 53 L. R. A. 650, 85 N. W. 122; *Collins v. Collins*, 62 N. C. (Phill. Eq.) 153, 93 Am. Dec. 606; *Blank v. Nohl*, 112 Mo. 159, 18 L. R. A. 350, 20 S. W. 477; *Friedman v. Bierman*, 43 Hun. 387; *Simpson v. Simpson*, 4 Dana, 140; *Blank v. Nohl* (Mo.) 19 S. W. 65; *Belden v. Munger*, 5 Minn. 211, Gil. 169, 80 Am. Dec. 407; *M'Kenna v. Phillips*, 6 Whart. 571, 37 Am. Dec. 438.

It will thus be seen that, viewed and tested by the foregoing principles, the contract in controversy clearly contravenes the policy of the law, and is void. Nor does it appear that the consummation of the transaction was the result of fair dealing. The conduct of the husband toward his wife was not such as to stamp it with fairness and justness. That the execution of the instrument by the wife was obtained through unfair advantage and unwarranted coercion on the part of the husband is a conclusion irresistible from an examination of the evidence. His consent and furnishing of the means for his wife to visit her parents; his selling out their property without her knowledge or assent, and leaving the state with the property in cash, while she was absent; his instructions to his attorneys to conceal

his whereabouts; his keeping his wife in ignorance of the value of and amount obtained for the property; his threat that he would never return to the state while the one whom he had promised to love, protect, and support was in it; his grossly unequal division of the property, which, with the assistance of her father, they had accumulated during their married life,—all these things, considered with the fact that his own intemperate habits, and consequent neglect of the duties he owed his wife, had brought on the estrangement then existing between them, savor much of the fraudulent, and militate strongly against the fairness and justice of the transaction which culminated in the contract. Not only the law, but a man's most sacred honor, as well as every principle of justice and equity, demands that he treat his wife at all times, and under all circumstances, respectfully, fairly, openly. Surely nothing less was due her. In that trying hour, when the cloud of disappointment and adversity was hanging over her, when she was to attach her signature to an instrument calculated to sever an alliance which had been made for life, she had a right to see her husband and talk with him face to face, and he had no right to conceal himself or anything relating to their affairs from her.

The record in this case is such as impels one to the thought that this is one of the sad, unfortunate cases where liquor, that prince of evil, blasted happy hearts and destroyed a happy home.

We are of the opinion that the appellant is not barred of her right of inheritance.

Having taken the view that the contract is without validity, it is unimportant to discuss the other points presented.

The judgment must be reversed, with costs, and the cause remanded to the court below, with directions to set aside the present findings of fact and the decree, and enter findings of fact and a decree in accordance herewith, in favor of the appellant. It is so ordered.

Baskin, Ch. J., and McCarty, J., concur.

Rehearing denied.

SALT LAKE CITY, *Appt.*,
v.

SALT LAKE CITY WATER & ELECTRICAL POWER COMPANY *et al.*, *Respts.*

(24 Utah, 249.)

1. One who has appropriated water from a flowing stream, and devoted it to a beneficial use, has a vested right thereto

NOTE.—As to right of prior appropriation of water, see also *note* to *Isaacs v. Barber* (Wash.) 30 L. R. A. 665; also *Benton v. Johncox* (Wash.) 39 L. R. A. 107; *Cache La Poudre Reservoir Co. v. Water Supply & Storage Co.* 61 L. R. A.

with which no court can interfere, or permit subsequent appropriators to do so.

2. An appropriator does not forfeit his right to use the water by the fact that he has not put it to actual use, where he has prosecuted the construction of the necessary ditches and flumes with reasonable diligence, but has been prevented from making use of the water by the opposition of prior appropriators.

3. The right to use a canal for the conveyance of water may be appropriated under the right of eminent domain.

4. Appropriated water is subject to secondary appropriation above the head of the ditch of the prior appropriator for the purpose of furnishing power, the water to be delivered to the prior appropriator near the head gate of his ditch and the point where it is needed for use by him, if the rights of the latter are not interfered with.

5. The destruction of a section of the ditch of a prior appropriator, and unlawful interference with his control and regulation of the flow of water appropriated by him, are not effected by taking the water from the river above his head gates, by a secondary appropriator, for the generation of power, and delivering it into his ditch above the point where it is needed by him, where he may still have use for such section of the ditch, and may manage his head gates and control the water in the canal.

6. A prior appropriator having the right to change his point of diversion cannot deny the right of a subsequent appropriator to take water near his head gate, until he has perfected his arrangements and appliances for effecting the change.

7. A constitutional prohibition of the alienation of the source of water supply by municipal corporations does not prevent a secondary appropriation of the water, to be used above the point where it is needed by the municipality, without injury to its rights.

8. The claimants of water rights, who, by junior appropriations and attempts to impound the water, render necessary the appointment of commissioners to regulate the respective rights of the parties, may be charged with the expenses, to the exclusion of the prior appropriators.

On Rehearing.

9. In considering a cause on appeal the court may properly look into the record of another appeal in a suit between the same parties which it has recently decided.

10. An appropriation of water which has been made effectual by use of a tall race under agreement with the prior appropriator cannot be rendered ineffectual by the withdrawal of the consent and a resort to litigation to prevent further use of the water.

11. The generation of electricity to furnish light, heat, and power to the people of adjoining towns is a beneficial use for which water may be appropriated.

12. So long as a prior appropriator's use of the water is neither interfered with nor abridged, he has no just cause to com-

(Colo.) 46 L. R. A. 175, with *note* as to periodical appropriation of water; *Water Supply & Storage Co. v. Larimore & W. Irrig. Co.* (Colo.) 46 L. R. A. 322, with *note* as to right to store appropriated water; *Smith v. Dunif*

plain, although another appropriator above him also uses the same water for a beneficial use.

(*Baskin, J., dissents.*)

(February 1, 1902.)

APPEAL by plaintiff from a judgment of the District Court for Salt Lake County in favor of defendants in an action brought to quiet title to the waters of the Jordan river. *Affirmed.*

The facts are stated in the opinions.

Messrs. Richards & Varian, with *Mr. F. B. Stephens*, for appellant:

The city's canal in on the east side of the river, and the power company's plant is on the west side, and, in order to utilize the city's water, it must take it out of the river above the city's point of diversion and on the opposite side, then convey it through the canal of the Utah & Salt Lake Canal Company, one of the plaintiffs, down to the power house, and flume it across the river for discharge into the city's canal. An appropriation of water could not be made under these circumstances, unless, by contract or condemnation, the right to interfere with the use and control of the city's water and canal was acquired.

McPhail v. Forney, 4 Wyo. 556, 35 Pac. 774.

The character of the use to which the city has devoted this water is that of a consumer, and by it notice was given to all the world that, after the water had been taken into the canal and system of the city, of necessity, it could not be subjected to any other or further appropriation by anyone.

Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 49 Fed. 431.

The city is charged, as a public trustee, with the management and control of all this class of property, which is not subject to be devoted to any other use.

Googins v. Boston & A. R. Co. 155 Mass. 505, 30 N. E. 72; *Fisher v. Bountiful City*, 21 Utah, 36, 59 Pac. 520; 1 Lewis, Em. Dom. § 56, note 10.

Such property is not held by the municipality in its proprietary capacity, but is of such public utility and necessity that it is held in trust for the use of the citizens.

New Orleans v. Morris, 105 U. S. 602, 26 L. ed. 1185; *Meriwether v. Garrett*, 102 U. S. 513, 26 L. ed. 205; *Ogden City v. Bear Lake & River Waterworks & Irrig. Co.* 16 Utah, 451, 41 L. R. A. 305, 52 Pac. 697; *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469, 12 S. W. 924; *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 30 L. R. A. 848, 62 N. W. 975.

The eminent domain act of this state "must be construed as are all such acts, as having regard only for the taking of private property, unless there is either express

or clearly implied authority to extend them further."

Seattle & M. R. Co. v. State, 7 Wash. 150, 22 L. R. A. 217, 34 Pac. 551.

There cannot be a complete appropriation which does not include the use of the water.

Hague v. Nephi Irrig. Co. 16 Utah, 429, 41 L. R. A. 311, 52 Pac. 765; *Long, Irrigation*, §§ 36, 47; *Black's Pom. Water Rights*, § 50; *Nevada County & S. Canal Co. v. Kidd*, 37 Cal. 311.

On rehearing.

Mr. George L. Nye, also for appellant:

In order to acquire a vested right in the use of water, there must be an appropriation or segregation of the quantity needed for the particular use, from the body of the natural stream or source of supply.

If there was no statutory notice given, the time of the beginning of the physical work is made available, by the doctrine of relation, as the date of the appropriation.

Kinney, Irrigation, § 168; *Black's Pom. Water Rights*, § 55.

No appropriator has any property in the corpus of the water of a public stream. Until it is lawfully appropriated and diverted, it must continue to flow in its natural channel, but, when it is appropriated and diverted into the ditches or conduits constructed to receive it, by one who, having a beneficial use for it, intends to forthwith apply it to such use, to the extent of the quantity so taken and diverted, the corpus does belong to the appropriator.

Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 49 Fed. 431; *Black's Pom. Water Rights*, § 58.

The appropriator has the right to insist that the water continue flowing as it did when he first made the appropriation.

Kinney, Irrigation, § 249; *Black's Pom. Water Rights*, § 64; *Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co.* 60 Cal. 410; *Phoenix Water Co. v. Fletcher*, 23 Cal. 482; *Natoma Water & Min. Co. v. McCoy*, 23 Cal. 491; *Bear River & A. Water & Min. Co. v. New York Min. Co.* 8 Cal. 327, 68 Am. Dec. 325; *Kidd v. Laird*, 15 Cal. 163, 76 Am. Dec. 472; *Nevada County & S. Canal Co. v. Kidd*, 37 Cal. 311; *Ware v. Walker*, 70 Cal. 595, 12 Pac. 475.

The control and regulation of the flow of water in the city's canal,—the dominion over all of it,—being necessary to the beneficial operation of the system, is a property right.

Fisher v. Bountiful City, 21 Utah, 36, 59 Pac. 520; 1 Lewis, Em. Dom. § 56, note 10.

The power company never made and completed an appropriation of water.

McPhail v. Forney, 4 Wyo. 556, 35 Pac. 774; *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732; *Taylor v. Abbott*, 103 Cal. 424, 37 Pac. 408; *McGuire v. Brown*, 106 Cal.

(Mont.) 50 L. R. A. 737; and *Longmire v. Smith* (Wash.) 58 L. R. A. 308.

As to abandonment or loss of rights of prior appropriators of water, see *Hewitt v. Story* (C. C. App. 9th C.) 30 L. R. A. 265, and note; also *Hargrave v. Cook* (Cal.) 30 L. R. A. 390; 61 L. R. A.

Ada County Farmers' Irrig. Co. v. Farmers' Canal Co. (Idaho) 40 L. R. A. 485; *Cache La Poudre Reservoir Co. v. Water Supply & Storage Co.* (Colo.) 46 L. R. A. 175; and *Smith v. Deniff* (Mont.) 50 L. R. A. 737.

669, 30 L. R. A. 384, 39 Pac. 1060; *Gregory v. Nelson*, 41 Cal. 278.

No appropriation having become perfected, no cause of action existed, and the power company had no title to be quieted, either at the beginning or at the end of the suit.

Kipney, Irrigation, § 167; *Black's Pom. Water Rights*, § 54; *Rincon Water & Power Co. v. Anaheim Union Water Co.* 115 Fed. 547.

Messrs. L. R. Rogers and Ogden Hiles, for respondent power company:

The failure of the power company to apply and use the water appropriated is not its fault or negligence. It has been prevented by the opposition of the city.

Union Mill & Min. Co. v. Danberg, 81 Fed. 109.

Under such circumstances the statute must be liberally construed and applied, in favor of a bona fide appropriator.

Osgood v. Eldorado Water & D. G. Min. Co. 56 Cal. 571.

Under the statutes of eminent domain, where two public uses can stand together, without impairment or impediment of one by the other, they must both so stand.

Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474, 65 Pac. 735; *Boston Water Power Co. v. Boston & W. R. Corp.* 23 Pick. 360; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *West River Bridge Co. v. Dia*, 6 How. 507, 12 L. ed. 535; *Lewis, Em. Dom.* § 274.

Neither the city nor any other person can ever acquire a proprietary right in the corpus of the water of the lake or river. The right of the city is strictly usufructuary.

Kidd v. Laird, 15 Cal. 180, 76 Am. Dec. 472; *Los Angeles v. Baldwin*, 53 Cal. 469.

Messrs. Brown & Henderson, James H. Moyle, Bennett, Harkness, Howat, Sutherland, & Van Cott, Rawlins, Thurman, Hurd, & Wedgwood, Ferguson, Cannon, & Tanner, Wilson & Smith, Stewart & Stewart, Daniel Harrington and M. M. Warner for other respondents.

Bartch, J., delivered the opinion of the court:

This action was brought to quiet title to the waters of the Jordan river, and the defendants and interveners are quite numerous. At the trial the court made findings of fact and of law, and entered a decree, *inter alia*, that the defendant Salt Lake City Water & Electrical Power Company is the owner of and entitled to the right to use all the waters of the river flowing in the channel at and above a point where the company's power plant is situated, and to convey such water to its power plant for use in operating the same, the water then to be returned to the stream and certain irrigating canals; and decreed to each of the other parties to the suit a certain portion of the water flowing in the stream, and appointed a commissioner at a certain monthly salary to superintend and direct the measurement

and division of the water distributed by the decree in accordance therewith, to direct, supervise, and inspect all means and appliances for the diversion, conveyance, and use of the water, and to report to the court from time to time any violations of the provisions of the decree; the court retaining original jurisdiction of the case for the purpose of making all necessary orders and decrees to make effectual the rights awarded and preserved. The plaintiff, Salt Lake City, now challenges the correctness of the decree by this appeal.

It is insisted by the appellant that the court erred in decreeing as follows: "That the said city and canal and irrigation companies shall at all times allow to flow unimpeded down through the channel of said river a sufficient quantity of water, which, when added to the accretions to the river from seepage and other sources, will furnish at the various points of diversion and measurement the several quantities of water herein awarded to the West Jordan Milling & Mercantile Company, the Utah Mattress & Manufacturing Company, the United States Mining Company, William Cooper, Jr., and Bennion & Bennion for the operation of their several mills and factories; and during the irrigation season of each year shall allow to flow unimpeded through the channel of the river such additional quantity of water as will, when added to the accretions from seepage and other sources, supply, at the various points of diversion and measurement, the quantity of water herein awarded to the several farmers and landowners taking water for irrigation purposes through the Gardner mill race, the Galena canal, the Beckstead Irrigating Company's canal, the Mousley ditch, Bennion & Bennion mill race, and the Cooper mill race, as hereinbefore set forth; and during the winter, or nonirrigating season, four (4) cubic feet of water for the use of the stockholders of the Beckstead Irrigating Company for domestic and culinary purposes. . . . That, subject to these limitations, and to the limitations and conditions contained in the agreement of compromise entered into in 1885 between Joseph H. Colladge and others and said city and canal and irrigation companies, the said city and canal and irrigation companies have the right at all times to shut off, impound, and store the entire flow of the Jordan river, and hold and save the same for future use, to the extent which, in their judgment, their interests may require." It is urged that this paragraph of the decree restricts the right of storage to the extent of making it subject at all times to the use of prior appropriators, and that under its provisions the quantity of water awarded to the prior appropriators must at all times be permitted to flow past the impounding dam, without regard to the necessities for impounding and storing the water, the impounding dam having been constructed about the year 1889. These provisions of the decree, it is claimed, are inconsistent

with and unsupported by the findings of fact.

Upon careful examination of the findings in support of the part of the decree above quoted, we are not prepared to assent to the position here assumed. The appellant does not seem to recognize the force and effect to which the limitations contained in the last part of the above quotation are entitled. It is true that the court also found that in dry seasons the flow of the river became insufficient to supply the needs of the several appropriators and users; that in the year 1889 Salt Lake City and certain canal companies entered into an agreement by which they jointly dredged the bed of the river and removed natural obstructions therein, thereby becoming enabled to draw the water from Utah Lake through the channel of the river at a level 22 inches lower than before such dredging; that during the years 1889 and 1890 they constructed a new dam in the river, to enable them to store the water of the lake for use, when needed, and contributed equally to the cost of dredging, of construction of the dam, and of its maintenance ever since; that in storing the water they caused certain lands adjacent to the lake to be flooded, in consequence of which a number of suits were commenced by farmers of Utah county, which finally resulted in an agreement of compromise, made in the year 1885, whereby the owners of those lands granted the city and canal companies the right, so far as the flooding of the lands was concerned, to hold back and store the waters in the lake until they should rise to a point 3 feet $3\frac{1}{2}$ inches above the low-water mark, which point has since been known as "compromise point," and its exact location fixed and determined by judicial decisions; and that said compromise agreement contains a provision for the election annually of a board of five persons, who have since been known as "Utah Lake Commissioners," under whose direction the rights granted by the agreement should be exercised by the city and canal companies. We perceive nothing in the findings of fact thus far quoted and referred to which sustains the contention of the appellant on this point. It is clear that the owners of the flooded lands, who were parties to the compromise agreement and permitted the storage of the water of the lake, were not the farmers and mill owners or prior appropriators mentioned in the above quotation from the decree. Nor does it here appear that such prior appropriators were parties to the suits, or how their rights are affected by the decisions referred to in the findings. In the absence of any showing that the prior appropriators referred to in the provisions of the decree above quoted were parties to the suits mentioned, or to the compromise agreement, or in some way assented to the storage of the water of the lake which they had appropriated, it is difficult to see upon what ground that part of the decree which simply grants them such rights as accrue by virtue of prior appropriation is inconsistent with and unsupported by those find-

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ings. It is, however, further found: "That ever since 1885 to the present time the said city and said canal and irrigation companies have openly, notoriously, continuously, and adversely, against all the world, maintained and used said Utah Lake as a reservoir, and said dam as an impounding dam to hold back and store the waters in the lake, when necessary to do so, in order to supply their needs during seasons of scarcity of water, and the said city and canal and irrigation companies have each contributed an equal share of all costs and expenses of all matters growing out of such joint enterprises. That said right of storage has been since the year 1885 recognized and assented to by all the parties hereto, except the Salt Lake City Water & Electrical Power Company, as necessary to preserve and save the waters of the river for the uses of all appropriators, and said right of storage was and is necessary for such purposes." It will be noticed that the court here found that ever since 1885—that is, since the making of the compromise agreement—the city and canal companies have stored the waters in Utah lake. The question is, To what waters did the court refer? To all the waters which would have naturally flowed in the channel of the stream, had it not been for the impounding dam obstructing them, or to the waters which the city and canal companies were permitted to store by virtue of the agreement? The evidence is not before us, and we are therefore unable to ascertain from the proof what the actual fact was. Considering, however, the paragraph of the findings of fact above quoted with those immediately preceding, and relating to the suits and transactions between the owners of the flooded lands and the city and canal companies, we are of the opinion that the court had reference to the storing of such waters as were permitted to be stored under the terms of the agreement. This is also explanatory of the fact found "that said right of storage has been, since the year 1885, recognized and assented to by all the parties hereto," because the prior appropriators had no cause for complaint so long as there was no interference with their rights. This view is strengthened by reference to the findings of fact relating to the several prior appropriators. Take, for instance, the case of the United States Mining Company. The court found that that company, by its predecessors in interest, in 1873 appropriated for the mill and smelter "of the theretofore unappropriated waters of the Jordan river a sufficient quantity to supply and operate said smelter and mill, which were from that time on operated by water power by the various owners thereof, and water diverted from the Jordan river and conveyed through said canal for that purpose; that the said canal has since been known as the 'Galena canal;'" "that ever since the construction of said canal, and until some time in the year 1897, the grantor's predecessors in interest of the said defendant continued to carry water through said canal from the said river for the use of and to use

the same for the purpose of operating and supplying the said mills and works incident thereto, and for such purpose, and whenever the interests of their business required it, appropriated and used seventeen (17) cubic feet of water per second of time, measured at the penstock of said mill." It was further found that after 1897 the mill was torn down for the purpose of erecting new reduction works, and that ever since that year the canal has been maintained for the purpose of using the water on the same site. Here are findings, not only that the mining company, one of the prior appropriators, is the owner of 17 cubic feet per second of the water of the river, but also that the same was appropriated in 1873, and used ever since for the purpose of operating its mills, and that it was so used whenever the interests of the business required it. So, likewise, the court found a continuous use of the water for a beneficial purpose by each of the other prior appropriators. From anything that appears in the findings of fact, it is difficult to perceive upon what theory the city and canal companies should be permitted, at their mere will and discretion, to interfere with a supply of water which has been appropriated and used continuously for a quarter of a century. According to those findings these prior appropriators have vested rights in the use of the water appropriated by them with which no court is warranted to interfere, or to permit subsequent appropriators to do so. There is nothing in the case of *Salt Lake City v. Colladge*, 13 Utah, 522, 45 Pac. 891, nor, so far as we are aware, in any other decision of this court, which militates against the views hereinbefore expressed. We conclude that upon this point the decree is neither inconsistent with, nor unsupported by, the findings of fact.

The appellant also complains of that portion of the decree wherein the court adjudged that the Salt Lake City Water & Electrical Power Company is the owner of and entitled to the right to use, and has the right to convey, to its power plant, for the purpose of operating the same, "all the waters of the river to which Salt Lake City is entitled by this decree, and to take into its canal, and to deliver back into the canal of the said Salt Lake City after such use, all of said water, undiminished in quantity and unimpaired in quality, so long as said Salt Lake City shall continue to divert its water at its present point of diversion, and to use the same at its present place of use; provided, however, that the right of the said Salt Lake City Water & Electrical Power Company to so take and use the city's said water shall be effective only after said power company has established by judgment of the court in an action at law its right to make connections with its flume and the said city's canal, and shall have paid to said city any sum which may be awarded to said city by such judgment, by way of damages therefor." It is insisted, among other things, that the finding of fact included in 61 L. R. A.

finding 16, upon which this part of the decree was based, can only support a decree that the power company, at the present time, has made no appropriation, and is entitled to no water. The court, on the question here presented, found: That in 1897 Dull and Stephens, acting for the predecessor in interest of the power company, by posting and filing for record notices for that purpose, "appropriated the entire flow of the Jordan river (except the waters theretofore appropriated by the East Jordan Irrigation Company and the Utah & Salt Lake Canal Company) at a point immediately south of the old dam, so called, in section 22, township 4 S., of range 1 W., for the purpose of operating a power plant for the generation of electrical power, the waters so sought to be appropriated to be returned, after having been used for power purposes at such plant, undiminished in quantity and unimpaired in quality, to said river; and such appropriation was declared in said notice to be subject and secondary to all vested rights of prior appropriators." "That in October, 1899, the said defendant power company posted, filed, and recorded a notice that it had appropriated the waters of Jordan river theretofore appropriated by Salt Lake City, and which said city was entitled to flow through its canal, such water to be conveyed through the canal of the Utah & Salt Lake Canal Company to said power plant, and, after passing through the wheels of said plant, to be returned to the city's canal at a point opposite the power plant, undiminished in quantity and unimpaired in quality. That it is practicable for said defendant company to use the waters of said river, the right of use of which is also in said South Jordan Canal Company and said Salt Lake City, through the wheels and machinery at said power house of said power company, and to discharge the same undiminished in quantity and unimpaired in quality into the said canal of said South Jordan Canal Company and that of Salt Lake City opposite the said power house by means of proper machinery and appliances therefor at said power plant. That the Salt Lake City Water & Electrical Power Company is the owner in fee simple of the land on which the said power house and plant and its appurtenances stand, being about twenty (20) acres of land, situated on the banks of said Jordan river to the thread of the stream." The court also found that the power plant is operated by turbine water wheels, which at full capacity require 700 cubic feet of water per second; that the plant has been operated continuously since 1899, except from December 15, 1900, to January 12, 1901; that to make the appropriation of the use of the water complete and effective the power company requires the use of the city's canal for the purpose of discharging water after it has been used in the plant into the canal through a flume across the river; and that a suit has been instituted to condemn the right to connect with the canal. The court thus found that

appropriations of the water were made which were effectual to confer on the power company for the purpose of operating its power plant, the right to a secondary use of all the water of the river, except that previously appropriated by the East Jordan Irrigation and the Utah & Salt Lake Canal companies; that it is practicable for the power company for such purpose to use the water of the river, the right of use of which was also in the city, by conveying it through the canal of the Utah & Salt Lake Canal Company, and, after using it, to propel the machinery of the power plant and generate power, to discharge it into the city's canal opposite the power house, undiminished in quantity and unimpaired in quality; and that the power company is the owner of the land on which the power plant is situated. The fact that the power company has thus far been unable to so use the water, which the city also has the right to use, is immaterial in determining the validity of the appropriations of the water by that company. It is quite evident that the company has been diligent in providing the necessary ditches and flumes to use the water, and that it has been prevented from using the same through the opposition of the city. This appears from the pleadings, for it is alleged by the power company and admitted by the city that the power company did construct a flume across the river, and connect it with the city's canal, and thereupon for a time, and until it was restrained from doing so in an action brought by the city, did deliver the city's water into its canal. Nor does it appear that any intervening right has accrued since the appropriations by the power company, as against its right. Having thus prosecuted the construction of its ditches and flumes with reasonable diligence, the power company cannot, under these circumstances, be held to have forfeited any rights secured to it by its appropriations because of a failure to use the water. "In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam or ditch or flume or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence." *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73. Upon careful examination it is evident that the portion of the decree here under consideration is supported by the findings upon which it was founded.

Nor do we think the decree is void on the ground, as claimed by the appellant, that it is indefinite, uncertain, and dependent upon a contingency. It definitely adjudges and establishes the rights of the power company acquired by the appropriations, and then simply limits the use of the water until the power company establishes in another forum its right to make connection of its flume with the city's canal. As to 41 L. R. A.

the validity of the appropriations, and the rights secured thereby, the decree appears to be, not only definite and certain, but is dependent upon no future event, and constitutes a present judgment. Under these circumstances we cannot regard the case of *Battell v. Lowery*, 46 Iowa, 49, relied upon by the appellant, as in point, and a controlling authority. Nor do we think, as claimed for the appellant, that it sufficiently appears, as matter of law, that such property as the city's canal is not subject to condemnation. But, since a suit is now pending to condemn the right to make connection with the city's canal opposite the power plant, we will refrain from deciding whether, in this particular instance, and under the circumstances as they may be shown to exist, the law of eminent domain, under our statutes, applies. That our statutes are broad enough to cover, under ordinary circumstances, that class of property, we entertain no doubt. Rev. Stat. §§ 3588, 3590, 3596. Under the statutes of eminent domain the law seems to be well settled that, where two public uses can stand together without material impairment or impediment of one by the other, they must so stand. This court so held in *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 65 Pac. 735. In deciding a like question in the case of *Boston Water Power Co. v. Boston & W. R. Corp.* 23 Pick. 360, Mr. Chief Justice Shaw said: "Both uses may well stand together, with some interference of the later with the earlier, which may be compensated for by damages." *Lewis, Em. Dom.* § 274; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535; *Re Touranda Bridge Co.* 91 Pa. 216; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 454, 44 Am. Dec. 556.

The appellant also contends that the appropriation and use of the water by the power company would result in the abandonment and destruction of a mile and a half of the city's canal, and practically take from the municipality the actual control and regulation of the flow of its own water. The record does not seem to sustain this contention. The decree gives the power company no right to interfere with the management, or to sequester the city's canal. It is true, its canal is on the east side of the river, while the power company's plant is on the west side, and that, in order to utilize the water, the power company must take it out of the river above the city's point of diversion, and on the opposite side, thence convey it through the canal of the Utah & Salt Lake Canal Company down to the power house, and flume it across the river for discharge into the city's canal; but this does not require an abandonment of that portion of the canal, and the city may still have use for it to convey the water which the power company may not use through its plant. Nor does it necessitate any interference with the city in the management of its headgates, or the control of the water in its canal. Such management and control re-

main absolutely in the city, and are among its rights; but the city has not the exclusive right to manage and control the use of all the water in the lake or flowing in the river. Such water is *publici juris*, and others have the same right to use it as the city, so long as they do not interfere with the city's use, for the use by one must not interfere with the use by another. Nor has the city, by virtue of its appropriation, acquired a right to the corpus of the water in the lake or river. Not until the water is conducted into its canal does the corpus belong to the city. Then, however, it has the right to use it in any manner it chooses, for any beneficial purpose. The right of the city to the water is strictly usufructuary, and not proprietary, and the use by the power company does not appear to interfere with that right. The decree requires the power company to discharge the water, after use by it, into the city's canal, undiminished in quantity and unimpaired in quantity. It is simply a case of two uses of the same water under a primary and secondary appropriation, neither one necessarily interfering with the other; and both uses are beneficial to the public. In such case the prior appropriator cannot complain simply because of the secondary use, but he has a right to insist that the water shall be subject to his use and enjoyment to the extent of his appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. Above his headgates, however, the water in the stream or lake is not his personal property, and he does not become the owner of it until he acquires control of it in artificial ditches or reservoirs. *Parks Canal & Mtn. Co. v. Hoyt*, 57 Cal. 44; *Nevada County & S. Canal Co. v. Kidd*, 37 Cal. 282; *Kidd v. Laird*, 15 Cal. 162, 76 Am. Dec. 472; *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769; *Los Angeles v. Baldwin*, 53 Cal. 469; *McGuire v. Brown*, 106 Cal. 660, 30 L. R. A. 384, 39 Pac. 1060.

It is further contended that this decree is erroneous in that it prevents the city from, in the future, changing its point of diversion, so as to take the water out upon a higher level. It does not appear from the record that the question whether or not the city has the right to change its point of diversion was presented to or decided by the trial court, and therefore we have no power to pass on it here. If such right exists on the part of the city, we perceive nothing in this decree to prevent its exercise. In fact, the decree expressly limits the use of the city's water by the power company to the present point of diversion, for the provision relating to this subject is that the power company has the right to use such water for the purpose of operating its plant "so long as said Salt Lake City shall continue to divert its water at its present point of diversion, and to use the same at its present place of use." The decree thus deals simply with the present place of diversion and the present place of use. If, therefore, 61 L. R. A.

the city, before this controversy arose with the power company, had the right to change its point of diversion, it would seem clear that this decree does not interfere with such right; and hence, if it be assumed, for the purpose of argument, that the appellant has the unquestioned right to change its place of diversion and use, still the right of the power company to use the water without diminishing it in quantity or impairing it in quality, until such time as the city has completed its arrangements and appliances to make the change in the place of diversion and use, cannot be denied. Relating to a like point, the supreme court of California, in *Nevada County & S. Canal Co. v. Kidd*, 37 Cal. 282, said: "A party may to-day take up a site for a dam and canal, and claim the waters of a river, to be diverted at that point, and immediately commence work with a view of appropriating the water to his use for mining purposes, and yet, although laboring with all diligence, be unable actually to use the water for any purpose for years to come. Until he can use it, another party may divert the whole water and use it, provided he can do so without injury to the plaintiff's dam or canal, or the progress of his work, and there would be no injury to the plaintiff's water right, and no right of action to establish the water right, or recover the water. . . . The property is not in the corpus of the water, but is only in the use." We are thus of the opinion that the decree, as to this point, is not erroneous.

Nor do we think a secondary water right, such as is claimed by the power company, is inhibited by § 6, art. 11, of the Constitution. That provision of the fundamental law prohibits the leasing, selling, aliening, or disposing of waterworks, water rights, or sources of water supply by municipalities, and doubtless was also intended as an interdiction against the power of the legislature to authorize municipalities to lease, sell, alien, or dispose of such property; but there is nothing to indicate that it was the intention of the framers of the Constitution thereby to inhibit the acquisition of secondary water rights, such as the one here under consideration. We, therefore, regard the constitutional provision above referred to as having no application to this case.

It is also insisted that the court erred in providing in the decree that the monthly compensation of the commissioners appointed to carry the decree into effect, and their necessary expenses in so doing, should be paid by the city, the four canal companies, and the power company. It appears from the record that the other parties to this suit were all prior appropriators; that they made their appropriations and used the water at a time when there was no scarcity of water in the river, and prior to the scheme for impounding water in the lake; and that the decree for a systematic distribution of the water among all the parties—appropriators—was made necessary by the acts of those designated to bear the burden. Under these circumstances, and having no opportunity to

examine the proof, the evidence not being before us, and in the absence of anything in the record showing that the disposition of the burden of carrying the decree into effect made by the trial court, who had an opportunity to hear and consider the evidence, is unjust or unlawful, we must decline to interfere with the distribution of the burden made in the decree.

Upon the whole case, after careful examination and consideration of the various points presented, we are of the opinion that the court committed no prejudicial error. *The judgment must, therefore, be affirmed, with costs.*

It is so ordered.

Miner, Ch. J., concurs.

Baskin, J., dissenting:

It appears from the findings of fact that long before the inception of the alleged right of the Salt Lake City Water & Electrical Power Company to the waters of the Jordan river claimed by it, Salt Lake City and the said canal and irrigation companies had appropriated all of the waters of said river flowing therein during the dry seasons at points several miles below Utah lake, from which the river flows, which had not previously been appropriated by parties further down that stream; and had constructed canals, each several miles in length, into which, by means of headgates, the waters so appropriated had for a long time been diverted and used for beneficial purposes by said city and the said canal and irrigation companies, and that they have ever since continued to so divert and use the same. In the 14th finding, the following facts were found by the trial court: "That in dry seasons the flow of the Jordan river became insufficient to supply the needs of the several appropriators and users, as hereinbefore set forth, and in the year 1889 Salt Lake City, the Utah & Salt Lake Canal Company, the East Jordan Irrigation Company, the South Jordan Canal Company, and the North Jordan Irrigation Company entered into an arrangement by which they jointly dredged the bed of the Jordan river, and removed natural obstructions therein, which enabled them to draw the water from Utah lake, through the channel of said river, at a level 22 inches lower than before such dredging; and during the years 1889 and 1890 the said city and canal and irrigation companies constructed in the river at a point about three-quarters of a mile south and above the old dam a new dam to enable them to hold back and store the waters of the lake for use when needed, the city and each of said canal and irrigation companies contributing equally to the cost and expense of such dredging and of the construction of said new dam, which amounted to over — thousand dollars, and of its maintenance since. That immediately thereafter the city and said companies commenced, by means of said dam, to hold back and store the waters in said Utah lake, and in doing so caused certain lands lying and adjacent to the lake to

be flooded, in consequence of which a series of suits were commenced by the farmers of Utah county owning such lands against said city and canal and irrigation companies, which finally resulted in an agreement of compromise entered into in the year 1885, by the terms of which the owners of said lands granted to the said city and canal and irrigation companies the right, so far as their interests or the flooding of their lands was concerned, to hold back and store the waters in the lake until they should rise to a point 3 feet and 3 inches above the low-water mark, which point has since been known as 'compromise point,' and the exact location of which has become fixed and determined by judicial decisions. Said compromise agreement provided for the election annually by the parties thereto of a board of five persons, who have since been known as 'Utah lake commissioners,' under whose direction the rights granted by said agreement should be exercised by the said city and canal and irrigation companies. That ever since 1885 to the present time the said city and said canal and irrigation companies have openly, notoriously, continuously, and adversely against all the world, maintained and used said Utah lake as a reservoir, and said dam as an impounding dam, to hold back and store the waters in the lake, when necessary to do so, in order to supply their needs during seasons of scarcity of water; and the said city and canal and irrigation companies have each contributed an equal share of all costs and expenses of all matters growing out of such joint enterprises. That said right of storage has been, since the year 1885, recognized and assented to by all the parties hereto, except the Salt Lake City Water & Electrical Power Company, as necessary to preserve and save the waters of the river for the uses of all the appropriators, and said right of storage was and is necessary for such purposes. That each year, during the early part of the irrigation season, the city and each of said canal and irrigation companies have taken from the river and conveyed through their respective canals water to the full capacity of such canals for the use of those entitled to use water therefrom. That as such seasons advanced, and the waters receded, the superintendents of the several canal and irrigation companies and a representative of the city would make a division of the waters so long as they could agree thereon, and later in the season, when an accurate division would be called for by any of said companies, an engineer would be employed to measure the waters, and divide the portion to which the city and each of said canal and irrigation companies were entitled equally between them. That in making such divisions there has been allowed to flow down the channel of the river such quantity of water as would, with the accretions arising from seepage or other sources, supply the necessities of the prior appropriators." The trial court further found that: "In October, 1899, the said defendant power com-

pany posted, filed, and recorded a notice that it had appropriated the waters of Jordan river theretofore appropriated by Salt Lake City, and which said city was entitled to flow through its said canal, such water to be conveyed through the canal of the Utah & Salt Lake Canal Company to said power plant, and after passing through the wheels of said plant, to be returned to the city's canal, at a point opposite the power plant, undiminished in quantity and unimpaired in quality. And in November of the same year a similar notice was posted, filed, and recorded by the said Salt Lake City Water & Electrical Power Company giving notice of the appropriation by it of the waters of the South Jordan Canal Company, to be used in the same way for the same purpose, and returned to the South Jordan canal in a similar manner. . . . That the appropriation of the use of such water for and on behalf of the power company, in order to be completed, requires the use of the city's canal by said power company through a flume across the Jordan river and into the city canal at a point about one mile and a half below the head thereof, and that without such use by the power company of the city's canal, the appropriation of the use of such water by the power company cannot be made effective. That the said Salt Lake City Water & Electrical Power Company has commenced an action in this court to condemn the right to use the canal of Salt Lake City in the manner aforesaid, and to make effective its appropriation of the use of the city's water. That the Salt Lake City Water & Electrical Power Company, at the time when it made and filed its notices of appropriation of the waters of the Jordan river and located and constructed its power plant upon the said river, had full knowledge and notice of the several rights of said Salt Lake City and the several canal and irrigation companies aforesaid, and of their several appropriations and rights of storage, as aforesaid, and of the exercise of said right to store water in Utah Lake for many years prior thereto." Among other conclusions of law, the trial court found: "That Salt Lake City, the Utah & Salt Lake Canal Company, the East Jordan Irrigation Company, the South Jordan Canal Company, and the North Jordan Irrigation Company are entitled to a decree awarding to them, subject to the limitations hereinafter set forth, the right to the use of all of the balance of the waters of the Jordan river for municipal, irrigation, culinary, and domestic purposes, to the extent of the capacity of their several canals, and the right to impound and store all the waters of said river in Utah lake, and to have their title thereto quieted, . . . and shall have an equal right to use all of such waters, to the extent of the capacity of their several canals, and, while there is sufficient water for that purpose, may each take the full quantity of water their respective canals will carry, and, when the water is insufficient to fill all the canals to their maximum capacity, then the city and

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canal and irrigation companies shall be entitled to an equal division thereof," etc., "and that the Salt Lake City Water & Electrical Power Company is entitled to a decree awarding to it the right to convey to its power plant, and use for the purpose of operating the same, the waters which the city of Salt Lake is entitled to take into its canal so long as said city shall continue to divert its waters at its present point of diversion, and use the same at its present place of use; but the right of the said Salt Lake City & Electrical Power Company to use the city's said water will be effective only after said power company has established by judgment of the court in an action at law its right to make connections with its flume and the city's canal, and shall have paid to the city any sum which may be awarded to said city by such judgment by way of damages therefor." The decree rendered embraces these conclusions of law.

It is clear from the findings of fact that each of said companies and Salt Lake City at and long before the inception of the rights claimed by the Salt Lake City Water & Electrical Power Company had acquired a vested right, subject only to the rights of prior appropriators, to have the waters of the river, and the waters so stored and held back, diverted in the manner and at the place agreed upon by said parties in their said agreement, and at will to change the points of use and diversion, unless the change would impair the prior rights of other persons. This vested right cannot be impaired by any subsequent appropriation. The Salt Lake City Water & Electrical Power Company has borne none of the expenses of storing the waters or of acquiring the right to flood the land bordering upon the lake, yet it seeks to share in the benefits arising from the storage by making an alleged appropriation, under which it claims the right to divert the water which the city by prior right is entitled to have turned into its canal in pursuance of its previous appropriation and agreement with the canal and irrigation companies, and conduct the same to its power plant on the opposite side of the river, and from thence across the river into the city's canal, $1\frac{1}{2}$ miles from its mouth. Under the findings the alleged appropriation is invalid, and they fail to show that the Salt Lake City Water & Electrical Power Company has acquired any right whatever to enter upon or discharge the diverted water into the city's canal at the point mentioned. On the contrary, it is clear, not only from the decree, but from the fact that a suit is pending in which said company seeks, under the law of eminent domain, to acquire such right, that it did not exist at the entry of the decree. In the pending suit referred to the Salt Lake City Water & Electrical Power Company does not seek to acquire the right to divert from the head of the Salt Lake City canal the water so as aforesaid appropriated by the city, but wrongfully claims that it has already acquired that right under its said notices of

appropriation of the same, and only seeks to acquire the right to discharge into the city's canal, 1½ miles below its head, water which it wrongfully claims it has the right to divert, under notices of appropriation which are invalid so far as they relate to the prior vested rights of the city. As the city is the only party that has appealed, only that portion of the decree which relates to the right claimed by the Salt Lake City Water & Electrical Power Company to divert the city's water should be set aside.

For the reasons stated, I am unable to concur with my associates in affirming the decree as a whole.

A petition for rehearing having been filed, **Bartch, J.**, on April 1, 1903, handed down the following response:

This case was before us on a former occasion, and the judgment of the lower court was then affirmed, Mr. Justice Baskin dissenting. 24 Utah, 249, 67 Pac. 672. Thereafter a petition for rehearing was granted, and the case argued and submitted.

In preparing the opinion on the former occasion, the writer was not unmindful of the great importance of the rulings herein as affecting the material interests and progress of the people, not only of Salt Lake county, but also of the entire state. With these things in view, a very thorough examination of the record and of the law applicable thereto was made, resulting in an irresistible conclusion that the learned trial judge had made a decision, not only just and wise, but sound in law, and which ought to be upheld, as an application of the principles growing out of and adapted to the peculiar conditions and necessities of our arid country. Having now again given the case and the opinion of the court very close scrutiny, the same conclusion is still, in our judgment, irresistible, being the more firmly convinced that it is right and that the judgment is just. We must therefore adhere to the former opinion of the majority of this court, as the correct exposition of the law applicable to this case, and give that decision our final judicial sanction, notwithstanding its correctness has been challenged with so much zeal by the learned counsel for the appellant who presented the oral argument on rehearing. In their brief the counsel say this decree discloses to them an interference with vested rights and a disturbance of existing law, and that, if this decision is perpetuated, it can but result disastrously in the administration of the law of appropriation of water in this state; but they fail to refer to a single fact in evidence, or to the application of a principle of law to support this contention. It is true they assert that the power company arbitrarily closed the city's headgates and diverted the water to which the city was entitled; but upon what facts in evidence, if any, this charge is based, does not appear, and, even if it were admitted that the power company perpetrated unwarranted, arbitrary acts, how could that justify the statement that

the decree interferes with vested property rights, or that the former decision of this court will be disastrous in the administration of the law of appropriation? Certainly there is not to be found even a hint in either the decree or the opinion of this court that can be fairly construed as in any manner countenancing arbitrary action on the part of either party to this controversy. Nor have counsel referred to any facts in evidence or anything in the record which warrants such an assumption. In this case the evidence never was before us. We were simply called upon to ascertain whether or not the decree was sustained by the findings of fact, and to determine the law applicable to the case. There was no question whatever made or presented as to whether the findings of fact were supported by the proof, and we, having had no opportunity to look into the evidence, were, under numerous decisions of this jurisdiction, bound by the findings of the lower court. That court had found that the power company had made a valid appropriation of the water for a secondary use, but, notwithstanding such finding, appellant then contended, as it now contends, that there was no appropriation, because, as is urged, the power company never put the water to actual use. But was there never an actual use of the water by that company? The record, in the action of the power company against the city to condemn an easement and acquire the right to connect the flume with the city's canal, clearly answers this question in the affirmative. The judgment of condemnation therein has been affirmed by this court (71 Pac. 1007), and from the evidence disclosed by that record, which we may now properly look into, it appears that the power company, before any litigation arose between these parties had made an actual use of the water for the purposes intended. The appellant's engineer, the witness Kelsey, who was in the employ of the city at the time the connection of the flume with the city's canal was made, said he knew that at one time the power company used the water through the power house and delivered it into the city canal under some agreement between the city and the power company, but that he did not know how long that use occurred before the agreement was abrogated. So, the appellant's witness Doremus, also an engineer of known ability, referring to the matter of discharging the water, after use by the power company, into the city canal through the flume undiminished in quantity and undeteriorated in quality, said: "In my opinion, it is practicable to do that with proper appliances and devices."

It thus appears from the appellant's own evidence that the very thing which it was claimed had not been done, and the omission of which was urged as fatal to a valid appropriation, had actually been done, and that the plan of the power company to discharge the water into the city canal is practicable. The mere fact that the city, after the power company had been using the wa-

ter for the purposes for which the appropriation was made, by abrogation of its agreement and a resort to litigation, prevented its further contemplated use, pending suit, could not have the effect of defeating rights which had become vested by consent or agreement, and of invalidating an appropriation of water which was then complete. So that it now transpires that the finding of the court respecting the appropriation was, after all, made in accordance with existing facts. From the same record it further appears that the power company is compelled, by decree of the court, to keep in ordinary repair and condition, at its own expense, all that portion of the city's canal extending from the point of connection of the flume with the canal to the headgates, each and every year, so long as the company shall use any part of that canal to flow water therein, and so long as it shall use any portion of the city's water through its plant and flume, the city being thus saved the expense of keeping that portion of its canal in repair. And, that there might be no infringement on the rights of the city in the use of its water, the court retained original jurisdiction of the cause, and appointed a commissioner, whose duty it is to see that there is at all times a faithful compliance with the decree, and to report from time to time to the court any violation of the provisions of the decree. Notwithstanding this, however, and lest there might be some question about the validity of the appropriation by the power company, let us now apply the test of the counsel for the appellant appearing in their brief. After admitting that no right in the water, as such, exists, while it flows in the natural stream, they say: "Before a right in the use of the water can become vested in any appropriator, several things must eventually concur: First, there must be a bona fide intent to take the water of a stream and apply it to some beneficial use; second, concurring with this intent, there must be an actual diversion of the necessary quantity; and, third, the application of the water, so diverted, to the contemplated use. Neither one of these acts nor the intent alone can constitute an appropriation. When all these steps have been taken, and the work completed, and the water actually used for a beneficial purpose, the appropriation becomes complete."

Assuming that this, appellant's own test, for the purposes of this case, is the correct one, then how will its application affect the power company's appropriation? That the company intended to take the water of the stream for a beneficial purpose, which is the first step under the test, no one attempts to deny. In fact, this was the initial step or thing that resulted in this controversy. The intended use was for the propelling of a power plant to furnish light, heat, and power to the people of several neighboring towns, and this was certainly a beneficial use. Nor is it controverted that concurring with such intent the company has complied with the second requisite of the test by hav-

ing diverted the necessary quantity of the water. As to the third requisite, appellant's own testimony now, as we have seen, shows that the water so diverted was applied to the contemplated use. Indeed, all this is admitted by the counsel for the appellant, in another part of their brief, when they say: "In its simplest form, the case may be stated thus: The power company, desiring to use the water for power purposes at a point on the river below the headgates and point of diversion by the city, arbitrarily closed the city's headgates, and diverted the water to which the city was entitled into a canal on the other side of the river; thence it conveyed the water to its plant a mile and a half below, where, after use, it returned it into the city's canal through a flume connected by the power company."

It will be observed that here is a clear admission that the power company, desiring the water for power purposes, diverted it, and then used it through its plant, and returned it into the city's canal through the flume, which is all that is required by the test to make a valid appropriation of water; and the appellant's own evidence, as we have seen, shows that such use is practicable, and was made with the consent or agreement of the city. In the face of all these things, and under the facts and circumstances shown by the findings of fact and evidence, how can it be maintained, or with what consistency can it be said, that these decrees and decisions overturn vested property rights and disturb existing law? Is the alarm expressed justified by the facts? Are not the matters which the counsel have assumed to be of the substance and utility of the law, and which have prompted the assertion, after all mere inconsiderable trifles of legal technism? We apprehend the records in the two cases will be searched in vain for any fact or facts in evidence, or for a single expression in the findings of fact or decrees, which justifies the alarm respecting the decisions affirming the judgments and decrees, or which shows that the usufructuary right of the city to the water, which it diverted under the law of appropriation, has in any way been interfered with or jeopardized.

Again counsel say: "More than half a century ago the miners of the Pacific coast declared that the common-law rule, predicated upon the rights and necessities of riparian owners, was not adapted to the conditions of the time and people, and by custom they created a new right and a new rule. Perhaps only a new application of common-law principles was made. In any event, the law of prior appropriation was established by the custom of the miners, and it at once and thereafter always found full recognition in judicial decisions and legislation."

To this it may, as matter of common knowledge, be added that it was not only the conditions of the time and people, but also the condition of this arid country, that caused this change in the common-law rule.

On account of the lack of precipitation, and in order that the barren country might be rendered habitable and profitable, and its hidden resources developed, the water was turned out of the streams, and conducted to places where, after use, it was impracticable, in many instances impossible, to return it to the stream in which it was wont to flow, and thus the doctrine of riparian rights was changed, or rather modified, as far as necessary, so as to harmonize with the necessities existing, and, as counsel say, a new right and a new rule created, and ever since recognized by judicial decisions and legislation. But, granting all this, was not the use of the water the substance of the "new right" thus created, and which required the modification of the then existing law? If the new use was such substance, which counsel seem to admit when they say, "If the appropriator was interfered with in his use of such water, he found a swift and adequate remedy in an action at law or a suit in equity," how could the appropriator complain so long as there was no interference with his use? How can the city complain so long as there is no manner of interference with its use? There has not been a scintilla of evidence before us, nor is there a single sentence in any finding of fact, which shows that the appellant has in fact been injured in the least by the industrial enterprise which the city, for what cause it is difficult to comprehend, is now seeking to throttle and force out of existence by judicial decision, to the discomfiture of many subjects of this commonwealth. On the contrary, besides being a participant in the general benefit, which such an enterprise naturally brings to the locality where it is located and to the state, the appellant, while suffering no injury, as shown by the evidence of its own witnesses, is the recipient of positive pecuniary benefit, in that, by decree, a considerable section of its canal must be kept in repair by the power company, thus relieving the city from that annual burden and expense.

Let us now see whether the decision herein is quite so startling, and so disturbing of existing law, as has been claimed. We have seen that the peculiar conditions existing in this arid region, and the demands of the times and people for the development of its soil and hidden resources, impelled, in accordance with the requirements of an industrious and enterprising people, and the progress of a growing country, a modification of the doctrine of riparian rights. That doctrine had come to us through the centuries,—from time immemorial,—and had withstood the wisdom of the sages of the law, the language of which is, *Aqua currit et debet currere, ut currere solebat*; and yet in the course of human endeavor, progress, and events it was ascertained that either that doctrine must be modified or that this country must remain a barren waste. The result was a modification, dictated by the law of necessity and countenanced by judicial decision and by legislation, to the extent of 61 L. R. A.

creating a right in any person, by complying with certain preliminaries and requisites, to use the water of a stream for any beneficial purpose, without, where it is impracticable or impossible to do so, returning the water into the stream. This right to use the water of a running stream now exists alike for mining, manufacturing, and agricultural purposes. At common law a riparian owner below was entitled to no redress against his neighbor above for the use of water when no injury resulted, not unless the water was deteriorated in quality or materially diminished, the maxim being, *De minimis non curat lex*, and in this respect there is no change under the law of appropriation. Indeed, it would be contrary to the universal sense of mankind to permit redress where there has been no wrong. At common law the right to use such water is usufructuary merely; so likewise, under the law of appropriation. Neither at common law, nor under the law of appropriation, does the proprietor or appropriator own the water in the stream. Therefore, so long as the use is neither interfered with nor abridged, an appropriator has no just cause to complain, although another proprietor above him also uses the same water for a beneficial use.

Is it not clear that the case at bar falls strictly within these principles? The power company owns the land on which its plant has been erected, and the land borders on the stream. It is therefore a riparian proprietor, has diverted the water for power purposes from the stream where the water is *juris publici*, and, except for the modification of the common law, the company would not only have had the right, but it would have been its duty, to return the water into the stream instead of the canal, and the city in its use lower down would have had no ground for an action, unless the water would have been impaired in quality or materially diminished in quantity. The city, however, having previously acquired the right to use the same water, under the modification of the common law, or the law of appropriation, the power company is bound after use to deliver it in such manner and place as in no way to interfere with the city's use. This is precisely what the power company sought to do, what the city, in the first instance, as we have seen, permitted it to do, and what the decree of the trial court and the decisions of this court require it to do. The appellant enjoys the same rights, with less expense in the maintenance of its canal, that it had before the power company made its appropriation, and without any restrictions, so far as the decrees and decisions are concerned, as to changing its place of diversion and use. Such being the case, what new and alarming doctrine has been herein established or applied? What vested property rights have been overturned? Is not this alarm founded more upon conjecture of what possibly, not probably, might happen in the future than upon anything substantial? Imagination may picture this city

and valley in the near future destroyed by an earthquake, but, so far as human eyes can discern, it is not probable. So, it may be confidently asserted that, guarded as the rights of both parties to this unfortunate controversy are by a court of equity, it is not probable that any serious injury can or will befall the city, or the best interests of the state, because of the decrees and decisions herein. Not a single principle has been applied in this case that is not embraced either in the law of riparian rights, or its modification, the law of appropriation. But suppose it were conceded that the law of appropriation were susceptible of a construction that the ditch which carried the water constituted a right of property so absolute in the owner that no connection could be made therewith, nor any easement created therein or over it, would equity transcend its bounds to an alarming extent by limiting or restricting the modification of the common law in its application to the use, when the condition of this arid region, which demanded that departure, the progress of the times, the furtherance and encouragement of industrial and manufacturing enterprises, and the development of resources demand such limitation? We think not.

It is matter of common knowledge, of which a court may take notice, that we are surrounded by conditions peculiar to this section of country. Located in the very heart of the arid belt, the soil is utterly useless without the application of water. In this valley, as in most other valleys of the state, all the water of the streams has been diverted, in ditches mostly, as in this instance of the city canal, for purposes of irrigation and domestic use. If, therefore, no industrial or manufacturing concern or plant could lawfully appropriate water as and in the manner the power company did in this case, for a secondary use, all manufacturing enterprises which require water for operation would be dependent upon the mere will or caprice of the owners of ditches, for they could permit such secondary use or not as they might choose, although such use for power purposes would in no way, as in the present instance, interfere with their use of the water. If, then, these conditions and circumstances existing, the law of appropriation could be so construed as to permit such a broad application as is contended

for in this case, an application alike inimical to useful and beneficial enterprises, progress, and material interests of the community and state, would not a court of justice be warranted in imposing a limitation? Shall the strong arm of equity, under such circumstances, be employed to cripple, if not annihilate, a commendable, useful, important enterprise, reared at an expenditure of much capital, and notice thereby be served upon all that this is no place for industrial or manufacturing concerns? In our judgment, upon very careful consideration of the whole controversy, the law as well as justice demands an answer in the negative.

As said in the former opinion of the majority of this court, this is a case where the two uses can stand together without injury to the prior appropriator, and where there is no injury equity will refuse a recovery. That the decree herein is just, under the circumstances, and ought to stand, is emphasized by the fact that, of the very numerous parties, prior appropriators of water from the same stream, to this action, the city is the only one to complain, or to express any alarm because of the decision. That, for its own welfare,—for its material advancement and that of the state,—the city ought to encourage rather than discourage the location of industrial enterprises like the one in question it would seem there can be no doubt. The undertaking is in harmony with the progressive spirit of the times. Neither the establishment of the plant nor its operation violates any law. It utilizes electric energy which is destined to revolutionize the various methods of promoting power and propelling machinery. In its operation the water used is neither impaired in quality nor diminished in quantity, and the city, having, at the beginning of the operation of the plant, permitted and sanctioned the use of the water, ought not now be heard to complain without showing resulting injury.

On account of the grave importance of this case, we have thus set forth upon this rehearing our reasons for upholding the decision of the majority of the court herein, and for again affirming the decision and judgment without any alteration in the former opinion.

The judgment is reaffirmed.

McCarty, J., concurs.

Baskin, Ch. J., dissents.

WEST VIRGINIA COURT OF APPEALS.

Flora COLLINS et al., Appts.,

v.

J. W. FEATHER et al., Exrs., etc., of Joseph Feather, Deceased.

(.....W. Va.....)

***1. Where a bequest is to one or more**

***Headnotes by POFFENBARGER, J.**

NOTE.—As to when beneficiaries under will take *per stirpes* and when *per capita*, see also cases in note to *Jackson v. Jackson* (Mass.) 11 61 L. R. A.

persons living, and to the children of another who is dead, whatever may be the relations of the parties to each other, the legatees will take *per capita*, unless it appears from the context or some clause in the will, or from the circumstances in view of which it was made, shown by competent extraneous evidence, that the testator intended a stirpital distribution.

L. R. A. 306, also *Pearce v. Rickard* (R. I.) 19 L. R. A. 472, and *MacLean v. Williams* (Ga.) 59 L. R. A. 125.

2. A testator having two sons and two daughters living, eight grandchildren of a deceased daughter, and the widow and two children of a deceased son, to provide for, gave to one of the sons valuable real estate and \$1,000 out of his personal estate; to the other valuable real estate, imposing upon him, as a condition subsequent, the support of his mother, testator's widow; and to the widow of the deceased son and her two daughters other real estate; and then disposed of the residuum of his estate as follows: "I will and bequeath that after all the bequests of this, my last will, is complied with, that the remainder of my personal property be equally divided between my children, and grandchildren of my daughter Sarah, who was married to Henry E. Cale; to my daughter Mary Jane, now married to Ethbell Falkenstein, my daughter Margaret, now married to Joseph Michael, J. W. Feather, and Michael E. Feather, I will and bequeath that my two daughters, Margaret Michael and Mary Jane Falkenstein, each receive one thousand dollars apiece out of my personal property before the above last-named division is made." *Held*, that each of the eight children of Sarah Cale takes one twelfth of the personal property, after payment of the specific legacies charged thereon.

(January 14, 1908.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Preston County in favor of defendants in a suit to construe the will of Joseph Feather, deceased. *Reversed*.

The facts are stated in the opinion.

Messrs. Edward H. Sincell, P. J. Organ, and A. I. Kelso, for appellants: The nature of the estate passed by a will must be determined from the face of the will alone, and parol evidence is inadmissible to show that the draftsman of the will was mistaken, and the testator designed something not expressed in the will.

Cesar v. Chew, 7 Gill & J. 127; *Frick v. Frick*, 82 Md. 218, 33 Atl. 462.

The intention sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will.

Bingel v. Volz, 142 Ill. 214, 16 L. R. A. 321, 31 N. E. 13; *Wilkins v. Allen*, 18 How. 385, 15 L. ed. 396; *Cesar v. Chew*, 7 Gill & J. 127; *White v. Hicks*, 33 N. Y. 383; *Miller v. Springer*, 70 Pa. 269; *Osborne v. Varney*, 7 Met. 301; *Ryers v. Wheeler*, 22 Wend. 148; *Pack v. Shanklin*, 43 W. Va. 304, 27 S. E. 389; *Couch v. Eastman*, 29 W. Va. 784, 3 S. E. 23; 1 Redf. Wills, 495-497.

A proper construction of the residuary clause of the will would be to distribute the residue of the personal estate *per capita*, and not *per stirpes* as alleged by the appellees.

When a gift is to the children of several persons, whether it be to the children of A and B, or to the children of A and the children of B, they take *per capita*.

Brown v. Ramsey, 7 Gill, 347; *Brittain v. Carson*, 46 Md. 186; *Thompson v. Young*, 25 Md. 461; *Maddox v. State*, 4 Harr. & J. 61 L. R. A.

539; *Young's Appeal*, 83 Pa. 59; *Post v. Herbert*, 27 N. J. Eq. 540; *Hill v. Bowers*, 120 Mass. 135; *Balcom v. Haynes*, 14 Allen, 204; *Ea parte Leith*, 1 Hill Eq. 153.

Where the residuary clause provides that the estate shall be equally divided between the daughter of the testator and children of another, and that clause is unexplained and uncontrolled by another portion of the will, the only construction to be placed upon the words is one solely upon the force of the words themselves, which the testator has chosen to employ. The legatees, by force of the language used, take equally, and the distribution is to be *per capita*.

Brittain v. Carson, 46 Md. 186; *Blackler v. Webb*, 2 P. Wms. 383; *Lenden v. Blackmore*, 10 Sim. 626; *Abrey v. Newman*, 16 Beav. 431; *Tyndale v. Wilkinson*, 23 Beav. 74; *Conner v. Johnson*, 2 Hill Eq. 43; *Farmer v. Kimball*, 46 N. H. 439, 88 Am. Dec. 219; *Stowe v. Ward*, 10 N. C. (3 Hawks) 605; *Howton v. Griffith*, 18 Gratt. 574; *Brewer v. Opie*, 1 Call (Va.) 212; *Crow v. Orgw*, 1 Leigh, 74; *McMaster v. McMaster*, 10 Gratt. 275.

A devise or bequest to several persons, "equally amongst them," or "equally," makes the objects tenants in common.

Walker v. Dewing, 8 Pick. 520; *Burghardt v. Turner*, 12 Pick. 534; *Emerson v. Outler*, 14 Pick. 108; *Partridge v. Colegate*, 3 Harr. & M'H. 339; *Maddox v. State*, 4 Harr. & J. 539; *Gilpin v. Hollingsworth*, 3 Md. 186, 56 Am. Dec. 737; *Mason v. Methodist Episcopal Church*, 27 N. J. Eq. 47; *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290; *Stevenson v. Lesley*, 70 N. Y. 512; *Allison v. Kurtz*, 2 Watts, 185; *McCamant v. Nuckolls*, 85 Va. 331, 12 S. E. 160; *Brittain v. Carson*, 46 Md. 186.

The legatees will take *per capita*, and not *per stirpes*.

Holbrook v. Finney, 4 Mass. 566, 3 Am. Dec. 243; *Bliven v. Seymour*, 88 N. Y. 469; *Purdy v. Hayt*, 92 N. Y. 446; *Van Brunt v. Van Brunt*, 111 N. Y. 178, 19 N. E. 60; *Dana v. Murray*, 122 N. Y. 604, 26 N. E. 21; *Re Kimberly*, 150 N. Y. 90, 44 N. E. 945; *Waller v. Forsythe*, 62 N. C. (Phill. Eq.) 353; *Britton v. Miller*, 63 N. C. 268; 2 Jarman, Wills, 5th ed. 193.

Messrs. Neil J. Fortney and A. G. Dayton for appellees.

Poffenbarger, J., delivered the opinion of the court:

The only question brought up on this appeal is the construction of the fourth clause of the will of Joseph Feather. It arises upon a bill to surcharge and falsify a settlement made by the executors of the will. Upon that bill the court decreed a distribution *per stirpes* of the residuum of the personal estate disposed of by said fourth clause. Insisting that said distribution should have been *per capita*, the plaintiffs have appealed from the decree.

The testator died July 1, 1896, owning a large amount of property, both real and personal, leaving surviving him Lydia Feather, his widow; Michael E. Feather, J. Wesley

Feather, Mary J. Falkenstein, and Margaret Michael, his surviving children; Rebecca F. Feather, widow of his deceased son, John H. Feather; Nitia Berry, wife of W. H. Berry, and Dessie Feather, children of said John H. Feather, deceased; Flora Collins, Norma Cuppett, Dora Jenkins, Maud M. Leighton, Charles H. Cale, Blanche Cale, Josie Cale, and Lizzie Cale, children of Sarah Cale, deceased, who was a daughter of the testator. These children of Sarah Cale, deceased, were the plaintiffs below, and are the appellants here. By his will, made on the 16th day of December, 1895, the testator provided in the first clause for the payment of his debts and funeral expenses; in the second he devised certain real estate, and bequeathed \$1,000 out of his personal estate to his son Michael E. Feather; in the third he devised certain other real estate to his other son, J. W. Feather; in the fifth he devised to his granddaughter Nitia Berry a one-half interest in the house and lot where testator resided; in the sixth he devised to his daughter-in-law Rebecca, widow of his deceased son, J. H. Feather, and her daughter, Dessie Feather, his one-half interest in the Forman farm, on which they then resided; and in the seventh he required his son J. W. Feather to provide for and take care of his widow, and made his failure to do so a condition subsequent upon which his said son should forfeit the devise to him in favor of his mother, testator's widow. By the fourth clause he disposed of the residuum of his personal estate as follows: "I will and bequeath that after all the bequests of this, my last will, is complied with, that the remainder of my personal property be equally divided between my children, and grandchildren of my daughter Sarah, who was married to Henry E. Cale, to my daughter Mary Jane, now married to Ethbell Falkenstein, my daughter Margaret, now married to Joseph Michael, J. W. Feather, and Michael Feather, I will and bequeath that my two daughters, Margaret Michael and Mary Jane Falkenstein, each receive one thousand dollars apiece out of my personal property before the above last-named division is made." On the 11th day of January, 1896, by a codicil, he gave certain property to his wife, as an additional provision for her, including a one-half interest in a house and lot, for her natural life, and after her death to the said Nitia Berry. This codicil concluded as follows: "My personal property not provided for above, I will that the same be sold, and the proceeds arising therefrom to be equally divided among my said heirs above named, after said bequests above stated are complied with." By another codicil, made on the same day, he named his sons, J. W. Feather and M. E. Feather, to be the executors of his will.

The appellants insist upon the rule that, where a devise or bequest is made to a person and the children of another, or to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation, as to "my son A and the children of

my son B," the devisees take *per capita*; A taking only a share equal to that of each of the children of B. This principle is stated in 2 Jarman on Wills, 5th Am. ed. 756, where numerous authorities are cited in support of it. All the cases there cited are from the English reports, but at page 671 there is a long line of American cases to the same effect, among which are *Brewer v. Opie*, 1 Call (Va.) 212; *Crow v. Crow*, 1 Leigh, 74; *McMaster v. McMaster*, 10 Gratt. 275, decided by the court of appeals of Virginia. In 2 Minor, Inst. 3d ed. 1062, the same Virginia cases are cited, and this author states the proposition in the following language: "In like manner, as a general rule, in a devise or bequest to several persons, in terms indicating that they are to take equally, as tenants in common, they take *per capita*; and the same rule prevails whether the devise or bequest is to one who is living, and the children of another who is dead, and that without regard to the relation of the parties to each other."

For the appellees it is insisted that the weight of American authority is against this rule, and, owing to the principle of equality embedded in our law of descents and distribution, thus abolishing the favoritism shown by the English law to the eldest son under the right of primogeniture, there is a presumption in favor of equality, which impels the courts to so construe such bequests to the one under consideration here that the beneficiaries will take *per stirpes*. The rule of construction contended for is stated by Blandford, J., in *Fraser v. Dillon*, 78 Ga. 474, 3 S. E. 695, as follows: "In the absence of anything in the will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interrupt or disturb this descent, or direct it in a different course, should require plain words to that effect." He cites *Wright v. Hicks*, 12 Ga. 163, 56 Am. Dec. 451; *Ferrer v. Pyne*, 81 N. Y. 281; *Lyon v. Acker*, 33 Conn. 222; *Brenneman's Appeal*, 40 Pa. 115. The same proposition is laid down in *Fissel's Appeal*, 27 Pa. 55, in the following terms: "In construing devises or bequests in favor of the next of kin, the court has regard to the legal and customary principles governing the descent and distribution of estates, which is according to classes, and is presumed to be the intention of a testator, unless the contrary appears." This is quoted in *Ross v. Kiger*, 42 W. Va. 402, 412, 26 S. E. 193, 196. There *Baloom v. Haynes*, 14 Allen, 205, and *Holbrook v. Harrington*, 16 Gray, 102, are also cited. Such seems to have been the rule applied in *Lott v. Thompson*, 38 S. C. 38, 15 S. E. 278, and in *White v. Holland*, 92 Ga. 216, 18 S. E. 17.

Undoubtedly there is such a rule of construction as is mentioned in these cases. But ordinarily the courts apply it under restrictions, and in some of the cases just mentioned it may have been carried rather beyond the limits originally prescribed to it.

In 2 Jarman on Wills, p. 619, note 12, it is said: "It may be added that a gift is often made by will to the heirs of two or more different persons, or to one and the heirs of another. In these cases a distinction as to the proportions taken will depend upon whether the ancestor be living or dead at the time of testator's death. In the former case his heirs will take *per stirpes*; in the latter, *per capita*. 2 Preston, Estates, 21-26; 2 Redf. Wills, 34." At the end of the note it is further stated that "the rule may be considered as established that in a devise to heirs 'the law presumes testator's intention to be that they shall take as heirs would take by the rules of descent,'" citing a number of decisions of reputable American courts. It is to be noticed here that, in the devises and bequests to which this rule of construction is applied, the technical term "heirs" is used, and not the word "children," found in the clause now under consideration. In *Lott v. Thompson*, 30 S. C. 38, 15 S. E. 278, the word "heirs" was used in reference to persons whose ancestor was living, and who by reason thereof would have taken *per stirpes* under this rule. As falling under it, the case of *Hoxton v. Griffith*, 18 Gratt. 574, is cited. A careful reading of the opinion in that case will show that the court found that the testator, by other clauses of his will, had expressed the intent that there should be a stirpital, and not a *per capita*, division. Hence, it seems to be an erroneous classification. *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. 193, recently decided by this court, and in which the testatrix disposed of the residuum of her estate by directing it "to be equally divided between my heirs and my husband's heirs," falls within the terms of the rule of presumption above referred to. The distinction between the use of the word "heirs" and the word "children" is a most important one, and cannot safely be overlooked in the construction of wills. "Like all other legal terms, the word 'heir,' when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import, in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in case of intestacy." 2 Jarman, Wills, 585. 2 Minor, Inst., at page 1064, says: "If the testator uses legal or technical phrases only, his intention should be construed by legal rules; and, if he uses common words, his intention should be regulated according to the common understanding thereof. But whilst technical words are presumed to be used according to their technical signification, unless the contrary appears (for the courts have no right to suppose that the party did not understand the meaning of the words employed, or that he did not mean what the words properly import), yet where other expressions are used in conjunction with such technical words, which plainly indicate what the intention was, and that it was not in accordance with the technical signification, the intention will control the legal operation of the words."

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It is also very well settled that, in endeavoring to ascertain what the intention of the testator was, his intention being acknowledged upon all hands to be the true test and proper guide in determining the meaning of the will, the courts will take into consideration the circumstances surrounding the testator at the time he made the will, or in view of which he made it, the nature and value of his estate, and the relations which he sustained to the persons to whom his property is given. An examination of the decisions construing testamentary clauses like and similar to the one now under consideration shows that this extrinsic evidence has been given great weight in some of them, at least. A striking example of this is *Hamlett v. Hamlett*, 12 Leigh, 350, in which, unfortunately, the opinion showing the reasoning of the court in arriving at the decision was mislaid and never reported. But the syllabus and the argument of counsel, reported, clearly show that what is here said of it is true. The clause construed there reads as follows: "My desire is that after the decease of my wife the whole of my estate, except the part hereinbefore disposed of, may be divided in manner and form following, viz.: equally among James Hamlett, Mary Jeffress, Patsey Wilson, Nancy Jeffress, Narcissa Jeffress, the children of my son George Hamlett and Lucy, his wife, the children of my daughter Elizabeth Averett, the children of my son Bedford Hamlett, deceased, and the children of my daughter Obedience." Clearly, the rule relied upon by the appellants, applied to the language of this clause, would have resulted in a *per capita* division. But the court held that the testator intended a stirpital division, and in the syllabus it is recited that the five children named as takers under the will had among them 31 children, while four sets of grandchildren named in the will, numbered 21, at the time of the testator's death, and 5 more were born before the death of the widow, the date fixed for the division; so that under a *per capita* division there would have been 31 shares, of which only 5 would have gone to the children of the testator, who had 31 of his grandchildren dependent upon them, while the other grandchildren, representing only 4 of the testator's children, would have taken over five sixths of the assets. A later Virginia case, in which the court held that a *per capita* division was intended, is that of *McMaster v. McMaster*, 10 Gratt. 275. There the clause construed read as follows: "I will and bequeath to the children of Arthur McMaster and David McMaster and to Robert B. McKee McMaster all the funds remaining after every just claim . . . has been satisfied, to be equally divided between them." Arthur McMaster had five children, of whom Robert B. McKee McMaster was one, and David McMaster also had five children. The testator had already given Robert B. McKee McMaster a plantation and \$2,000 but he claimed under this clause one third of the residuum, upon the theory of a division *per stirpes*. The court, how-

ever, held that the property should be divided into ten shares, giving one to each of the ten children. In *Crow v. Crow*, 1 Leigh, 74, the clause construed read as follows: "I devise and direct that the balance of my slaves shall be equally divided between my children, to wit, the heirs of William Crow, namely, William, Robert, Patsey, Nancy, Henry, Ennis, and John (heirs of William Crow, deceased), Thomas, Moses, John Crow, and the children of my deceased daughter Massey Jones, and the children of my deceased daughter Sarah Crane, to them and their heirs; but the children of my daughter Massey Jones are to take only such part as their mother would take if she was still alive,—that is to say, a child's part; and, in like manner, the children of my daughter Sarah Crane are to take only such part as their mother would take if she was still alive,—that is to say, a child's part." The court held that the seven children of the deceased son took equally *per capita* with the testator's three living sons, and the children of his two deceased daughters took *per stirpes*, each set, their mother's part. It is to be noted here that the testator, in making his gift to the children of William Crow, deceased, designated them as "heirs," using that word twice in reference to them, and that the gift to the children of the deceased son is construed in accordance with the principle laid down in 2 Jarman on Wills, p. 619, note 18. But the decision of that case is not based upon that rule. It rests upon the principle which the appellants claim as decisive of this case, for Judge Carr, in delivering the opinion of the court, cites some of the same cases that are given by Jarman in support of his text, one of which is *Blackler v. Webb*, 2 P. Wms. 383, the doctrine of which was strongly invoked and relied upon by those who contended for the *per capita* division in *Hamlett v. Hamlett*, cited. However, the learned judge who delivered the opinion in that case did not ignore the rule relating to the presumption based upon the statute of distribution. On the contrary, he admitted it, but seems to have considered it unimportant, in view of the positive terms of the clause he was construing. His language is: "The cases all lay it down that where a legacy is to several, whatever may be their relations to each other, or however the statute of distribution might operate upon such relations, equality shall be the rule, unless the testator has established a different one."

But the rule upon which the appellants stand is not more firmly established, nor extensively recognized, than is another rule, which, when applicable, compels it to yield. 2 Jarman, Wills, at page 577, says: "But this mode of construction will yield to a very faint glimpse of a different intention in the context." Then a number of illustrations are given. One is that "where the annual income, until the distribution of the capital, is applicable *per stirpes*, it is a sufficient ground for the presumption that the same method of division was intended to govern the gift of the capital." So, also, 61 L. R. A.

where the share of one of the takers, upon a contingency, is given over to the others *per stirpes*, where the gift to the children is substitutional, as where it is to several or their children, and where there is a clause providing that one set of children shall take their parents' share. *Hoxton v. Griffith*, 18 Gratt. 574, is a case in which this is clearly illustrated. The will in that case contained these clauses: "Should any of the children of Dr. and Eliza Hoxton die without heirs, the property left them shall be divided among the survivors. If I should survive my dear E. C. Griffith, it is my will that the property left him in this will should be divided between his three children, Frederick, Eleanor, and David." Of those two clauses the court said, in part, "These clauses indicate clearly the purpose of the testatrix to distinguish the objects of her bounty into two classes,—the children of her deceased niece being one class, and her nephew, or, in case of his death, his children, being the other." It was these and other clauses found in the will, tending to show the same general intent, that determined its construction in favor of a stirpital distribution. In the opinion the general rule is stated and upheld in the following strong terms: "Where a bequest is made to several persons, in general terms indicating that they are to take equally as tenants in common, each individual, of course, takes the same share; in other words, the legatees will take *per capita*. The same rule applies where a bequest is to one who is living, and to the children of another who is dead, whatever may be the relations of the parties to each other, or however the statute of distributions might operate upon those relations in case of intestacy. . . . The substance of this rule of construction is that, in the absence of explanation, the children in such a case are presumed to be referred to as individuals, and not as a class, and that the relations existing between the parties, and the operation which the statute would have upon those relations in case of intestacy, are not sufficient to control this presumption." The learned judge then passes into a discussion of the exception which has been referred to, and within which he placed that case in the manner hereinbefore indicated, and gave numerous illustrations of it found in the reported decisions.

The review and analysis of the Virginia cases bearing upon this question, here given, fully warrant the assertion that in them little, if any, weight is given to any presumption arising from the statutes of descents and distributions. As has been shown, it was expressly subordinated to the general rule in two of them, while in *Hamlett v. Hamlett* the decision clearly appears to have been determined by the light thrown upon the terms of the will by circumstances appearing from the extrinsic evidence introduced. Although the construction of that case harmonizes with the statute, it seems not to have resulted from any presumption arising therefrom, but rather from the hard-

ship and manifest injustice which would have been wrought by a different construction, and so great that the testator could not have intended it, although upon its face the will indicated it. The only case decided by this court that bears any sort of relation to this question is *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. 193, and, as has been shown, it falls under a rule somewhat different from both of the rules contended for by the parties to this suit. The language of the clause so construed is: "The balance of property, land, and money in notes to be equally divided between my heirs and my husband's heirs." There are numerous precedents for holding that when the gift is to heirs "the law presumes the testator's intention to be that they shall take by the rules of descent." See *Rand v. Sanger*, 115 Mass. 124, where the property was directed "to be equally divided among those persons who shall be my legal heirs at the time of my decease;" *Wintermute v. Snyder*, 3 N. J. Eq. 489, where the property was "to be divided, share and share alike between the heirs of Joseph (deceased), William and his heirs, and Peter and his heirs;" *Miller's Appeal*, 35 Pa. 323, where the gift was "to my two brothers and their heirs," although the brothers died before the testator; *Templeton v. Walker*, 3 Rich. Eq. 543, 55 Am. Dec. 646, where the gift was "to the future heirs of my daughter's body;" *Britton v. Johnson*, 2 Hill Eq. 430, where the gift was to "my children or their heirs;" *Lowe v. Carter*, 55 N. C. (2 Jones Eq.) 377, where the gift was "to the bodily heirs of my three daughters;" *Burgin v. Patton*, 58 N. C. (5 Jones Eq.) 426, where the gift was "to be equally divided amongst my heirs;" *Bassett v. Granger*, 100 Mass. 348, a bequest "to the heirs of my late husband and to my heirs equally;" *Holbrook v. Harrington*, 16 Gray, 102, where the legacy was directed "to be equally divided between the heirs of A, and the heirs of my brothers and sisters." However, this rule is not inflexible. It often yields to the force of extrinsic circumstances, casting light upon the question of the testator's intent, and expressions in the context tending to show an intent inconsistent with it. See *Ward v. Stow*, 17 N. C. (2 Dev. Eq.) 509, 27 Am. Dec. 238, a residuary devise to the "heirs of my brother A, the heirs of my sister B, and to my nephews C;" *Harris v. Philpot*, 40 N. C. (5 Fred. Eq.) 324, where the gift was to the heirs of A mentioned in the will as living; *Vannorsdall v. Van Deventer*, 51 Barb. 137, where the gift was to the heirs of A, B, and C, mentioned in the will as living; *Lemacks v. Glover*, 1 Rich. Eq. 141, where the gift was to A for life, and after her death to the heirs of her body in fee; *Witmer v. Ebersole*, 5 Pa. 458, a residuary legacy "to my heirs and my wife's heirs, to share equally, share and share alike." In all these last-mentioned cases, and many others, in which similar clauses have been construed, the devisees and legatees took *per capita*.

It would be very great, and practically useless, labor to go through all these cases, 61 L. R. A.

and endeavor to distinguish them from one another, and show why some have been decided in conformity with the rule, and others excluded from its operation. No doubt, it could be shown that in reaching these apparently inconsistent conclusions the several courts have acted upon varying states of facts which made the rule applicable in some of the cases, and forbade its application in others, and that the decisions are not really in conflict. From the review of cases showing the application of the various rules of construction, it is deemed safe to say that there is hardly any such rule that has not its exceptions, and that is not excluded from cases apparently falling under its control by the peculiar provisions of the will, and the facts and circumstances in view of which it was made. It is clearly apparent, also, that, when a testamentary clause falls, by its very terms, within one of these general rules of construction, and there is no other clause in the will, nor anything in the context, nor anything appearing from competent extrinsic evidence, by which it can be taken out of the operation of that rule, the court can do nothing but apply the rule. While ordinarily these rules of construction are not rules of property, but only means and agencies created by the courts to enable them to ascertain the intent of the testator, and determine what he really meant by the words written in his will, yet, if they are to be disregarded and laid aside, the courts have nothing to guide them in disposing of questions of the gravest import, and directly affecting vital interests of the citizen; nor is there anything by which the correctness of a decision may be tested or known. The courts would have but little to do, in cases of this kind, other than to say whether or not, under the circumstances, they would have made the same sort of a will. "It is plain that such rules are necessary in order to insure just and uniform decisions. . . . It will be discovered that the maxims and rules which are thus laid down are not arbitrary, but are all suggested, or at least justified, by sound sense and rigorous logic." 2 Minor, Inst. 1058, 1059. They are the creation of the best thought and the brightest minds that have adorned and illuminated the English and American bench and bar. They have been wrought out by the great minds which constructed our system of jurisprudence. Their necessity was felt at the very beginning, and time and experience have not only demonstrated their continued necessity, but have added to them and systematized and perfected them.

It is not contended that there is any clause in this will which shows, or tends to show, an intent that the children of Sarah Cale should take as a class. No clause appears in it similar to those found in the will construed in *Howton v. Griffith*, and which took that will out of the general rule. Nor is it contended that there is anything in the circumstances under which the will was made or surrounding the testator at the time it was made, tending to show that he intended that the children of the daughter

should not take *per capita*. The argument which seems to have prevailed in *Hamlett v. Hamlett*, cannot be invoked here. The testator had made liberal provisions for his two sons. To Michael he had given the Jesse Forman place, and three undivided shares in the Sterling Graham farm, and \$1,000 out of the personal estate. To his other son, J. W. Feather, he had given the Beaghy farm, another farm near Bruceton Mills, and all the town lots owned by the testator in the town of Cranesville. To each of his two living daughters he had given \$1,000 out of his personal estate. To his granddaughters Nitia Berry and Dessie Feather and his daughter-in-law Rebecca Feather he had given considerable real estate. Aside from what the children of his daughter Sarah were given by the fourth clause of the will, disposing of the residuum of the testator's estate, these grandchildren were given nothing. It might be regarded as significant, and as an argument in favor of the construction contended for by them, that they represent the only child of the testator for whose interest no special provision is made in the will, and is wholly dependent upon what is given by said fourth clause. While the children of his deceased son took nothing under this clause, the testator specifically devised to them a part of his real estate. If these facts are entitled to any weight, as bearing upon the intent of the testator, their tendency is in favor of the appellants. But it must be admitted that the tendency is not strong, for the reason that the provision made for the two living daughters is apparently meager as compared with what the sons received. Assuming that there is a fund of \$10,000 to be distributed under said fourth clause, the children of Sarah Cale would take \$6,666.66 of it, while the four living children of the testator would take the balance of \$3,333.33, — a little over \$800 each, — making the total amount to each of the daughters only about \$1,800, as against \$6,666.66 to the daughter represented by the eight grandchildren. This, it may be said, is inequitable and unjust, and therefore never was intended by the testator. But how are we to determine what were the views of the testator concerning the equity of the disposition of his property? May he not have said: "These grandchildren are motherless. Some of them are infants and helpless. Their necessities and their helplessness demand more ample provision for them than for the married daughters." Is the court to make the will speak so as to work out its own conclusion as to what would have been just and equitable, or shall it give effect to what the testator has said, as determined by a rule of construction which is the outgrowth of centuries of experience and the world's best judicial thought, and thereby enforce the legally expressed intention of the testator? There can be no doubt that the latter course is the correct one.

But the brief of counsel for appellees is an argument against the existence in this country of the rule laid down in 2 Jarman 61 L. R. A.

on Wills, at page 756. Hence, as admitted in the briefs, the only question is whether that rule has been abrogated in this country, and replaced by another rule, determining that, under a testamentary provision such as is presented here, the distribution will follow that of the law of descents and distributions, unless a contrary intent is clearly revealed in the context. In support of this, *Hamlett v. Hamlett*, *Houston v. Griffith*, and *Ross v. Kiger* are cited. From the explanation of those cases already given, it is clearly apparent that they establish no such rule. In each of them the court reached its conclusion without any, or very slight, reference to the presumption arising from these statutes. *Fraser v. Dillon*, already referred to, fully supports the contention of the appellees. There Blandford, J., speaks of the rule contended for by the appellants as the *dictum* of Mr. Jarman. But *White v. Holland* is a later case decided by the same court, and Lumpkin, J., delivering the opinion of the court refuses to take the advanced ground asserted in *Fraser v. Dillon*, and, in effect, says there was no reason or necessity for asserting it in that case. He refers to two other cases as sustaining that principle, and then says, "There are, however, respectable authorities to the contrary, and we do not deem it necessary in the present case to decide this question." This clearly indicates that the rule is not considered as settled in the state of Georgia. *Lott v. Thompson*, 36 S. C. 38, 15 S. E. 278, seems to rest upon exactly the same grounds and reasons which determined the construction of the will in *White v. Holland*. In the latter it was manifest that the testatrix had no desire or wish to alter the distribution which the law would have made, further than to exclude one of her sons from taking any of her estate, but not the children of that son. In the former it appeared that he only desired to alter the laws of descent and distribution to the extent of excluding two of his daughters, but not the children of those two daughters. These cases have little or no bearing on the question under consideration here. If the general plan of the disposition of his whole estate adopted by the testator in this case is entitled to any weight in determining what he intended by said fourth clause, it is manifest that it does not argue, in any particular or in any degree, that he was endeavoring to adopt, to any extent, the disposition which the law would have made of his estate in case of his dying intestate. He excluded his two daughters entirely from participation in his real estate. In no instance did he adopt the law of descents in disposing of his real estate, and in but one instance did he create a tenancy in common. In that he gave to his daughter-in-law Rebecca Feather and her daughter Dessie Feather his one-half interest in a certain farm, instead of giving it to the daughter absolutely, or to her for life and the remainder to the grandchild. No division was directed anywhere, except in said fourth clause by which he disposed of the larger portion of his personal property. From that, he wholly ex-

cluded two of his grandchildren representing his deceased son. On the whole, it is clear that he paid but little attention to the manner in which the law would have disposed of his estate. *Henry v. Thomas*, 118 Ind. 23, 20 N. E. 519, is also relied upon. The clause there construed bequeathed the residue of the estate of the testatrix, "to be divided equally between my brothers and my sisters, and the children of deceased brothers and sisters and the brothers and sisters of Perry J. Brinegar, deceased [husband of testatrix], and the children of deceased brothers and sisters" of said Brinegar. This is very much like the clause construed in *Fissel's Appeal*. It is unlike this case, in that it does not exclude any of the next of kin either of the testatrix or of her husband. Moreover, the terms used are general, not mentioning even the names of the deceased brothers and sisters. In that case *Olds, J.*, said of the principle relied upon by appellants: "This rule has been so far abrogated by the courts of the different states that it no longer has any practical force in the construction of wills, and the weight of authority is to the effect that the beneficiaries take *per stirpes* unless the language used in the devise or bequest is such as to exclude that intention." He cites *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457; *Houghton v. Kendall*, 7 Allen, 72; *Raymond v. Hillhouse*, 45 Conn. 467, 29 Am. Rep. 688; *Minter's Appeal*, 40 Pa. 114; *Fissel's Appeal*, 27 Pa. 55; *Clark v. Lynch*, 46 Barb. 68; *Vincent v. Newhouse*, 83 N. Y. 505; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Alder v. Beall*, 11 Gill & J. 123. In *Houghton v. Kendall*, after a life estate to A there was a gift to her "children who may be the surviving heirs of her body." The rule that where the gift is to heirs they shall take as heirs would take is decisive of that case, independently of the rule insisted upon by appellees. *Raymond v. Hillhouse* is the case of a residuary gift "to be equally divided among my sisters R and S, the grandchildren of my deceased brother W., and the grandchildren of my deceased sisters D. and M." The language of this clause clearly separates the beneficiaries into classes, and it was unnecessary to apply any rule or any presumption, although the court did say that, as the rule relied upon by appellants would so easily yield to indications of a contrary intention on the part of the testator, it is reasonable that it should also yield to the presumption in favor of natural heirs or next of kin, for distribution according to the statute, in all cases where the language of the will is consistent with such distribution and the real intention of the testator is in doubt. In *Minter's Appeal* the language was clear and explicit: Share and share alike among the children of A. and the children of M. and to my sister B. "Said B. and the children of my said brothers A. and M. shall have . . . share and share alike." The same is true of *Fissel's Appeal*. In *Bool v. Mix* the devise was to two daughters for life, "to be equally divided between them, and after their decease to their, and each of

their, children, to be divided between them, share and share alike." Here there was a direction to divide between the two daughters, and then the remainder is disposed of. This direction of itself was sufficient to indicate that a stirpital division was intended among the children. *Alder v. Beall* directed a division "between the children of my sister A and their heirs, forever, and the children of my sister B and their heirs forever." The use of the word "heirs" sufficiently indicates the intention that the beneficiaries should take *per stirpes*. The same is true of *Swallow v. Swallow*, 166 Mass. 241, 44 N. E. 132, where the testatrix gave one half of her estate to her heirs, and the other half to the heirs of T, "her deceased husband, namely, N., S., and D." It is to be noticed that in *Fissel's Appeal* the decision is not based wholly upon the rule contended for by appellees, although it is there stated as broadly as is contended for here; for it is there said: "Where the bequest is not to the several children of brothers and sisters, but to the children of the several brothers and sisters, and the classes are distinguished by the repetition of the words 'and' between each of them, it amounts to a classification, and the children in each instance take their parent's share." This makes it clear that the rule of presumption in favor of a statutory distribution was only given a persuasive and secondary weight in the decision. The peculiar phraseology upon which that decision rests is found in some of the cases above mentioned, from which the conclusion is irresistible that the broad language in *Raymond v. Hillhouse* and *Henry v. Thomas*, asserted upon the authority of these cases, is not fully sustained by them. In other words, it goes further than the cases warrant. It must be admitted that the rule laid down in *Jarman* has been approved and applied in Virginia cases, decided before the organization of this state, and which are binding authority upon this court. They have never been overruled. They ought not to be overruled unless it clearly appears that they are wrong and do not enunciate the law. In view of the array of authorities, American as well as English, upholding the doctrine of these decisions, as compared with the few cases holding the contrary, some of which do not appear to be very maturely considered, this court cannot consistently overrule them. While in some instances the broad principle asserted in opposition to the doctrine of these cases would prove to be equitable and just in its operation, cases will undoubtedly arise in which the strict application of it contended for here would work injustice and inequality. From the examination of the various rules of interpretation of testamentary clauses like this one, it is considered that they afford a better guide in seeking for the intention of the testator than the single broad principle, which, if adopted, would be substituted for more than one of them, and would be defective by reason of its generality.

These views result in the conclusion that

the decree of the Circuit Court is erroneous and should be reversed, and the cause should be remanded for further proceedings in ac-

cordance with the views here expressed, and further according to the rules and principles governing courts of equity.

WISCONSIN SUPREME COURT.

Fred J. JULIEN, *Appt.*,
v.

MODEL BUILDING, LOAN, & INVESTMENT ASSOCIATION, Impleaded, etc.,
Respt.

MODEL BUILDING, LOAN, & INVESTMENT ASSOCIATION, *Respt.*,
v.

Fred J. JULIEN, Impleaded, etc., *Appt.*

(.....Wis.....)

1. A mortgagor who departs from the state without giving the mortgagee any information as to where he may be found, or leaving any instructions as to the forwarding of his mail, cannot object to the act of the mortgagee in declaring the mortgage due for default for want of notice to him of intention to do so, as required by an equity rule, where notice was in fact mailed to his last known address.
2. The wisdom of a particular classification for purposes of legislation is a matter exclusively for legislative discretion.
3. A statute giving mortgages to building and loan associations priority over other liens upon the mortgaged property filed subsequent to the recording of the mortgage is not void as depriving anyone of the equal protection of the laws.
4. A provision making the lien of a mortgage to a building and loan association superior to other liens filed subsequent to the recording of the mortgage is within a title, "An Act Regulating Building and Loan Associations."
5. A law applicable to building and loan associations as a class is a public and general, and not a private or local, law, within the meaning of the constitutional provision respecting the form of title to acts.
6. A statute enacted to give immediate effect to certain provisions of a general revision of the statutes will not operate as a repeal or modification of other sections of the revision, which, under the general plan, do not take effect until a subsequent period, where the intent was not to change the laws by carrying them into the revision.
7. A statute giving mortgages to building and loan associations priority over all liens filed subsequently to the date of their record cannot be declared void on the ground that it is contrary to public policy.

(December 16, 1902.)

NOTE.—As to statutes giving special privileges to building and loan associations in regard to interest, see, in this series, *Henderson Bldg. & L. Asso. v. Johnson* (Ky.) 3 L. R. A. 289; *Falls v. United States Sav. Loan & Bldg. Co.* (Ala.) 24 L. R. A. 174, and *Iowa Sav. & L. Asso. v. Heidt* (Iowa) 43 L. R. A. 689. 61 L. R. A.

APPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in favor of defendant in an action brought to enforce a lien on certain real estate upon which the loan and investment company held a mortgage. *Affirmed.*

APPEAL by defendant Julien from a judgment of the Circuit Court for Milwaukee County in favor of plaintiff in an action brought to foreclose a mortgage upon property upon which defendant Julien claimed a lien. *Affirmed.*

Statement by Marshall, J.:

Action to enforce a lien on real estate under § 3314, Rev. Stat. 1898, as to the owner of two mortgages on the property, and other persons; and an action by the mortgagee against the lien claimant and such others to foreclose the mortgages. The actions were tried together on the issue raised by the answer of the mortgagee to the complaint in the lien action, and the answer of the lien claimant in the suit to foreclose the mortgages, as to whether such mortgages were encumbrances upon the property, affected by both claims, superior to the lien.

The following points were decided by the trial court, omitting formal matters as to which there is no dispute: May 25, 1899, defendants Mary Siebert and Frank Siebert her husband, for value gave the Model Building, Loan, & Investment Company, a corporation organized under the laws of this state and of the character its name indicates, their bond to secure the payment of \$3,000 with interest, and, as collateral security thereto, gave the association a mortgage in the ordinary form, dated on such day, on the premises described in the complaint, which said mortgage, on the day of the date thereof, was duly recorded. It was provided in the bond, among other things, that in case of any default in the conditions thereof existing for the space of six months, or the obligor suffering a mechanic's lien to accrue or be filed against the mortgaged property, the entire indebtedness should, at the option of such association, become due. The provisions of the bond in addition to the one particularly mentioned, are in harmony with the usual methods of dealing between a building and loan association and its borrowing members. The amount due upon the bond and mortgage is \$3,542.38, with interest from the date of the findings, which sum the association is entitled to recover. On January 2, 1901, the conditions precedent to the right of the association to declare due the entire amount secured by the bond and mortgage existed, and it exercised its option in that regard by mailing copies of a notice of election in the matter to each of

the debtors at their respective postoffice addresses in the city of Milwaukee, with the postage prepaid thereon. Facts similar to those mentioned exist as to the second bond and mortgage declared on in the foreclosure complaint and in the answer of the association in the lien action, for \$1,000. Such mortgage was given by the Sieberts to the association December 10, 1899, and was duly recorded December 19, 1899. The amount the association is entitled to recover on such bond and mortgage is \$305.21, with interest thereon from the date of the findings. Facts exist, alleged in the complaint in the lien action, entitling the plaintiff therein to a lien under § 3314, Rev. Stat. 1898, for \$190.67. The lien petition was filed July 19, 1900. The lien dates from September 15, 1899, subject to whatever right of priority the association has under § 2014-5, Rev. Stat. 1898, which provides that mortgages upon real estate, taken by such associations, shall take precedence over all liens upon the mortgaged premises filed subsequent to the recording of such mortgages. The court decided, as a matter of law, that by force of such statute the plaintiff's lien was subordinate to the two mortgages, and ordered judgment of foreclosure of the mortgages, with suitable provisions for the protection of the lien claimant and other defendants interested in the property. The lien claimant appealed.

Mr. M. N. Lando for appellant.

Mr. Frederick H. Remington, with **Messrs. Winkler, Flanders, Smith, Bot-tum, & Vilas**, for respondent:

The setting apart of building associations in a class by themselves is a reasonable classification.

Endlich, Bldg. Asso. chap. 12, §§ 338-346; *Leahy v. National Bldg. & L. Asso.* 100 Wis. 555, 76 N. W. 625.

The mechanics' lien law relates to the remedy, and not to the contract.

Phillips, *Mechanics' Liens*, 3d ed. §§ 28, 30; *Hildebrand's Appeal*, 39 Pa. 134; *Rishell v. Rishell*, 48 Pa. 243.

Amendment 14, § 1, U. S. Const., merely requires that all persons subject to such legislation be treated alike, under like circumstances and conditions, both in the privileges conferred, and in the liabilities imposed.

Bittenhaus v. Johnston, 92 Wis. 588, 32 L. R. A. 380, 66 N. W. 805; *Hayes v. Missouri*, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350.

It does not prevent the states from discriminating between different classes of persons and corporations, so long as the classification is based upon reasonable grounds, and is not an arbitrary classification.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; 61 L. R. A.

Home Ins. Co. v. New York, 134 U. S. 594-606, 33 L. ed. 1025-1032, 10 Sup. Ct. Rep. 593; *Mugoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 8 Sup. Ct. Rep. 594; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Marshall, J., delivered the opinion of the court:

The necessity of notice of election, by a creditor to his debtor, to exercise an agreed option to treat an entire indebtedness as due before the date specifically named in the papers evidencing the same and securing its payment, for nonperformance of some stipulation to the contract, as a condition precedent to the use of judicial remedies for collection of the whole debt, is merely a rule of equity. In most jurisdictions no such notice is necessary. It is held that, if the debtor makes default, he is neither legally nor equitably entitled to notice that by reason thereof the creditor will consider the debt all due, before judicial remedies are resorted to to collect the same, unless such a notice is specifically provided for in the contract; that it is not the business of the courts to supply an element in the contract, by an arbitrary rule of construction, which the parties see fit to omit, because, without it, the contract would seem to be a harsh one. This court stands alone, or nearly so, in holding that notice of election should be given the debtor as a condition of treating the contract as fully matured; but its decision in that regard is not based upon a construction of the contract. *Pingrey, Chat. Mortg.* § 1539; *Jones, Mortg.* § 1182a, and cases cited. *Pingrey* is in error in classing California with this state on the subject. He cites *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514, where the subject of necessity of notice before suit brought was not considered, the sole question being, What are the essentials of notice where one is required? In subsequent cases that court distinctly held that no notice is necessary unless specially required by the terms of the contract. *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423; *Siehler v. Look*, 93 Cal. 600, 29 Pac. 220. In *Hewitt v. Dean* this language was used: "It was competent for them to include in their note or mortgage a provision requiring notice of such election as a condition precedent to instituting the suit; but, instead thereof, they have agreed that, upon the mere fact of the default, the plaintiff may, at his option, treat the whole amount as due, and foreclose the mortgage. To add to this agreement the requirement that the plaintiff should give notice of his election would be for the court to add to the agreement of the parties a condition which they have not themselves chosen to make."

The rule here was first distinctly stated in *Busse v. Gallegger*, 7 Wis. 442, 76 Am. Dec. 225. It was not based upon judicial or other authority. The decision is not in conflict with those we have cited and many other cases that might be mentioned, as regards reading a requirement for notice out

of the contract by construction. The rule was declared, as before indicated, as a rule of equity, to be applied where a person seeks its jurisdiction to enforce his mortgage to the full extent, under an option so to do, by reason of some default in the terms thereof. This language was used: "It seems to us but just and proper to require the mortgagee, in cases like the present, to exercise his election, and give notice thereof to the mortgagor before bringing suit."

There is no disposition to recede from a doctrine so long established, or even to criticize it. The state of the law in general has been referred to merely to show that decisions as to what is sufficient notice of election to exercise the option, in a case where notice thereof is required by the contract either expressly or by implication, are not controlling where the requirement for such notice is not a matter of contract but a mere condition of the use of the equity jurisdiction to enforce the security. No doubt the rule that he who asks equity must do equity led to the adoption of the judicial policy of this state. If a person who, under ordinary conditions, is entitled to the benefit of the rule, is guilty of conduct toward his creditor rendering compliance by the latter unnecessarily burdensome, as by secreting himself, so notice of the election to treat the whole debt due cannot be served upon him, or by leaving his usual place of abode without acquainting his creditor where he can be reached by mail or otherwise, or making any provision for obtaining mail addressed to him at his last known place of residence,—he cannot be heard to complain that injustice was done him by his creditor's noncompliance with the rule. He will be deemed to have waived such compliance, or forfeited it. The equitable considerations which led the court to adopt the policy appellant invokes, justify, if they do not demand, the countervailing rule we have suggested, protecting the creditor against danger of having the value of his contract unnecessarily diminished by negligence or wilful misconduct on the part of the debtor, rendering it unreasonably difficult for the former to comply with the judicial rule designed for the latter's protection.

The claim here made is that proper notice of election to treat the entire indebtedness due was not given to the debtors, wholly on the theory that, prior to the time notices were mailed to them at Milwaukee, Wisconsin,—their postoffice address when the indebtedness was contracted and for a considerable period of time thereafter,—they had changed their place of abode to some unknown point outside the state. Assuming in appellant's favor, for the purposes of the point under discussion, that the evidence shows all that is claimed for it, we think the debtors, by their conduct, waived the giving of any better notice to them than the one given. If they made no arrangement, upon departing from the state, to have mail addressed to them at Milwaukee, Wisconsin, forwarded to them, and gave their creditor no information as to where they could

be reached in some better way than by letter addressed to them at their old postoffice address, they have no standing in equity to complain that they were brought into court to defend against a claim that the whole indebtedness was due, in advance of being notified of the exercise by their creditor of its option in the matter; and obviously, persons claiming under them, circumstanced as appellant is, can have no better right than they.

Section 1, art. 14, of the United States Constitution, providing that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws," does not preclude state legislation applicable only to a particular class of persons, if there is a reasonable ground for treating such class of persons different from the general mass. That constitutional provision was so construed by the Supreme Court of the United States early after its adoption, and the construction steadfastly adhered to up to the present time. *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Barbier v. Connolly*, 113 U. S. 27, 23 L. ed. 923, 5 Sup. Ct. Rep. 357; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; In *Barbier v. Connolly*, the court, speaking by Mr. Justice Field, said: "Neither the amendment,—broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had."

In *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, referred to in respondent's brief, this language was used: "The greater part of all legislation is special, either in the object sought to be attained by it, or in the extent of its application. . . . When legislation applies to particular bodies or associations . . . it is not open to the objection that it denies to them the equal protection of the laws if all persons brought under its influence are treated alike under the same conditions."

Legislative discretion to classify persons for the purposes of legislation is substantially the same under the 14th Amendment of the Federal Constitution as under the state constitutional provision prohibiting special legislation. The rules on the subject, which generally prevail, and which have received the sanction of this court, are as follows: (1) All classification must be based upon substantial distinctions which make one class really different from another. (2) The

classification adopted must be germane to the purposes of the law. (3) The classification must not be based upon existing conditions only; it must not be so constituted as to prevent additions to the number included within the class. (4) To whatever class a law may apply, it must apply equally to each member thereof. *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270. Whether any particular classification made by the legislature satisfies those requisites is primarily a legislative question. The field covered by its discretionary power in the matter is very broad. It is, of course, not above judicial control, but is safe from restraint so long as any reasonable ground can be discovered to support it. The court can apply no test to the matter except the constitutional test. That of the mere wisdom of the measure is exclusively for legislative consideration.

If we were called upon to apply the law as above stated, without the aid of judicial authorities, to § 2014-5, Rev. Stat. 1898, giving to mortgages of mutual building and loan associations priority over other liens upon the mortgaged premises and the buildings and improvements thereon, filed subsequent to the recording of the mortgage, for the purpose of determining whether such legislation is constitutional, it would stand the test. The supposed dominant purpose of building and loan associations is to promote, by means of the mutual efforts of a large number of persons, the ownership of homes in severalty for themselves and families. The acquirement and enjoyment, in an individual way, free from hostile demands of creditors, of the comforts of life, was deemed to be of sufficient importance to the state at the time of the adoption of the Constitution, that a mandate was embodied in it requiring the legislature to promote safe proprietorship in that regard by wholesome laws. Certainly, laws reasonably calculated to promote the acquirement and safe enjoyment of homes is within the spirit of that constitutional provision. The legislative policy of the state, embodied in our statutes, shows that it has always been so regarded. Upon that ground alone, if upon no other, the law in question would be safe from condemnation as being unconstitutional class legislation. But, independently of such constitutional recognition of the importance of promoting individual security from loss of the comforts of life by hostile demands of creditors, the social instinct suggests home building and proprietorship in an individual way, as strongly as any one thing that can be mentioned in the economy of nature, which is not given to us from its bounty without effort on our part to secure it. Nothing contributes more to the prosperity of a people, individually and collectively, than the general satisfaction of the desire for home ownership, which all must admit is universal, as we have indicated. Hence, a law applicable to a class of corporations designed primarily to administer to that desire, cannot be reasonably said to be unconstitutional because the classification is not legitimate. The law in question seems to satisfy all the

essentials of one applicable only to a particular class of persons, so as to remove it safely beyond the condemnation of the 14th Amendment of the national constitution.

The conclusion reached by courts elsewhere is in harmony with the views above expressed. *McLaughlin v. Citizens' Bldg. Loan & Sav. Assn.* 62 Ind. 264; *Shaffrey v. Workingmen's Sav. Loan & Bldg. Assn.* 64 Ind. 600; *Holmes v. Smythe*, 100 Ill. 413; *Freeman v. Ottawa Bldg. Homestead & Sav. Assn.* 114 Ill. 182, 28 N. E. 611; *Winget v. Quincy Bldg. & Homestead Assn.* 128 Ill. 67, 21 N. E. 12; *Security Loan Assn. v. Lake*, 69 Ala. 456; *Vermont Loan & T. Co. v. Whitted*, 2 N. D. 82, 49 N. W. 318. In most of the cases cited the question whether it was constitutional to make building and loan associations a class by themselves for legislative regulation of interest charges was the one considered; but certainly classification on that subject would not have better reason to support it than classification as regards priority of liens. In the case last cited this language was used: "Operations of building and loan associations, when confined to their own members, differ so radically from ordinary loan transactions that the legislature was clearly warranted in placing such associations in a separate class for the purposes of such legislation as pertains to interest and usury."

Counsel for appellant calls attention to some authorities contrary to the views we have expressed, particularly *Gordon v. Winchester Bldg. & Accumulating Fund Assn.* 12 Bush, 110, 23 Am. Rep. 713. We have examined them all, and many other authorities which we do not deem necessary to specially mention here. In our judgment the better reasoning and the greater weight of authority is in harmony with the conclusions we have reached.

The law under which respondent's mortgage lien was adjudged superior to appellant's lien under § 3314, Rev. Stat. 1898, is chapter 368, Laws 1897. It is entitled "An Act Regulating Building and Loan Associations." It is suggested that the term "regulating," with its context, does not suggest that feature of the body of the act relied on by respondent necessary to its judgment; hence that, as regards such feature, at least, the law is fatally defective under § 18, art. 4, of the Constitution, which prohibits the passage of any private or local law containing more than one subject, which must be stated in its title. There are two sufficient answers to that: (1) The law is plainly not a private or local law. It is a general law as distinguished from a local law as the latter term is used in the section under consideration. It has none of the characteristics of a private act. A law applicable to a special class of persons is a public and general law. *Milwaukee County v. Isenring*, 109 Wis. 9, 53 L. R. A. 635, 85 N. W. 131. (2) The title to the act suggests, reasonably, in our judgment, any means deemed by the legislature necessary or appropriate to the efficient administration of the business of building and loan associa-

tions. Obviously, the status of their mortgage liens, as regards other liens on property affected falls within that field. The technical meaning of words used in the title to a law cannot be safely taken to mark the limits of the enactment. The broadest meaning of which the words are reasonably susceptible under the circumstances must be given to them, since the Constitution leaves to the legislature unrestricted authority respecting the manner in which the subject of a law shall be stated in its title, so long as language is used which in any reasonable view can be said to state such subject. The statement of the subject is purely a legislative function. Courts cannot condemn the exercise thereof because, in their judgment, it might have been exercised better. The limit of judicial authority is to determine whether there was a failure to exercise the legislative function in the given case. *Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 89 N. W. 880.

A suggestion is made by appellant's counsel that the provision of § 3314, making liens of the character of appellant's date from the time of the commencement of the building regardless of when the work for which the lien is claimed was done or the material furnished, was re-enacted in August, 1897, by chapter 380 of that year; that such chapter, being a later act than the one upon which respondent's judgment depends, repeals so much of such act as is repugnant thereto. The conclusive answer to that is that the feature of § 3314 upon which counsel for appellant relies did not originate with chapter 380, Laws 1897. It is as old as the Revised Statutes of 1878. The only purpose of chapter 380, Laws 1897, was to give immediate effect to certain sections of the new revision of the statutes which went into effect as a whole in September, 1898. It contains no repealing clause, and was not intended to operate to repeal any existing law carried forward into the new revision, and by such revision to re-enact such law. In the general act giving effect to the new statute, passed at the same time as the special act under discussion, it was expressly provided that "the provisions of these Revised Statutes, so far as they are the same in substance as those of existing laws, shall be construed as a continuation of such laws, and not as new enactments." Rev. Stat. 1898, § 4985.

In that the legislature only voiced the unwritten law. *Laude v. Chicago & N. W. R. Co.* 33 Wis. 640; *Gilkey v. Cook*, 60 Wis. 133, 18 N. W. 639; *Cox v. North Wisconsin Lumber Co.* 82 Wis. 141, 51 N. W. 1130. But its action, in connection with the absence of any repealing clause in chapter 380, Laws 1897, indicates clearly that the enactment of such chapter was not intended to give existing laws which were continued, the 61 L. R. A.

character of original legislation; but that the contrary is expressly negatived.

The further claim is made that the law in question is contrary to public policy. We know of no ground upon which a constitutional legislative enactment can be rightly spoken of as contrary to public policy. What is and what is not public policy must obviously be determined by the written and the unwritten law, giving precedence to the former where the two are in conflict. We sometimes say that a contract is void because contrary to public policy, in that it is contrary to the policy of the law. Laws are never said to be contrary to public policy in any other sense than contrary to constitutional policy. To illustrate, a promissory note made on Sunday is said to be void, not because expressly made so by any written law, but because it is a penal offense to transact business on the Sabbath day. *Hove v. Ballard*, 113 Wis. 375, 89 N. W. 136; Rev. Stat. 1898, § 4595. We look to the statute in testing the validity of the note. It does not in terms condemn it as void, but it prohibits the doing of business, which includes the making of a note; therefore the giving thereof on the Sabbath day is contrary to the policy of the law,—in other words, contrary to public policy,—hence judicial remedies cannot be invoked, successfully, to enforce it. Statutes are not tested by any rule of public policy. We look to the statutes as well as the unwritten law to determine what is and what is not public policy, and then we test acts *inter partes* by the result. If such acts are not directly the subject of legislation, we say they are contrary to public policy. When we leave constitutional limitations out of view, the will of the legislative branch of the government, when expressed, is the highest evidence of public policy. To judicially condemn its expressed will when exercised within constitutional limitations, would be the plainest kind of usurpation. Baron Parke, in *Egerton v. Brownlow*, 4 H. L. Cas. 122, 123, expressed the same idea substantially thus: "It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only, to declare public policy as he finds it in the unwritten and written law." Public policy is a proper ground for a decision only in the sense of the policy of the law, not in the sense of mere judicial notions as to what is best for the public good. An act (speaking of an act *inter partes*) is properly said to be illegal when it is contrary to the principles of established law.

What we have said covers all the assignments of error generally and in detail that are presented for consideration in the brief of appellant's counsel.

The judgment is affirmed.

KENTUCKY COURT OF APPEALS.

City of GEORGETOWN, *Appt.*,
v.
COMMONWEALTH of Kentucky.

(.....Ky.....)

A municipal corporation is not subject to indictment for failure to compel the abatement of a nuisance to which it has not contributed, consisting of the emptying of filth into an open drain on private property within its limits.

(April 29, 1903.)

A PPEAL by defendant from a judgment of the Circuit Court for Scott County convicting it of permitting a nuisance within its limits. *Reversed.*

The facts are stated in the opinion.

Mr. W. S. Kelly for appellant.

Messrs. Clifton J. Pratt, Attorney General, and *M. R. Todd* for the Commonwealth.

NOTE.—Duty and liability of municipality with respect to drainage.

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I. Right and duty to provide.

a. In general.

A municipal corporation, in the absence of
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Nunn, J., delivered the opinion of the court:

At the May term, 1902, of the Scott circuit court, an indictment was returned against appellant, a city of the fourth class, in the usual and proper form, charging, in substance, that it did unlawfully suffer and permit in an open gutter, drain, and sewer between the gas plant and "Big Spring Branch," two points within the limits of the city, all sorts of filth, excrement, vegetable and animal matter, refuse and waste from the gas plant, and the ordinary sewerage of the community in, through, and along the open gutter, drain, and sewer to flow therein, and to remain rotting and festering, and giving forth and emitting noxious and poisonous gases, charging and burdening the atmosphere with dangerous and offensive odors, and disturbing the comfort of all good people, etc. On the plea of not guilty the evidence showed, in substance, the following facts: That there was a natural drain run-

any duty, express or implied, placed upon it by statute, is under no obligation to provide drainage. Its citizens cannot complain of the absence of a drainage system, or compel it to proceed to establish one. Under the strict rule that a municipality has only the powers expressly granted or necessarily implied, it is doubtful if it would be permitted to do so, even if it wanted to. However, there are very few municipal charters which do not contain some provisions about drainage, and all of them require the maintenance of highways. To maintain a highway in a safe condition necessitates drainage, so that the municipality has some authority in the matter. But, in the absence of statutory requirement, it has absolute discretion as to how much or how little it will provide.

In a Canadian case it is held that a municipal corporation has power to make sewers without any special authority given with that view, and, having made them, may by general rules, independent of its general taxing power, regulate the use of them and the price at which any private person may tap them and protect them by proper penalties against invasion or injury. *Fisher v. Harrisburg*, 2 Grant Cas. 291.

And the same idea appears in Pennsylvania and Ohio cases holding that power in a municipal corporation to construct sewers may be deducible either from its inherent faculties or from statutes. *Philadelphia v. Tryon*, 35 Pa. 401.

And that village authorities acting in good faith have the power to construct a general system of sewerage, and in so doing to destroy or change existing sewers. *Potter v. Norwood*, 21 Ohio C. C. 461.

But as a general rule such authority is traced to statutes where drainage for the benefit of the inhabitants is involved.

A municipal corporation having authority to construct sewers is not liable for injury for failure to do so, but is liable for injuries caused for failure to keep those already constructed in repair. *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719.

Authority to lay out and construct public drains and sewers cannot properly be claimed by a town as necessarily incident to the exercise of its corporate powers or the performance of its corporate duties, if ample provision for

ning from the gas plant to "Big Spring Branch," the drain passing along through the city, and into this drain the waste from the gas plant was permitted to flow, likewise the filth from privies on private property along this drain, and especially during the dry seasons of the year, when water was not flowing in this drain, it became very obnoxious and offensive to the smell, and was in fact a nuisance. The gas plant was not owned or operated by the city. It was shown by the record that the city council had passed ordinances making it an offense, and fixing the penalties therefor, for causing, maintaining, or permitting in the city limits noxious or unhealthy matter in such a drain or in any place within the city. The trial resulted in a verdict against the appellant for \$480, and, the court refusing to set aside the verdict and grant a new trial, the case is here on appeal.

If the corporation, the appellant, is liable to be indicted and fined for such an offense as proved in this case, then the judgment ought to stand. The only question to be determined is whether or not it is liable. As this is an important question to the state and all the cities and towns in the state, we have taken great pains to examine all the authorities touching the subject within our reach. This direct question, so far as we have been able to find, has never been before this court before; that is, as to whether or not a municipal corporation can be indicted and fined for its failure to cause the abatement of a nuisance, or cause the punishment of the individuals creating and suffering the same on their private property. There is no pretense that the city or its officials created or caused the nuisance, or that it exists on any property belonging to or under the control of the appellant, ex-

them is made by general statutes. *Bulger v. Eden*, 82 Me. 352, 9 L. R. A. 205, 19 Atl. 829.

The right of an incorporated town to construct sewers is usually regarded as incident to its power to maintain its streets, and does not conflict with authority conferred upon the supervisors of the county to construct levees and drains and change water courses so as to prevent the exercise of these authorities within the corporation. *Aldrich v. Paine*, 106 Iowa, 461, 76 N. W. 812.

Authority to repair and keep streets in order carries with it, without special mention, authority to construct drains and sewers. *Johnson v. Milwaukee*, 88 Wis. 389, 60 N. W. 270.

Authority to construct sewers imposes no duty to do so; and when a municipality has not itself built or accepted as public a sewer across private lands, but the same was made by the landowner of his own volition, it may recover of the latter the price of the labor and materials it furnished in the construction. *St. Albans v. Noble*, 58 Vt. 525.

Authority in a municipality "to drain the property" confers authority to construct a drain or sewer for the disposal of all sewage, as well as mere surface water. *Lewis v. Alexander*, 24 Can. S. C. 551, affirming 21 Ont. App. Rep. 613. Under a statute providing that "any city shall have full power to construct systems of sewerage," etc., the word "any" is used in the sense of "every," and includes all cities, whether organized under special charters or under the general laws of the state. *Heyler v. Watertown* (S. D.) 91 N. W. 334.

It seems, that the power to provide for the health and cleanliness of a city grants power to the mayor and common council to cause sewers to be constructed to carry the waste outside of the city, and authorizes the mayor and common council to cause such sewers to be constructed to such points outside of the city as may be necessary in order to rid it entirely of such waste. *Willson v. Boise City* (Idaho) 55 Pac. 887.

Under the Voorhees act, providing for the formation, establishment, and government of towns, and its supplements, the power is given to construct sewers within the municipality and beyond it, and to acquire sewage outlets beyond its limits. *Butler v. Montclair*, 67 N. J. L. 426, 51 Atl. 495.

Municipal corporations which avail themselves of a system of sewage disposal provided at the expense of the state may be required to repay the amount advanced, although the system will not be under their control, and even 61 L. R. A.

Its use will be subject to rules established by the legislature. *Kingman, Petitioner*, 153 Mass. 506, 12 L. R. A. 417, 27 N. E. 778.

The municipal corporation is sole judge of the necessities of sewers, and its judgment is conclusive. *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174.

At common law, a city is not liable for its failure to construct a sewer in a street of sufficient size to accommodate owners of land abutting on the street who connect their private sewers therewith. *Baxter v. Tripp*, 12 R. I. 310; *Mills v. Brooklyn*, 32 N. Y. 489; *Fair v. Philadelphia*, 6 W. N. C. 534.

A municipal corporation has no inherent duty to devise and execute such a system of drainage as will secure all private property against all ordinary and extraordinary flooding by rain or melting snow. *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342.

The duty of providing drainage or sewerage is in its nature judicial or legislative, and consequently, a municipal corporation is not liable for mere nonaction in failing to perform it. *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767; *St. Paul & D. R. Co. v. Duluth*, 56 Minn. 494, 23 L. R. A. 88, 58 N. W. 159 (*dictum*).

A municipal corporation is not liable because its sewerage system is not so constructed as to enable the owner of adjoining land to drain his house thereby. *Johnson v. Toronto*, 25 Ont. Rep. 312. In this case the house was constructed after the sewer was laid, with information as to its depth.

The absence of duty on the part of the municipality is illustrated by a case holding that a person discharging sewage from a house drain into a public street is not relieved from liability by reason of the failure of the municipality to establish a public sewer,—at least not until it appears that no other practical means of discharging the sewage can be devised. *Kirkwood v. Cairns*, 44 Mo. App. 88.

A purchaser of lands in New Orleans, flooded at times from a ditch, and at all times rendered unsuitable for the purposes of building, improvement, or occupancy, is not entitled to recover damages against the city for failure to improve the locality, where the condition of things existed at the time of and long before the purchase of the property by the plaintiff; but it is the duty of the council, under the charter, to adopt plans for thoroughly draining the entire area of the city, the expense of which must be borne by local assessment upon the property drained. *Davies v. New Orleans*, 40 La. Ann. 806, 8 So. 100.

cept the ordinary police control as the agent of the state. In the case of *Dudley v. Flemingsburg*, 24 Ky. L. Rep. 1804, 60 L. R. A. 575, 72 S. W. 327, the court said: "There are two general principles underlying the administration of government of municipal corporations. The one is that a municipal corporation in the preservation of peace, maintenance of good order, and the enforcement of the laws for the safety of the public, possesses governmental functions, and represents the state. The other is where the municipal corporation exercises those powers and privileges conferred for private, local, or merely corporate purposes peculiarly for the benefit of the corporation. Under the former the city is not liable for the malfeasance, misfeasance, or nonfeasance of its officers. Under the latter it is." This prosecution is based upon the theory that the city is liable to punishment for the fail-

ure of its officials to abate a nuisance and to prosecute the individuals responsible therefor. Nuisances are offenses at common law, and the persons creating or permitting them are liable to indictment wherever committed; and when the state grants to a city the power to abate or pass ordinances to punish persons guilty of such offenses this right is exercised only in aid of sovereignty in the enforcement of its laws for the comfort, safety, and health of the public. The city, in such a case, becomes a part of the sovereignty, and therefore is not liable to indictment. A municipal corporation is not liable for the acts of its officers in enforcing or the failure to enforce the criminal or penal laws of the commonwealth or the penal ordinances of the city. In *Taylor v. Owensboro*, 98 Ky. 271, 32 S. W. 950, the court, in an action seeking to make the city liable for the malfeasance and

A city is not liable for wholly failing to provide drainage or sewerage; nor for a mere error of judgment as to the plan of drainage; nor for insufficiency in the size or capacity of drains or gutters for the purpose intended,—at least if the adjoining property is in no worse condition than if no gutters or drains whatever had been constructed. *Pye v. Mankato*, 38 Minn. 373, 31 N. W. 863.

The law does not impose on a municipal corporation the duty of providing drainage for private property within its limits to prevent an inundation thereof caused by the owner of another lot obstructing a water course by filling his own lot to conform with the established grade of a street. *Beatrice v. Knight*, 45 Neb. 546, 63 N. W. 838.

A municipal corporation is not liable for damages to a house erected in a ravine across which the drainage from a turnpike naturally flows before it has built a gutter, as it is not bound to provide drainage for private lands. *Buchert v. Boyertown*, 1 Monaghan, 577, 17 Atl. 190.

A municipal corporation need not adapt its sewer grade to the elevation of any particular property, it being controlled by the necessities of the general system of grading and sewerage of which it is a part. *Betterly v. Scranton*, 5 Lack. L. News, 179.

When a municipal corporation constructs a system of sewers in a public road, it is required to place the sewers only to the depth required for the general convenience of adjoining proprietors; and it is incumbent on those whose premises are below the level of the sewer to place them in position to obtain benefit from its construction, as the corporation is not required to provide for such exceptional cases. *Roberts v. Montreal*, Rap. Jud. Quebec, 16 C. S. 342.

A municipal corporation is not liable for damage resulting from the depositing of garbage and drainage from kitchen sinks in a highway, when it has permissive authority to construct sewers and abate nuisances, both being governmental functions. *Chattanooga v. Reid*, 103 Tenn. 616, 53 S. W. 937.

In the case of statutory drains, the obligation to build is imposed by the properly constituted tribunal in the exercise of judicial authority while the duty to construct and keep in repair is a ministerial duty; and where there was no original necessity for the construction of a drain by the building of the road resulting in the obstruction of surface water, there is no reason why the town cannot abandon it whenever it chooses, as an owner of adjoining property, who has used it for the drainage thereof, 61 L. R. A.

will be in no worse situation than if it had not been built. *Estes v. China*, 56 Me. 407.

But a city, in discontinuing a sewer upon building a new one, is bound to proceed with due regard to the fact that the premises of a person are connected with a drain into the old sewer, and may be liable for the injuries caused by its failure to do so. The city is under no legal obligation to build or maintain a sewer, and has a right to discontinue an old one and build a new one. *O'Brien v. Worcester*, 172 Mass. 348, 52 N. E. 383.

Under a statute giving sewer commissioners power to act in their discretion, such discretion must be legally exercised. They have not an absolute power, but they are to proceed according to the rules of law. *Hetley v. Boyer*, 2 Bulstr. 197. *Rooke's Case*, 5 Coke, 100.

A general grant of power to construct sewers does not justify the creation of a nuisance. *Sayre v. Newark*, 58 N. J. Eq. 136, 42 Atl. 1068.

Where a statute requiring a local authority to drain its district provides a remedy for default or breach of the duty imposed, such remedy is exclusive, and the landowner injured by the failure of the board to construct drains cannot maintain an action for damages. *Robinson v. Worthington* [1897] 1 Q. B. 619, 66 L. J. Q. B. N. S. 388, 75 L. T. N. S. 674, 61 J. P. 164, 45 Week. Rep. 453.

Nor can the district be compelled by mandamus to construct the sewers. *Peebles v. Oswaldtwistle* [1897] 1 Q. B. 625, 66 L. J. Q. B. N. S. 392, 76 L. T. N. S. 315, 61 J. P. 308, 45 Week. Rep. 454.

There cannot be a public or common sewer that has not been constructed and maintained by the municipality, and that is not subject to municipal control. *Com. v. Yost*, 11 Pa. Super. Ct. 323.

The question as to the duty with respect to surface water is discussed in a note confined to that subject *post*, —.

b. Special circumstances.

There may be conditions under which it may become the duty of the municipality to provide drainage with respect to particular parcels of land. It is generally the duty of the municipality to abate nuisances, and, if drainage is necessary to abate a nuisance, the municipality has authority to provide it.

But the mere grant of authority to a municipal corporation to construct sewers does not amount to an imposition of a duty to do it. *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342.

misfeasance of its officers, said: "The municipal corporation in all these and the like cases represents the state or the public; the police officers are not the servants of the corporation; and hence the principle of *respondet superior* does not apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability.

. . . The cases rest on the ground that municipalities represent the commonwealth, and municipal officers, while engaged in duties relating to the public safety and in the maintenance of public order, are the servants of the commonwealth,"—and refers to *Dillon on Municipal Corporations*, §§ 974, 975; *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260; *Jolly v. Hawesville*, 89 Ky. 279, 12 S. W. 313; and *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585. The case of *State v. Burlington*, 36 Vt. 524, was

where the city was indicted for suffering and permitting a nuisance wherein the slop and waste water from the premises of several individuals was conducted into a ditch, from which offensive and unwholesome odors arose, offensive to the inhabitants living on the street. The court, after discussing the liability of the city upon statutory questions, decided the case upon broader principles, and said: "But we are also of opinion that the removal or abatement of nuisances erected or created by private persons cannot be considered as a corporate duty imposed by law upon towns. . . . This cannot be considered as creating a corporate duty on the town, unless we can assume that all and every duty which by general laws is devolved upon officers elected by the town is a corporate duty, and that the failure of every town officer to perform his official duty sub-

So, under a power to construct sewers and assess their cost on property benefited, a municipal corporation cannot license a private sewer to be laid and the contents emptied into a water course. *Hutchinson v. State ex rel. Trenton Bd. of Health*, 39 N. J. Eq. 569, Affirming 39 N. J. Eq. 219.

And a statute authorizing the construction by a municipality of a drainage canal from a designated point to a specified slough or lake does not justify the construction thereof to a point short of that specified, emptying into another lake and overflowing the lands of riparian owners thereon. *Davis v. Sacramento*, 59 Cal. 596.

A structure under ground, constructed by a city, not only to carry off the sewage from the streets and houses, but also to divert the water of a brook, is a common sewer within the meaning of a statute authorizing the city to lay out common sewers. *Bennett v. New Bedford*, 110 Mass. 433.

So, it must provide drainage for its own property, and its duty to keep its streets in safe condition requires them to be drained.

A municipality is as much bound as an individual owner of a lot to find an outlet for the water and filth deposited on ground occupied by a public school, and is liable for damage resulting from the neglect to do so. *Brigel v. Philadelphia*, 135 Pa. 451, 19 Atl. 1038.

There can be no doubt that there is an implied power in the city, arising from the duties imposed upon it in relation to the streets and highways within its limits, and as incident to the proper discharge of those duties, to construct drains upon the surface of the streets to carry off the water falling upon them, or coming upon them in whatever way, either to prevent their accumulation at points where it would be injurious, or to prevent the waste or washing away of the streets. The same duties would oftentimes require, and still more frequently render it expedient and proper, to carry it off under ground. The water, in its passage off, whether upon the surface or beneath it, must necessarily carry along with it the matter thrown or deposited in gutters, and coming upon the surface from travel,—the natural accumulation of a city: all the matter not pure, but of every degree of impurity to the last degree. If noisome and offensive, it would impose upon the city a high duty, to cause it to pass off without being an offense in its passage. *Clark v. Peckham*, 9 R. I. 455.

A culvert with too small an orifice to carry off all the water flowing to it, part of which, consequently, is thrown across a highway and

causes injury to a traveler thereon, is insufficient and defective so as to render a municipality liable in damages under the Vermont statutes. *Cook v. Barton*, 66 Vt. 63, 28 Atl. 631.

But personal injuries occasioned by a hole in a highway due to, and 5 rods away from, a culvert not large enough to carry off water from a side ditch, are too remote to make a municipality answerable under the Vermont statutes imposing liability for damages caused by insufficiency or want of repair of culverts and sluices. *Ford v. Braintree*, 64 Vt. 144, 23 Atl. 633.

Notice to town officers that a culvert under a highway will be insufficient to carry the water in time of flood is not sufficient notice of the defect in the highway which results from a flood, so as to permit one whose horse is injured by the defective highway to hold the town responsible therefor. *Pendleton v. Northport*, 80 Me. 598, 16 Atl. 253.

The question of the duty of a municipality to provide drainage for streets raises the question of its liability for the unsafe condition of its sidewalks owing to lack of proper drainage. In general, it may be said that there is a liability if the water is permitted to freeze on the walk in such a way as to make it unsafe. See *note* to *Brown v. White* (Pa.), 58 L. R. A. 321.

But a municipality is not liable for injuries caused by the fall of a pedestrian on the sidewalk, which was caused by the freezing of water flowing upon the walk by reason of the defective drainage of adjoining property, where it had not existed for any length of time, and was so thin and smooth as not to cause an obstruction to travel. *Landolt v. Norwich*, 37 Conn. 615.

So, where the bottom of a gutter which extends across a sidewalk is not a true grade, and the water stands thereon in pools and freezes, and a person is injured by slipping on the ice in the gutter, he cannot recover, in the absence of notice to the city of the obstruction of the street by ice as required by R. I. Gen. Laws, 454, unless the plaintiff shows that the gutter as it existed at the time of the accident constituted such a defect in the sidewalk as would have rendered the city liable, in case the accident had happened by reason of it, in the absence of ice. *Allen v. Cook*, 21 R. I. 525, 45 Atl. 148.

And where a gutter extends across a sidewalk, and a person is injured by slipping on ice in the bottom of the gutter, and he seeks to recover against the city, although no notice is given to the city of the existence of the ice as required by R. I. Gen. Laws, chap. 72, § 13, on the ground that the city is negligent in not maintaining the bottom of the gutter at a true grade so that water can pass off,—he must

jects the town to suit or indictment if the consequence is injurious either to any individual or to the community generally. But no such principle has ever been understood to prevail, except where the liability was created by statute. . . . The general supervision of the business affairs and concerns of towns is given to the selectmen, and in the performance of such duties they are agents of the town, and they may bind the town by their acts, and the town be liable for their acts, in much the same manner and upon the same principles that obtain between ordinary principles and agents. But when the legislature by general laws devolve certain duties relative to the general police upon selectmen, they do not become corporate duties and obligations of the town, any more than such duties required to be performed by constables, grand jurors, or

justices of the peace. If there is any liability to individuals or to the public growing out of their failure to perform such duties, it is upon the officers, and not upon the town." Cities are liable for the malfeasance of their officials in matters peculiarly pertaining to their benefit and advantage, but not for their failure to enforce or for non-enforcement of the criminal and penal laws of the sovereignty. Upon this principle the town of Marion was made liable to McGraw. The town imprisoned him for the failure to pay a license fee, unconstitutionally imposed, for the peddling of spectacles in the town. The court, in substance, said that the license fee was for the sole benefit of the town, and McGraw had not committed any offense against the criminal or penal laws of the state, and therefore the officials of the town were not in that matter acting as

show that the ice is caused by the defective condition of the gutter. *Ibid.*

See, further, on the question of street drainage, *infra*, VI. d and e, and note on the *Rights and duties of municipal corporations with respect to surface water, post*, —

The rule that a municipal corporation is not liable for an omission to supply drainage is not applicable where the necessity for the drainage is caused by its own act. *Byrnes v. Cohoes*, 87 N. Y. 204, Affirming 5 Hun, 602.

A pond of stagnant water may endanger the health of the neighborhood, and the public may cause it to be drained at once, and for that purpose may dig the necessary drains, and the land may be interfered with for that purpose, under the police power, without compensation. *Re Cheesebrough*, 78 N. Y. 232 (*dictum*).

A municipality, in abating a nuisance created by the basement of a barn filling with water and refuse, should do so by constructing a drain rather than filling it with earth, if drainage would render it sanitary; otherwise, it was proper to fill it. *Waggoner v. South Gorin*, 88 Mo. App. 25.

The fact that a private sewer exists upon the premises does not abate the power of a city to build a sewer for sanitary or other purposes. *St. Joseph use of Gibson v. Owen*, 110 Mo. 445, 19 S. W. 713.

II. Location.

a. In streets.

The accommodation of drains and sewers is one of the purposes of a city street, so that the city may locate sewers there without placing an additional servitude on the fee or on the rights of the abutting owner.

The putting of a sewer in a public street is simply the use of the street in a manner which is necessarily incident to the use for which streets are opened and laid out in cities. *Re Yonkers*, 117 N. Y. 564, 23 N. E. 661; *Malone v. Toledo*, 28 Ohio St. 643; *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519; *Cone v. Hartford*, 28 Conn. 363.

The appropriation of land to the uses of a public street in conformity to statutes confers the right to lay a sewer through it for conducting away the surplus water collected from portions of the city, without making additional compensation to the former owner. *Kelsey v. King*, 32 Barb. 410, Affirmed 33 How. Pr. 30.

A street is a public thoroughfare or highway established for the accommodation of the public generally in passing from place to place and for

such other incidental uses as are ordinarily made of public streets, such as laying drains, sewers, gas and water pipes, and the like. *Theobald v. Louisville*, N. O. & T. R. Co. 66 Miss. 279, 4 L. R. A. 735, 6 So. 230.

A town may make common drains and sewers under a highway whether it owns the fee or not. *Boston v. Richardson*, 13 Allen, 146.

A municipal corporation may construct a sewer in a street given to the public by dedication without payment of compensation therefor, the same as in a street acquired by condemnation proceedings. *Stoudinger v. Newark*, 28 N. J. Eq. 187.

The same principle was affirmed in *Warren v. Grand Haven*, 30 Mich. 24 where the court held that the dedication of land for street purposes is a waiver of any claim of compensation the owner might otherwise have had, where a sewer is laid along the premises.

But the New York court of appeals held that a dedication of a piece of land in a village or city to the use of the public for a street or highway does not authorize the use of the land for the construction of a sewer. *Kelsey v. King*, 33 How. Pr. 39.

Although the owner in fee of land dedicated to public use as a highway is entitled to only nominal damages for the additional burden upon the fee by reason of placing a sewer in the street. *Re Wells Avenue*, 22 N. Y. S. R. 648, 4 N. Y. Supp. 301.

Equity will not restrain the construction of a sewer in a street dedicated but not accepted as a highway, when the complainant will have undisturbed use of the 19 feet width of his half of the street, and can suffer but little inconvenience by the disturbance thereby of his easement in the other half. *O'Rourke v. Orange*, 51 N. J. Eq. 561, 20 Atl. 858.

But equity will restrain on terms of payment, the owner of the fee from depriving the public of the use of a street in which a sewer has been constructed after condemnation proceedings, the award of which was not paid, for which neglect said owner has brought ejectment and recovered judgment. *Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97.

A municipal corporation can use its streets without compensation to the owners of the fee for the drainage of any stagnant or running water whenever the public health, comfort, or convenience will be promoted thereby, under a power to construct drains and sewers whenever the public good requires, and to provide generally for the protection and maintenance of the health of the city. *Stoudinger v. Newark*, 28 N. J. Eq. 446.

However, the occupation of a considerable

agents of and in aid of the state in the enforcement of her laws, but were acting as the agents for the town, and solely for its pecuniary benefit. *McGrav v. Marion*, 98 Ky. 673, 47 L. R. A. 593, 34 S. W. 18.

Counsel cite, as sustaining the judgment of the lower court, Dill. Mun. Corp. § 933; 20 Am. & Eng. Enc. Law, 2d ed. pp. 1209-1231; *Hammar v. Corington*, 3 Met. (Ky.) 494; *Com. v. Hopkinsville*, 7 B. Mon. 38; *Bragg v. Bangor*, 51 Me. 532; *State v. Burksdale*, 5 Humph. 154; *Chattanooga v. State*, 5 Sneed, 578; and *Seifried v. Hays*, 81 Ky. 377, 50 Am. Rep. 167.

Dillon on Municipal Corporations, § 933, is as follows: "Neglect of duty in respect of repair of streets, etc. In Tennessee a municipal corporation is considered liable, upon the general principles of the common law, to indictment for neglecting its duty to

keep its streets in reasonable repair, and it is no defense that the street is little used, and is in a remote part of the town. And the mayor and aldermen may also be personally indicted for like neglect of duty. So in the same state it is held, upon the general principles of the law, that if a municipal corporation has power by its charter to pass such ordinances as may be necessary 'to preserve the health of the town and to prevent and to remove nuisances,' it is its positive duty to exercise this power, and that for a neglect of this public duty it or its officers are liable to an indictment. An indictment against the mayor and aldermen was accordingly sustained for permitting a slaughterhouse to be kept upon the private property of a citizen or the town, to the annoyance of the inhabitants and the endangering of the public health; the court re-

portion of a street by a municipal corporation for the construction of a ditch not for the improvement of the street, but for the sole purpose of draining adjacent land, the natural flow of water from which is not in that direction, is a new use of the street, for which compensation must be made in case property is damaged thereby. *Chicago & N. W. R. Co. v. Jefferson*, 14 Ill. App. 615.

The power of a municipal corporation to provide sewers and drains in the public streets is to be exercised in the discretion of the corporate authorities. *Daniels v. Denver*, 2 Colo. 669.

A municipal corporation will not be enjoined from constructing a drain along a public street on the ground that lots abutting thereon will suffer damages by overflow, where it is not attempting to collect the water in one channel and cast it upon such lots in a body, but the damages, if any, will be merely consequential damages resulting from a careful and skilful performance of the work. *Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300.

It is the settled policy of the state of Michigan to permit the use of highways for drainage purposes; and it is within the power of the legislature to permit this, and to authorize the laying of drains in highways by other officers than those having the highways in charge. *Kiley v. Bond*, 114 Mich. 447, 72 N. W. 233.

Power to construct a sewer under a street is conferred by a statute to regulate, grade, and otherwise improve it. *Re Leake & Watts Orphan Home*, 92 N. Y. 116.

A statute authorizing a municipality to make and repair the public streets and highways within its limits includes the right to construct sewers beneath the surface of such streets. *Cone v. Hartford*, 28 Conn. 363.

A city incorporated under a special charter, but which adopted an article of the general law in relation to cities, villages, and towns, has the power, under such article, to construct a sewer in a street, and to levy a special assessment for the cost thereof upon the property benefited, without regard to its powers in that respect as conferred by its special charter. *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895.

Where it is clearly shown that a sewer, when constructed, will not interfere with the use of a highway along which it is to be built, and that, during its construction, such use will not be seriously interrupted, it is not necessary to show that the new use is superior to the one to which the property is already appropriated, as required by the California statutes as a condition precedent to the right to take property for a public use, where already appropriated to 61 L. R. A.

some other public use. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

Under a statute providing that the mayor and aldermen may lay off, make, and maintain all such main drains or common sewers as they shall adjudge to be necessary through the land of any persons or corporations, they may construct a sewer in a public street. *Carr v. Doolley*, 122 Mass. 255.

A private alleyway laid out for the common use of certain city lots must be supposed to be laid out and granted for the ordinary uses of a city alley, such as a place for sewer, water, and gas pipes. *Foran v. McIntyre*, 26 Pittsb. L. J. N. S. 488.

Drains cannot be constructed along a public street so as to hinder the public use of it as a street or constitute a nuisance to abutting owners. *Richardson v. Boston*, 10 How. 263, 15 L. ed. 639.

Equity will not forbid a municipal corporation to continue by the construction of a sewer the improvement of a highway which it has appropriated at great expense, on private land without hindrance by the owner, who is shown to be guilty of laches. *Traphagen v. Jersey City*, 29 N. J. Eq. 206.

An abutting property owner may recover damages consequential on the construction of a sewer in a platted but unopened street. *Re Spring Street Sewer*, 5 Pa. Dist. R. 373.

But after a highway has been laid out and accepted, a sewer can be constructed in it without further notice or proceedings, although the highway itself has not been constructed. *Lawrence v. Nahant*, 136 Mass. 479.

A street in one municipality cannot be used for a sewer for the benefit of the inhabitants of another municipality which in no way benefits the abutting owners, without making the compensation to them. *Van Brunt v. Flatbush*, 128 N. Y. 50, 27 N. E. 793, *Reversing* 59 Hun, 192, 13 N. Y. Supp. 545.

The construction by the state of a metropolitan system of sewers under a highway in a town does not create an additional servitude for which damages can be claimed by the owner of the fee. *Lincoln v. Com.* 104 Mass. 1, 41 N. E. 112.

But a legislature may delegate power to municipal corporations to make use of highways for the purpose of drainage, although the same are outside the corporate limits. *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618.

A municipal corporation has the power to construct drains in public highways outside the corporate limits, under a provision in the city incorporation act providing that corporate au-

marking that 'an indictment against the corporation is the proper mode of redress by the public for a grievance of this nature.' . . . In Vermont a town is liable to an indictment as at common law for not erecting a bridge pursuant to an order from a competent tribunal. In Maine towns charged with the maintenance of public highways are by statute indictable for failing to discharge their duty in this respect, and the general principle is asserted in such cases that, where the town is civilly liable in damages, it may be indicted." It will be noticed that the part of this section which refers to making corporations criminally liable for the failure to abate or permitting nuisances on private property refers solely to authorities in the state of Tennessee in support thereof. The authorities referred to are *State v. Shelbyville*, 4

Sneed, 176; *Hill v. State*, 4 *Sneed*, 443, and *McCrouell v. Bristol*, 5 *Lea*, 685. The case of *State v. Shelbyville* was where an indictment was against the mayor and aldermen of the town for permitting a public nuisance, to wit, a slaughterhouse, to be kept by a private citizen in the town, alleged to be a nuisance, and for their failure to abate or suppress it. The court said that they were liable, and the court stated in that opinion that the corporation was also liable to indictment. This was mere *dictum*, and the court did not cite any authority to support the statement. In the case of *Hill v. State* the mayor and aldermen of an incorporated town were indicted and punished individually for their failure to keep in repair the public streets of the town. The court sustained the judgment of the court below. It will be seen that this case is not

authorities, "for the purpose of drainage of such city, may go beyond the city limits, and condemn lands and materials, and exercise full jurisdiction, and all the necessary power therefor." *Cummins v. Seymour*, 79 *Ind.* 491, 41 *Am. Rep.* 618.

An ordinance of a municipal corporation providing for the construction of a sewer with an outlet over a highway outside the corporate limits is not invalid because such city had not, prior to the passage of the ordinance, acquired the right to occupy and use such highway, where the statute authorizing the making of such improvements by municipal corporations does not so require. *Cochran v. Park Ridge*, 138 *Ill.* 295, 27 *N. E.* 939.

Assessments upon property abutting on the street used as a public highway, but owned by a private corporation at the time of the construction of a sewer therein, but subsequently acquired by the city in condemnation proceedings before the assessing ordinance, are not invalid, where no objection was made by such corporation to the construction thereof. *Cincinnati v. Hanningfort*, 1 *Ohio S. & C. P.* Dec. 563.

An injunction will not be granted to restrain the construction of a sewer under a sidewalk in front of an owner's property on the street, as such owner has no rights in the street which are not subject to the city's prior right to the use thereof for such improvements as may be necessary for the public good. His remedy is by a suit for damages. *Re Pavement*, 5 *Ohio S. & C. P.* Dec. 573.

A statute providing that whenever a municipality shall lay out a sewer in whole or in part through or across the land of individuals, it shall cause to be appraised and paid to the owners of such land the damages thereto, and providing for the form of the proceedings to be had for such purpose, does not refer or apply to sewers constructed in public highways. *Cone v. Hartford*, 28 *Conn.* 363.

Under a clause in its charter authorizing a city to construct sewers along its streets, etc., and to assess the cost of such construction upon the lands of the abutting owners, an assessment for a sewer in a street belonging to a turnpike company is valid and enforceable where such turnpike is within the corporate limits, and, therefore, is under the control of the city, and is within the taxing district designated by the ordinance for such sewer, and the turnpike company is not complaining, but consented to such construction. *Lewis v. Schmidt*, 19 *Ky. L. Rep.* 1315, 43 *S. W.* 433.

Where, at the time of the construction of a
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sewer in a street, it has been opened and graded by the adjoining owners, and used by all who wish to do so, and the municipality has constructed a dock at the foot of it, the assessment will not be set aside, although it has not been opened by legal proceedings,—especially where it is legally opened before proceedings are taken to set aside the assessment, and the abutting owner makes no objection to the work during its progress. *Re McGown*, 18 *Hun.* 434.

In an action to enforce the payment of an assessment on lands for the construction of a sewer by a municipal corporation, the question as to whether, at the time of the passage of the ordinance and the letting of the contract for its construction, the municipal corporation had such ownership or control of the street as properly authorized it to construct the sewer therein, is incompetent, where the statute authorizing municipal corporations to construct sewers, etc., provides that, on the trial of cases like this, "no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council." *McGill v. Bruner*, 65 *Ind.* 421.

Eminent domain proceedings are not the proper proceedings in which to assess the damages of an abutting owner on a highway by the laying of a sewer in the street. *Re Youkers*, 117 *N. Y.* 564, 23 *N. E.* 661.

In a suit against a city by a street railway company for an injunction to restrain the city from laying sewer pipes along the center of its streets, where it is not alleged or shown that the city council acted arbitrarily or capriciously in directing the sewer pipes to be laid in the centers of the streets, the courts will not undertake to revise or control the honestly exercised discretion of the council, although the proof may tend strongly to show that there was no necessity for putting the sewer pipes in the center of the streets. *San Antonio v. San Antonio Street R. Co.* 15 *Tex. Civ. App.* 1, 39 *S. W.* 136.

Where abutting owners own the fee of the land under a turnpike road, the additional easement of a sewer thereunder, not for the benefit of the road, but for the purposes of city infirmity buildings, cannot be imposed by the consent of the turnpike company without the consent of the owners of the fee; and the laying of the sewer will be enjoined until the city obtains their consent, or appropriates the right to lay down a sewer by condemnation proceedings. *Cilley v. Cincinnati*, 7 *Ohio Dec. Reprint*, 527.

b. On private property.

There is no right to locate sewers on private

in point, because it has reference to the public streets of the town. The case of *McCrowell v. Bristol* was where McCrowell sued the mayor and aldermen of the town of Bristol, alleging that they had aided in establishing a nuisance, to wit, a saloon, on property adjoining his dwelling, and suffered and permitted drunken and boisterous persons to assemble, congregate, and remain there, to his annoyance and damage. The court in that case said that he could not recover.

20 Am. & Eng. Enc. Law, 2d ed. p. 1209, is as follows: "A municipal corporation is liable for the creation or maintenance of a nuisance whereby an individual sustains special injury. And a city is also liable if it licenses the creation or maintenance of a nuisance by third persons. But though cities have, as a rule, the power to abate

nuisances, and it is their duty to abate them, yet there is no liability in damages for a failure to exercise the power of abatement. But a municipal corporation has been held liable to indictment for a dereliction of duty in such respect. If a city, having power to prevent and remove nuisances, invades and trespasses upon the rights of an individual in undertaking to exercise such power, it is liable in damages therefor." The author, in the use of this language, "But a municipal corporation has been held liable to indictment for a dereliction of duty in such respect," refers only to the case of *State v. Shelbyville*, 4 Sneed, 176, to uphold it. Again, in same book, page 1231, this language is found: "Where duties of a public nature are imposed upon municipal corporations, such corporations are liable to indictment if they

property unless the right is obtained by contract or under the right of eminent domain. *Re Rhineland*, 68 N. Y. 105.

But a municipal corporation may be given power to lay out sewers through private property. *Hildreth v. Lowell*, 11 Gray, 845.

A municipal corporation having exclusive jurisdiction over all highways within its limits, and general power to construct sewers and drains, has, as an implied power, the right to acquire by lawful means private property necessary to be crossed in order to complete a sewer,—especially to obtain an outlet therefor,—and to pay for the same at the public expense, where there is no legislative grant of the power to acquire such property by special assessment. *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711.

A municipal corporation has no power, in the absence of express statutory authority, to condemn and appropriate private property for the construction of a sewer; and that power will not be implied in the grant of authority to enforce ordinances to construct sewers and provide for the payment of the cost of the same. *Allen v. Jones*, 47 Ind. 438.

The statutory power conferred on a municipal corporation "to provide on what terms real estate in such city may be drained by means of surface or under drains over and across other real estate therein" does not authorize the condemnation and appropriation of private property for the construction of public sewers. *Ibid.*

A municipal corporation has authority, if necessary for the public health, to procure the right of way for the construction of a ditch to alter the course of a stream flowing through its limits, and may reimburse a private citizen who furnishes the money with which to pay for the land. But the mere determination to procure the right of way does not authorize the private citizen to go on and construct the ditch so as to require the municipality to reimburse him for the expenditure. *Stewart v. Council Bluffs*, 50 Iowa, 668.

Without founding it on a law for the ascertainment and prepayment of damages to the owner of invaded property, a municipal corporation has no power to provide that it shall be lawful for the street committee, or its agent, to enter upon any lot, etc., of the borough, for the purpose of cutting or opening drains and ditches and of keeping them in repair. *Strasburg v. Bachman*, 21 W. N. C. 462.

A municipal corporation does not wrongfully enter upon private property for the purpose of constructing a ditch when done by virtue of a statute making it liable subsequently for the 61 L. R. A.

land taken or damage done. *Stonehouse v. Enniskillen*, 32 U. C. Q. B. 562.

A city, in improving its system of drainage, has no right to maintain a ditch so as to encroach upon the land of a canal company, ingress to and egress from which is thereby obstructed; but the city will be required to cover the ditch and the street crossings leading to the landing. *Carondelet Canal & Nav. Co. v. New Orleans*, 38 La. Ann. 308.

A city which, under an oral arrangement, drains sewage into a ditch constructed along a railroad track to carry off surface water, will be enjoined from making the ditch an outlet for another sewer, in the absence of any public exigency or necessity requiring it, where the increased flow of sewage would constitute a nuisance. *New York C. & H. R. R. Co. v. Rochester*, 17 N. Y. S. R. 303, 1 N. Y. Supp. 456.

A lot owner who drains his property by a private drain leading under an adjoining street has no right of action against the municipal corporation for opening a connection with the drain to conduct surface water, although there may be a right of action in case the municipality obstructs the drain. *Emery v. Lowell*, 104 Mass. 13.

A right of a municipal corporation to take as much of an estate as shall be adjudged necessary for the purpose of constructing a sewer gives only a right to acquire the right to construct the sewer across the property, and to enter and keep it in repair, subject to which rights the use of the land remains in the former owner. *Clark v. Worcester*, 125 Mass. 226.

A municipal corporation which has authority to take land in different counties for the construction of a sewer system, making compensation to landowners for land taken, may remove the land excavated in the construction of the work in one county to another for use there, without being liable to the owner for conversion of it, although the municipality has not acquired the fee of the land. It acquires the right to dig up the surface and appropriate the soil so far as is reasonably necessary to carry out the plan and construct the work contemplated. *Titus v. Boston*, 149 Mass. 164, 21 N. E. 310.

If a common drain is laid out 12 feet wide in a certain town, but constructed only 8 feet wide, the town has power to enlarge it to the width of 12 feet if such enlargement is reasonable and necessary for the purpose of proper drainage, although it runs through private land. *Melrose v. Hilland*, 163 Mass. 303, 39 N. E. 1031.

fail to discharge those duties according to law;" and refers, as authorities to sustain it, to the Tennessee cases above referred to. Also the cases of *Richardson v. Boston*, 24 How. 188, 16 L. ed. 625; *Hammar v. Covington*, 3 Met. (Ky.) 494; *Bragg v. Bangor*, 51 Me. 532; *Com. v. New Bedford Bridge*, 2 Gray, 339; and *State v. Canterbury*, 28 N. H. 195.

We have already discussed the Tennessee cases referred to.

The case of *Richardson v. Boston* was where the plaintiff, Richardson, was the owner of two wharves running from high to low water mark. The city owned a strip of ground 30 feet wide between the two wharves. The plaintiff sued the city for creating and maintaining a nuisance upon its property. The statement of the case shows that it has no application to the case

involved here. The case of *Hammar v. Covington* was where the court said that individuals whose property was about to be destroyed by the giving way of a street of a city had the right to a writ of mandamus against the council to compel them to have the street repaired. The case of *Bragg v. Bangor* was where the court said: "Towns may be indicted and fined for allowing their highways to become unsafe and inconvenient." The case of *Com. v. New Bedford Bridge* was where the proprietors of a private corporation, called the "New Bedford Bridge," were indicted for creating and maintaining a nuisance in the manner of erection and maintenance of its bridge. The case of *State v. Canterbury* was where the town was made liable to indictment for not building and repairing bridges as parts of the highway in which they are situated.

The state has the undoubted right to authorize the improving of a drain across the right of way of a railroad company by deepening and widening a natural channel. *Pittsburgh, C. C. & St. L. R. Co. v. Machler (Ind.)* 63 N. E. 210.

In locating and constructing a drain across a railway, the taking, though presumably for a permanent use, is not of the fee, but of an easement not interfering with the use of the railroad for all consistent purposes. *Farmers' Loan & T. Co. v. McAndrews*, 48 C. C. A. 261, 109 Fed. 109.

A city is chargeable with the cost of alterations in the tracks of a railroad company, and of strengthening the side walls of a sewer to support the tracks as altered, necessitated by the construction of the sewer in a new street laid out across the company's right of way over the premises through which the street was opened without condemnation of its easement and expressly subject thereto. *Baltimore v. Cowen*, 88 Md. 447, 41 Atl. 900.

One across whose land the city constructed a canal through which it has for over six years drained sewage does not thereby suffer such an irreparable injury as will prevent the court from dissolving the temporary injunction pending suit. *Jefferson & L. P. R. Co. v. New Orleans*, 30 La. Ann. 970.

A sewer constructed by a city across the lands of a private owner without his consent or permission belongs to the owner, and upon conveyance of the premises passes to his grantee. *Harrington v. Port Huron*, 86 Mich. 46, 13 L. R. A. 664, 48 N. W. 641.

Authority by charter to construct sewers, is limited to its exercise in such a manner as not to create a nuisance injurious to private rights of property, where such consequence is not a necessary result of the exercise of the power given. One exercising such power is liable to one to whom the construction of a sewer is peculiarly injurious by reason of its proximity to his abode, in consequence of which he sustains damage not shared by the community at large. *Edmondson v. Moberly*, 98 Mo. 523, 11 S. W. 390.

Must comply with contract.

Where a city, in consideration of a right of way across lands for a sewer, contracts with the landowner, so to construct such sewer, with a suitable valve, as to prevent water from flowing back through it, in times of high water, into the premises of such landowner, it is the duty of the corporation to select such a valve or water trap as will be reasonably fit for the purposes for which it is to be used, and so to lay and cement the pipes as to make them

effective to protect the landowner's premises from all overflow to which they had not previously been subjected; and such landowner does not waive or lose his rights because he fails to protest when he sees the work is being defectively done, and an unsuitable valve is selected. *Nashville v. Sutherland*, 94 Tenn. 356, 29 S. W. 228.

A property owner who has consented to the enlargement of a ditch extending across his land so as to provide an outlet for the drainage of a city, which agrees to maintain it so that the adjacent soil will not be overflowed or saturated, will be enjoined from filling up the ditch, where the enlargement, when made, was satisfactory to the owner of the land, and the city has substantially complied with its obligation, and when any obstruction of the ditch will work irreparable mischief, and the contract between the city and landowner provides for an adjustment of disputes by arbitration. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

Liability for construction on private property.

A municipal corporation is not liable in damages for the improper location of a ditch which it had authority to construct. *Wicks v. DeWitt*, 54 Iowa, 130, 6 N. W. 176.

A municipality is not liable for the acts of its officers and agents in laying a sewer pipe across private property under a statute authorizing it to perfect a sewerage system and to enter any premises in the municipality for that purpose, and, if necessary, to condemn private property; neither are the officers and agents liable if they acted in a prudent manner and without malice. *Parks v. Greenville*, 44 S. C. 168, 21 S. E. 540.

As a town is without authority to ditch on private property, except as the right may be acquired under the statute, it will not be liable if, by means of such ditches, surface waters are accumulated and cast upon land to its owner's damage, when the ditches were dug by its officers on private property, for the improvement of the highway, without authority. *Kreger v. Blsmarck Twp.* 59 Minn. 3, 60 N. W. 675.

A municipal corporation which has located built, and maintained a sewer, as laid out by an order of the board of aldermen, through the land of a person, cannot defeat liability for the damages by the fact that the order omitted the boundaries and measurements as required by the ordinance. *Saunders v. Lowell*, 131 Mass. 387.

A landowner has no action against a municipality for injury resulting from the voluntary act of one holding the office of street commissioner and in charge of the sewers, in conduct-

The case of *Com. v. Hopkinsville*, 7 B. Mon. 38, was where the trustees of the town were indicted for their failure to keep the streets clean. The case of *Seifried v. Hays*, 81 Ky. 377, 50 Am. Rep. 167, was where Seifried was running a slaughterhouse on his own property, and the appellees sought an injunction restraining him from continuing the nuisance, and the court enjoined and restrained him from keeping dead animals, or any parts of dead animals, on his premises in such manner as would cause the offensive odor and stench complained of. And in the opinion the court remarked that an indictment against the appellant would have been the proper remedy. It will appear from the statement of all the cases referred to that they have no application to the question before us.

We have found two cases decided by the superior court of this state which are apparently in conflict with the views herein expressed by this court. One case is *Paris v. Com.* (opinion by Judge Richards) 4 Ky. L. Rep. 599. After announcing the true doctrine, he uses this language: "But whenever the ministerial powers or duties of municipal corporations are involved, they

stand before the criminal law upon the same footing with all other corporations. To this class belongs the duty to abate public nuisances." He then refers to the case of *State v. Shelbyville*, 4 Sneed, 177, *supra*, as the only authority to sustain such a proposition. The other case is *Com. v. Paducah*, opinion by Judge Ward, 6 Ky. L. Rep. 292. We have examined the manuscript opinion in this case, and find that he refers to, as authority, only *Morawetz, Priv. Corp. § 94, Diil. Mun. Corp. § 933, and Ang. & A. Priv. Corp. §§ 394-6*. We have in this opinion quoted and discussed Dillon on *Municipal Corporations, § 933*, and we have examined the sections referred to in *Morawetz* and *Angell & Ames on Corporations*, and find that they have reference alone to private corporations, and have no application to this case.

We have been unable to find any authority in any state sustaining the contention of the commonwealth, except the case of *State v. Shelbyville*, 4 Sneed, 176, above referred to.

Wherefore the case is reversed, and the cause remanded for further proceedings consistent herewith.

ing sewage from a broken sewer across intervening land to be discharged on such landowner's premises, as such act was not in the line of duty, but an individual trespass. *Jersey City v. Klernan*, 50 N. J. L. 246, 13 Atl. 170.

The fact that a municipal corporation, in constructing a sewer, departed from the route authorized by statute, and laid a portion of the sewer through private land with the consent of the owners, will not absolve it from injuries caused by the casting of its contents on private property through negligence in its construction. *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030, affirming 22 N. Y. S. R. 215, 4 N. Y. Supp. 745.

A municipal corporation must construct and maintain its sewers where it can exercise ordinary care and skill; and, if it locates them on property where it cannot control them, the fault is its own, and it cannot escape liability to one who suffers injury from its negligence in that respect. *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743.

Interference with property in street.

A franchise of a street railway corporation, granted by a city, is subordinate to the charter right of the city to control its streets and construct sewers therein, and the constitutional guaranty against taking property for public use is not applicable in such cases; and the city will not be enjoined from laying the sewer pipes, and cannot be held liable for damages necessarily occasioned thereby to the street railway company. *San Antonio v. San Antonio Street R. Co.* 15 Tex. Civ. App. 1, 39 S. W. 136.

A municipal corporation, having the absolute control over its streets, has the right to construct a sewer in that portion of a street covered by the tracks of a street railway,—especially where the franchise of the latter contains a reservation of the right of the city to "enter upon said streets, or any part thereof," for the construction of sewers and other street improvements. *Spokane Street R. Co. v. Spokane*, 5 Wash. 634, 32 Pac. 450.

A provision in a charter of a street railway company that the municipality shall do no act "to hinder, delay, or obstruct the operation" of
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the route will give way to authority given to a municipality by a subsequent act to lay a sewer in the street through which the tracks are laid so far as is necessary to interrupt the operation of the road by the laying of the sewer. *Dry Dock, E. B. & B. R. Co. v. New York*, 55 Barb. 298.

The location by a municipality of a sewer in the center of a street so as to obstruct and suspend the travel upon a street railway is an unreasonable and unlawful exercise of its power, where there is ample room for the sewer elsewhere in the street; but the city is not required to incur any considerable or additional expense by having granted the railway the free right to the use of the street. *Clapp v. Spokane*, 53 Fed. 515.

A drainage commission is entitled to joint occupancy of the streets of a city with a waterworks company, and, in order to secure such joint occupancy, has the right to remove and replace mains and pipes, but only upon making just and adequate compensation to the waterworks company. *Moore v. New Orleans Waterworks Co.* 114 Fed. 380.

A municipal corporation may construct a sewer in a highway occupied by a turnpike corporation without its consent, under a police power to which the turnpike company is necessarily subject, as a sewer in a populous city is a public necessity of the highest kind, due regard being had to the demands of transportation and the travelling public. *Providence & A. Turnp. & P. Road Co. v. Flanagan*, 2 Lack. L. News. 101.

The construction by a municipal corporation of a ditch under and across the right of way of a railroad company across a highway, for the draining of water that does not naturally flow in that direction, constitutes a taking or damaging of the property of the railroad, within the meaning of the Constitution, for which compensation must be made. *Chicago & N. W. R. Co. v. Jefferson*, 14 Ill. App. 615.

Remedy.

Equity will not restrain a municipal corporation from constructing a street ditch along land which it claims has been dedicated to the pub-

lie, as the law furnishes adequate remedy if the land is private property. *Doughty v. Somerville*, 33 N. J. Eq. 1.

Where a municipal corporation has taken property in fee for sewer purposes, its former owner cannot enjoin the municipality from contracting to permit the sewage from other cities to be turned into the sewer, either on the ground of possibility of reverter to him in case of abandonment of the sewer, or because of anticipated injury to his remaining property because of the increase in flow of water through the sewer. *Titus v. Boston*, 161 Mass. 209, 36 N. E. 703.

An injunction will lie to restrain a city from laying a sewer through private property, when claiming to do it under a statute which allows cities to lay sewers through public streets. But in such a case, where the question as to whether the land in question is a public street is in doubt, the city may have an issue made to a jury to try the question, and the injunction will be withheld upon the city giving stipulation that it will proceed with all reasonable despatch to have the question determined, and upon the city giving a bond to pay damages. *Clark v. Providence*, 10 R. I. 437.

An action of tort lies against a city by the owner of land through which its agents have unlawfully laid a sewer. *Hildreth v. Lowell*, 11 Gray, 345.

Ejectment will not lie in Michigan against a city which claims to own a sewer it has constructed upon private property without the owner's permission and to have the right to discharge water through it, since there is nothing tangible or capable of being delivered to the plaintiff by the sheriff under a writ of possession. *Harrington v. Port Huron*, 86 Mich. 46, 13 L. R. A. 664, 48 N. W. 641.

If a municipal corporation has built a sewer upon private property with the knowledge and consent, or at the request, of the owner, it will not be liable for the discharge of sewage thereon through a defect in the pipe, since the remedy is to remove the sewer. *Searing v. Saratoga Springs*, 39 Hun, 307, Affirmed in 110 N. Y. 643, 17 N. W. 873.

A landowner is not liable for damage resulting from his obstructing a public sewer where laid on his land without his consent; and one whose property is connected with the sewer only has redress against the municipal corporation for maintaining the sewer in an insufficient condition. *Ostrom v. Sillis*, 28 Can. S. C. 485, Affirming 24 Ont. App. Rep. 526.

Damages.

The measure of damages for property taken for a sewer outlet is the difference between the fair market value of the whole tract immediately before and immediately after the taking, less any advantage to the owner on account of the improvement. *Bennett v. Marion*, 106 Iowa, 628, 76 N. W. 844.

The measure of damages under a statute providing for damages for injuries caused by the entry of the health authorities upon land to construct a drain to ameliorate the condition of wet and spongy land injurious to health for the abatement of the nuisance, is the difference between the fair market value before the acts of the authorities, and its value afterwards. *Driscoll v. Taunton*, 160 Mass. 486, 36 N. E. 495.

Damages for the taking of land by a city for the laying of a sewer are not to be awarded in reference to the peculiar situation or circumstances or plans of the owner, or to the business in which he happens to be engaged; but any possible use of the land may be considered

by the jury. *Maynard v. Northampton*, 157 Mass. 218, 31 N. E. 1062.

The measure of damages for the taking by a municipal corporation for sewerage purposes, of land belonging to a railroad company and to be used as a gravel pit, is the value of the property taken, and the injury, if any, to the remaining property of the company. *Providence & W. R. Co. v. Worcester*, 155 Mass. 35, 29 N. E. 56.

Authority given by ordinance to build over a sewer cannot be considered for the purpose of diminishing the damages to be paid for taking a right of way through private property for sewer purposes, if the landowner has refused to assent to the concession. *Roanoke City v. Berkowitz*, 80 Va. 618.

Where a municipal corporation enters upon land for the construction of a sewer across it under an ordinance void because of noncompliance with the provision of the charter, it becomes a trespasser, and the landowner may hold it liable for the value of the land so illegally appropriated, without any allowance for the value of the improvements placed on it. *Holliday v. Atlanta*, 96 Ga. 377, 23 S. E. 406.

The fact that a public nuisance may be created by deposits below the mouth of a public sewer, which would specially damage the owner of the land upon which the sewer is constructed, cannot be made an element of damages in proceedings to recover for the land taken, as the municipality has no right to create a nuisance. *Clark v. Washington*, 11 Pa. Co. Ct. 433.

A municipal corporation is not liable for damages from the erection of a sewer on one's land prior to the time when he received the title. *Alexander v. District of Columbia*, 3 Mackey, 192.

The damages for the appropriation by a municipal corporation of a private sewer on private land are to be measured by the servitude to which the land is thereby subjected, rather than by the *quantum* of use at any particular time. *Hays v. South Easton*, 10 Pa. Super. Ct. 330.

The value of a private sewer appropriated by a municipal corporation, for which damages must be paid, is not necessarily fixed by the amount paid by the owner for its construction, but by the cost of an adequate sewer at the time of taking, not exceeding the cost of the sewer taken. *Ibid.*

III. Construction.

a. Sufficiency.

Much uncertainty has existed with respect to the liability of the city for insufficiency of drains which it constructs. A large part of this is unnecessary if the principles involved are kept in mind.

As stated in I. a, there is no duty to provide drainage, unless the duty is imposed by statute. As a corollary, an individual has no right of action if no drainage is provided for his property, although his neighbor's property is drained. This nonliability is usually placed upon the ground that the determination as to drainage and the preparation of plans are legislative or judicial questions, for an exercise of which the municipality cannot be made to account. The adoption of this ground, however, is unwise, because it leads to consequences which are not supportable. If the municipality is not liable for errors in the plans, then there is no liability in case the plans are such that they will gather the water from a large territory, and then, because the drain is insufficient to carry it, or because the outlet is defective, cast it upon private property to its

injury. Nonliability in such cases cannot be admitted; and yet some cases, by the application of the "adoption of plans" doctrine, have reached such result. The city is not an absolute insurer that its plans shall be adequate; but, to escape liability, it must act with ordinary business sense, and have the plans prepared by competent engineers, and not attempt to settle them through its own officials, who may be utterly ignorant in regard to such matters.

The true distinction is well stated in *Tate v. St. Paul*, 56 Minn. 527, 58 N. W. 158, as follows: To determine when, and upon what plan a public improvement shall be made, is, unless the charter otherwise provides, left to the judgment of the proper municipal authorities, and is in its nature legislative; and, although the power is vested in the municipality for the benefit and relief of property, error of judgment as to when or upon what plan the improvement shall be made, resulting only in incidental injury to the property, will not be ground for the action. But, for the direct invasion of one's right of property, even though contemplated by, or necessarily resulting from, the plan adopted, an action will lie; otherwise it would be taking private property for public use without compensation.

Failure to drain.

In considering the liability of the city for failure to provide adequate drainage, attention must be given to the charter provisions, and to the manner in which the drain was paid for. The charter which largely influenced the decision in *McCarthy v. Syracuse*, 46 N. Y. 196, provided that it should be the duty of the mayor and common council to make, open, regulate, repair, and improve sewers. The liability of a city acting under such a charter must, of necessity, be greater than that of a city whose charter imposes upon it no duty in that regard. So, if the sewer is made at the expense of abutting property, or a fee is exacted for its use, the municipality may be regarded as under an implied contract obligation that the sewer shall be at least reasonably adequate for the purpose intended.

It is the duty of a municipal corporation, in constructing a sewer by special assessment against abutting property owners, to use due care so to construct it that it will carry away the drainage for the designated district during the heavy rainfalls occurring annually; and negligence will be presumed if the sewer proves to be of insufficient capacity for that purpose. *Litchfield v. Southworth*, 67 Ill. App. 398.

A city authorized to construct public sewers, and which charges property owners for the privilege of draining into them, is liable to one whose premises are flooded because of the obstruction of a sewer which it negligently permitted to remain in a defective condition. *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464.

The construction by a city of a public sewer from which it may derive revenue is not the exercise of a governmental function, but is a private municipal enterprise, for the negligent conduct of which the city is liable. *Ostrander v. Lansing*, 111 Mich. 693, 70 N. W. 332.

But it has been held, even in this class of cases, that there is no liability. Thus, in a Michigan case it was held that a sum paid annually by a private citizen for the privilege of draining into the public sewer is for the license or permission so to do, and does not impose any obligation on the city to furnish ample drainage for his premises, or render it liable in case water is set back from the sewer through such citizen's drain to his damage. *Dermont v. Detroit*, 4 Mich. 435.
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In the absence of special circumstances, it is held that there is no liability for failure to drain, due to a defective plan.

For the construction of a sewer which has not the capacity to carry off the ordinary or extraordinary rain falls, the city cannot be made responsible; and the reason for this is, that a city cannot be held to answer for an error of judgment, committed by a body created by law, and clothed with discretion to determine the width and depth of drains and sewers. To hold a city responsible, under such circumstances, would be to vest the power of judging of the proper grade of street and the width and depth of sewers in the judiciary, instead of the city council, where the legislature placed it. Where a city prescribes the grade of a street, or the capacity of a drain, and it is not constructed as directed, or is constructed in such an unskillful manner as to damage the property of persons adjacent thereto, in that event, the city is liable. The law is that, for the exercise of a lawful power, which by law is vested in the judgment and discretion of a public body for the good of the whole, no injury, for which an action will lie, can be committed,—*salus populi est suprema lex*—but that for an imperfect, negligent, unskillful execution of the thing ordained to be done, an action will lie in the absence of an express statute. *Little Rock v. Willis*, 27 Ark. 572.

A municipal corporation is not liable for the insufficient capacity of drains or sewers constructed by it, due to error of judgment in devising the plan thereof; nor is it called upon to anticipate or estimate the probable amount of water that is likely to fall within its limits, and to construct drains with reference thereto. It is not legally bound to construct any drains whatever; and if it does it is not for the citizens to say that the same are not of sufficient capacity to carry all the water that may accumulate at times of floods such as may reasonably be anticipated. *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

The duty of municipal authorities, in adopting general plans of drainage, and determining when and where sewers shall be built, and of what size and at what level, are of a quasi-judicial nature, involving the exercise of deliberate judgment and large discretion, depending upon considerations affecting the public health and general convenience. The exercise of such judgment and discretion in the selection and adoption of the general plan is not subject to revision by the court in a private action for not sufficiently draining a particular lot of land. *Johnston v. District of Columbia*, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923.

For an erroneous estimate of the public needs in the matter of sewers, a municipal corporation cannot be held liable. *Paine v. Delhi*, 116 N. Y. 224, 5 L. R. A. 797, 22 N. E. 405.

No action lies for a defect of want of sufficiency in the plan or system of drainage adopted in the exercise of a quasi judicial discretion under powers specially conferred by statute. *Bates v. Westborough*, 151 Mass. 174, 7 L. R. A. 156, 23 N. E. 1070.

A municipal corporation is not liable for injuries caused by faulty plans by which a sewer is constructed along the bed of a stream by its trustee under statutory authority to construct the sewer. *Garratt v. Canandaigua*, 135 N. Y. 436, 32 N. E. 142.

So, where a plan for draining a municipal corporation by constructing works along the bed of the outlet of a lake is submitted to the trustees of the municipality, and the plan adopted by them includes the construction of gates to regulate the flow of water from the lake, the manner of using the gates is a matter for their

judgment; and the municipal corporation cannot be held liable if they are not operated so as to drain property of a private owner in the best manner. *Garratt v. Canandaigua*, 135 N. Y. 486, 32 N. E. 142, Affirming 40 N. Y. S. R. 944, 16 N. Y. Supp. 717.

A municipal corporation is not liable for injuries caused to private property by the fact that a sewer provided for the section in which the property is located is insufficient to carry off all the water. *Mills v. Brooklyn*, 32 N. Y. 489.

When a municipal corporation has discretionary authority as to the construction of a sewer, it is not liable for mere omission to provide adequate means to carry off water, which storms and the natural formation of the ground throw on a lot. *Fair v. Philadelphia*, 88 Pa. 309, 32 Am. Rep. 455.

A municipal corporation is not liable for the overflow of an owner's lot abutting a street, caused by an error of judgment or mistake in policy of the city authorities in providing a sewer of insufficient capacity to carry off the water, if the same was constructed in a skilful and careful manner, and was afterwards kept in repair. *Rozell v. Anderson*, 91 Ind. 591.

A municipal corporation constructing a system of sewerage in accordance with the plans of skilled engineers is not liable for its failure to drain all the water from underground cellars, in the absence of negligence on its part in constructing or maintaining the sewers according to the plan adopted. *A. M. C. Medicine Co. v. Montreal*, Rap. Jud. Quebec, 15 C. S. 594.

In *King v. Kansas City*, 58 Kan. 334, 49 Pac. 88, it is said that, in inaugurating a sewerage system, and in devising plans for the construction of the same, the city is vested with a large legislative discretion; and if, in good faith, it is exercised, the city is ordinarily not liable for incidental injuries to property owners which are solely attributable to the plan. In such case, however, if, through any negligence in carrying out the plan, or in constructing or maintaining the sewers, the property of a private owner is injured, a liability will arise.

A municipal corporation is not liable for damages resulting, without its negligence, from the insufficient capacity of its sewer. *Fairlawn Coal Co. v. Scranton*, 148 Pa. 231, 23 Atl. 1069.

A municipal corporation is not liable for damage to private property resulting from its sewer being inadequate to carry off the water it was intended to drain, because of a mistake of judgment. *Bear v. Allentown*, 148 Pa. 80, 23 Atl. 1062.

In acting under the charter power to construct sewers, the municipal authorities must necessarily deliberate and adjudge upon the system or plan of the work,—when to perform it and where to locate it. So far no liability to private action is incurred for errors of judgment or want of foresight. If the plan is carried out in a proper manner, the charter power is a complete bar to a claim for consequential damages to persons or property, although the same act, if done without legislative sanction, would be actionable. *Salus populi suprema lex*. *Winn v. Rutland*, 52 Vt. 481.

A board of public works is exempted from liability for injuries resulting from its sewage system constructed by it with due care, where the statute absolutely imposes upon it the duty of constructing the system and the principle of *Fletcher v. Rylands*, L. R. 1 Exch. 265, 35 L. J. Exch. N. S. 154, 12 Jur. N. S. 603, 14 L. T. N. S. 523, 14 Week. Rep. 199, 4 Hurlst. & C. 263, does not apply. *Dixon v. Metropolitan Bd. of Works*, L. R. 7 Q. B. Div. 418, 50 L. J. Q. B. N. S. 772, 45 L. T. N. S. 312, 30 Week. Rep. 83, 46 J. P. 4. 61 L. R. A.

Trespass because of defective plan.

The municipality should not be allowed to plead defectiveness of plan to shield itself in case of a direct trespass on private property.

A municipal corporation cannot relieve itself from liability for overflow of a sewer upon the ground that the insufficiency was caused by error in judgment upon the part of the common council, as to the size of sewer necessary to carry the water, where the council might, or ought to, have known that the one provided was insufficient, and reasonable care was not exercised in its construction. *Dixon v. Baker*, 65 Ill. 518, 18 Am. Rep. 591.

A municipal corporation is liable for a negligent error in the plan of a drain or sewer, as well as for the want of care and skill in the mechanism. *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618.

Where a municipal corporation undertakes to construct drains and sewers, the work becomes a ministerial one, and the corporation must exercise ordinary care and skill in devising the plan, as well as in performing the work. *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86.

A city is liable for defective plans for drainage, where the construction and maintenance of improper drainage in accordance with the plans create a nuisance, and obstruct private or public ways in which the property owner has a special interest. *Seymour v. Cummins*, 119 Ind. 148, 5 L. R. A. 126, 21 N. E. 549.

A city is liable for damages to an abutting owner by the flooding of his cellars through the insufficiency of its sewers,—especially when such sewers are improperly constructed by making the sewers of several streets, and notably one of 15 inches in diameter, flow into one of but 12 inches in diameter, manifestly insufficient in heavy rains to receive the waters of the sewer flowing into it. *Papineau v. de Longueuil*, Rap. Jud. Quebec, 11 C. S. 98.

In an action against a city to recover for damages caused by a sewer, owing to insufficient size, setting back the water into plaintiff's cellar, the following charge was approved: "Where . . . a sewer, as the same was originally planned and constructed, is found to result in direct and physical injury to the property of another, that would not otherwise have happened, and which, from its nature, is liable to be repeated and continuous, but is remediable by a change of plan or the adoption of prudent measures, the corporation is liable for such damages as may occur in consequence of the original cause after notice and an omission to use ordinary care to remedy the evil." *Tate v. St. Paul*, 56 Minn. 527, 58 N. W. 158.

The care and skill required in the construction of a sewer to relieve a municipal corporation from liability for consequential injuries to private property from back water relate, as well to the capacity of the sewer, as to the mere mechanism of its construction,—as well to its plan, as to the execution. *Indianapolis v. Huffer*, 30 Ind. 235.

An abutting lot owner, who owns the fee of the street, has a right to construct therein an area, and to use the same, subject to the public easement; and where a city negligently constructs sewers and drains in such a manner that they do not carry off the rainfall, and, as a consequence, water is discharged into the area, the tenant on the abutting lot may recover for the damages resulting from the discharge of the water into the area, where it does not appear that the area was negligently constructed or out of repair, so that its condition contributed to the injury. *Dell Rapids Mercantile Co. v. Dell Rapids*, 11 S. D. 116, 75 N. W. 898.

And a land owner, in extending his cellar under a sidewalk, is not required to guard against possible defective construction of sewers in the highway. *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519.

A municipal corporation is liable for injury to an owner's premises from flooding occasioned by the construction of a sewer to carry off the surface drainage, obstructed in consequence of street improvements, of insufficient capacity to carry off the water, which insufficiency was obvious to persons of ordinary sense at the time of its construction. *Indianapolis v. Huffer*, 30 Ind. 235.

In Illinois the jurisdiction and control over the streets and their improvements are conferred upon the municipal government embracing that territory, and the doctrine that a municipal corporation is not liable for injury resulting to a person from a sewer, due to a defect in the plan of the sewer adopted by the city, being a suit grounded upon a wrong attributable to a legislative body and, therefore, not subject to judicial question, does not prevail in that state. *Chicago v. Seben*, 163 Ill. 371, 46 N. E. 244.

An action for injury to private property by a defective sewer can be maintained against a municipal corporation if such defect results from a wrong mode of carrying into execution adequate plans adopted by it, if the plans are unskillful or improperly drawn, or if the sewer, when built, is found to be defective or inadequate, and injury results from a neglect to remedy such defects or inadequacy when discovered; although no action would lie for mere failure to construct the sewer, or for injuries from inadequacy if built according to plans made by competent persons, and adopted by the city in good faith. *Kiesel v. Ogden City*, 8 Utah, 237, 30 Pac. 758.

Failure to provide flood gates over the mouths of sewers, which would have prevented injury to property at their sources from inundation, which it was manifest to those selecting the plans, as well as to everyone else, would result from regularly recurring rises in the river setting back the water, is negligence which renders the city liable for resulting damage. *King v. Kansas City*, 58 Kan. 334, 49 Pac. 88.

A municipal corporation is not excused from liability for injuries to property by flooding due to the inadequacy of the sewer, on the ground that the defect was due to a mere error of judgment, where it failed to use reasonable care to secure and put into exercise the services of competent engineers skilled in the construction of sewers, as such a failure constitutes negligence. *Terre Haute v. Hudnut*, 112 Ind. 542, 18 N. E. 886.

Though a city is not generally liable for an error of judgment in its legislative body, still, in adopting plans for a sewer, it must make such provision as ordinary care and skill would suggest for carrying off the water collected from such rainfalls as may reasonably be expected to occur, and no notice of the defective construction need be given the city in order to make it liable for damages for overflow. *Louisville v. Norris*, 23 Ky. L. Rep. 1195, 64 S. W. 958.

The liability of a city for damage done by the flooding of private property during a rain storm because of the inadequacy of the sewer is not affected by the fact that the owner of the opposite side of the street had raised the grade of his walk to protect his property, and that such barrier cast water upon the premises flooded which would not otherwise have gone there. *Martin v. Brooklyn*, 32 App. Div. 411, 52 N. Y. Supp. 1086.

A municipal corporation will be liable for injuries to abutting property from the bursting

or overflowing of a sewer when caused by the insufficient size and capacity to carry off the water. *Lewenthal v. New York*, 61 Barb. 511, 5 Laus. 532.

A city is liable for a municipal act negligently and wrongfully done in the construction of a sewer improvement; but, where the fault is with the wisdom, sufficiency, or adaptability of the plan, there is no liability when the construction according to the plan invades no private rights. *Defer v. Detroit*, 67 Mich. 346, 34 N. W. 680.

In Vermont it is held that the law regulating the rights of individuals and corporations in respect to surface water is quite different from that governing the disposal of house drainage, which every householder is bound to keep upon his own premises, and with respect to which the public authorities, if they undertake its disposal, are held to the exercise of proper care and skill. *Winn v. Rutland*, 52 Vt. 481.

Who to exercise discretion.

It would seem that intelligence must be exercised in the adoption of the plan. Persons who have no knowledge of the size of pipe necessary to carry a given quantity of water should not be permitted to determine the dimensions of the sewers for the drainage of large tracts of land. But they should be required to seek competent advice to relieve the municipality from liability for mistakes of judgment.

If the city constructs drains, it is not for the citizens to say that they are not of sufficient capacity to convey all the water that may accumulate at a time of flood, such as experience teaches may now and then be anticipated. It is with the city authorities exclusively to determine the dimensions and plans of the drain. *Denver v. Capell*, 4 Colo. 25, 34 Am. Rep. 62.

A city will not be excused for negligent omission to make a sewer safe, merely on the ground that the power to fix its location and prescribe a plan for its construction rests on the board of aldermen, when that board has not exercised that power. *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519.

A municipality is not liable for the consequences of mere error of judgment in the plan or design of its sewer; but it is incumbent on one complaining of injury to show negligence in the choice of agents or instrumentalities before liability will attach. *Bannagan v. District of Columbia*, 2 Mackey, 285.

In *Winn v. Rutland*, 52 Vt. 481 it is said that it is difficult to see why the location of a sewer is not one of the most important factors in the problem how to build the sewer with reasonable skill. When the plan fixes the location through a certain section of a municipality, the duty to assume is to construct the sewer in that location with due care and proper skill to the end that it shall convey the drainage emptied into it to its ultimate destination without injury to residents along its route.

A municipal corporation which makes use of private property for the purpose of constructing a sewer, and, in order to obtain the privilege of using the property, submits to the demand of the owner to construct the sewer according to the plans and specifications prepared by him, is, nevertheless, liable for negligence in constructing or maintaining it. *Ft. Wayne v. Coombs*, 107 Ind. 75, 37 Am. Rep. 82, 7 N. E. 743.

A municipal corporation cannot escape liability to one injured by the negligent construction of a sewer on the ground that, in order to obtain an outlet for the sewer, it was necessary to construct it across a canal, to obtain permission for which it consented to construct the

sewer according to the plans and specifications prepared by the canal company's engineer, where the street on the line of which the sewer was built crossed the canal at right angles, and was a lawfully existing highway, having been used as a public street for more than twenty years, by virtue of which the municipal corporation had the power and authority to construct the sewer under the canal according to its own plans, without submitting to the demands of the company, provided it did no injury to the canal. *Ibid.*

A municipal corporation is not liable for damages arising from the defective construction of a sewer, unless it is "guilty of carelessness, either in the selection of the engineer, or in the selection of the plan." *Herring v. District of Columbia*, 2 Mackey, 87.

It would be mere error of judgment, and not negligence, if the plan of a sewer constructed by a municipal corporation should prove defective, where reasonable care was used to secure the preparation of the plan by competent men, and ordinary care was used to see that the skill of such men was brought into exercise, and it will relieve the municipality from liability for injuries to private property caused thereby. *Terre Haute v. Hudnut*, 112 Ind. 642, 13 N. E. 686.

Where the selectmen of a town, in deepening and straightening the channel of a river, employ a competent engineer, the town is not liable for his oversights or misjudgments resulting in the construction of a defective channel which, during an unusual flood, causes the water to overflow to the injury of adjoining property. *Diamond Match Co. v. New Haven*, 55 Conn. 510, 13 Atl. 409.

A municipal corporation is not liable for the overflow of an owner's premises due to the insufficient capacity of a sewer or culvert, if such insufficiency is due merely to error of judgment, and not to negligence in devising the plan or performing the work. *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139.

A municipal corporation is not liable for mere error of judgment in the construction of a sewer, in the absence of any negligence in selection of a plan or employment of proper agents to devise and execute it. *Johnston v. District of Columbia*, 1 Mackey, 427.

A municipal corporation is not liable for the overflow of property by back water from a sewer during a heavy rain storm caused by error of judgment on the part of the proper authorities in locating the sewer, in adopting the plan of the system, or in the means of carrying the same into operation, when the proper authorities were selected with reasonable care, and the sewer as constructed is not grossly inadequate for the purpose intended, and the injury could not have been avoided by the exercise of reasonable diligence in ascertaining the best course to be taken in locating and constructing the sewer. *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779.

A mistake or error of judgment in devising the plan of a sewer, which results from a failure of the city council to consult a skillful and competent person with respect thereto, is *prima facie* negligence, which will render the city liable for damages to private property caused thereby. *Ibid.*

A municipal corporation is not liable for damage resulting from the inadequacy of a sewer constructed without negligence, but with mistaken judgment. *Collins v. Philadelphia*, 93 Pa. 272.

A municipality is not, in the construction of a sewer, obliged, at its peril, to select the best route, or to adopt the best possible plan, provided the route selected and the plan adopted 61 L. R. A.

are reasonably safe. *Uppington v. New York*, 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91.

In an action to restrain a township from maintaining an unauthorized culvert across a highway to the injury of private land, the court has no power to direct the township officers how and when the drain shall be constructed, inasmuch as the control of that matter is committed to those officers, and not to the court. *Patoka Twp. v. Hopkins*, 131 Ind. 142, 30 N. E. 896.

Effect of notice of insufficiency.

The mere fact that experience has proved a sewer to be insufficient does not of itself make a city liable for the injury caused to an owner adjoining a street, by water which should have been carried off by the sewer, but which flowed on the surface. *Knostman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887.

A municipal corporation is not liable for the inadequacy of a sewer to dispose of surface water, notwithstanding its officers had notice thereof after construction. *Bealafeld v. Verona*, 188 Pa. 627, 41 Atl. 651.

A municipal corporation is not liable for the flooding of private premises by back water from a sewer due to its failure, in good faith and not wilfully or wantonly, to remedy defects in the plan or the inadequacy of the sewer after it has notice thereof; as the determination of the time and plans for altering and enlarging sewers already built, even when known to the city to be inadequate, is as much within its discretion as the plans, time, and place for the original building. *Hesslon v. Wilmington (Del.)* 27 Atl. 830, 1 Marv. (Del.) 122, 40 Atl. 749.

A statutory liability to provide adequate sewers, or knowledge that a nuisance was being created, might, however, create a liability.

A municipal corporation will be liable for injuries caused by the overflowing of a trunk sewer upon the property of an adjoining owner by reason of incapacity, which sewer commissioners constructed in accordance with a plan adopted by them for drainage of the district, where, after notice of its incapacity, they took no steps to remedy the defect. *Selfert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 821, 15 Abb. N. C. 97.

A municipal corporation is liable for the flooding of private premises from back water caused, either by the inability of a sewer to carry off the water delivered to it by another sewer, as well as surface water, or by such sewer being obstructed at the time, of which insufficiency the city had actual or constructive notice, or, if caused by the obstructions, the same were due to its neglect, unless the flood was caused by a rain fall of such extraordinary nature as could not reasonably be anticipated. *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779.

A city which, in the exercise of a discretionary power, constructs a sewer so defective that the premises and cellar of a property owner are flooded with sewage, is liable, after notice thereof, for the resulting damage, where the evil is remedial by a change of plan and the adoption of prudential measures. *Munk v. Watertown*, 67 Hun, 261, 22 N. Y. Supp. 227.

Decisions denying all liability.

There are decisions which carry the doctrine of nonliability for defects in plans to the full extent of denying a liability when a trespass is committed. Some of these cases are subject to the influence of the New England doctrine, which tends towards the absolving of the municipality from all liability except what is ex-

pressly imposed on it by statute. Thus, in a Massachusetts case it was held that the reason of exempting a municipal corporation from liability for injuries caused by a defect in the plan or system of sewerage built by order of mayor and aldermen is that the mayor and aldermen, in laying out sewers, act as an independent body of officers, and that the city has no control over, and no responsibility for, the plan or system adopted. *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320.

So, where county commissioners are authorized to improve the channel of a stream running through a city for drainage purposes, the sufficiency of an existing culvert to carry the increased flow of water is a matter for their determination, and the city cannot be made liable for injuries caused by the damming back of the water because of its insufficiency. *Cochrane v. Mulden*, 152 Mass. 365, 25 N. E. 620.

So, in *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72, it was held that a municipal corporation is not liable for injuries caused by the defects in the plan of a sewer, or in the method of construction.

So the construction of public drains where certain municipal officers deem it necessary for public convenience or health is the exercise of judicial discretion and judgment on the part of those officers, and not of the town or its inhabitants. *Estes v. China*, 56 Me. 407.

So under a statute providing that municipal officers of a town may construct public drains at its expense, they are not, while so doing, the agents of the town, so as to charge it with responsibility for their acts. *Gilpatrick v. Biddeford*, 86 Me. 534, 30 Atl. 99.

And when town officers are not actuated by any malice they are not personally liable, even for the negligent location and construction, for the preservation of a highway, of a ditch, due to an error in judgment, whereby the waters flowing through the ditch injure private property. *Smith v. Gould*, 61 Wis. 31, 20 N. W. 369.

But an Illinois case held that a city being a corporation created for its own benefit, as distinguished from involuntary quasi corporations, such as counties and towns, is responsible for injuries to individuals resulting from the negligence of its officers in the manner of constructing a sewer. *Chicago v. Seben*, 165 Ill. 371, 46 N. E. 244.

If a municipal corporation makes a mistake by selecting too small a pipe, or in selecting an inefficient plan for draining water across its street, that is not negligence, but an error of judgment; and it cannot be held liable for resulting damages. *Pressman v. Dickson City*, 13 Pa. Super. Ct. 236.

A municipality is not liable for damages to property by the backing up and flowing in of water thereon in consequence of the construction of a sewer in a street, in the absence of negligence in the construction thereof. *Cummings v. Toledo*, 12 Ohio C. C. 650.

A city is not liable to one injured by falling into a partially covered sewer, where the charge of negligence is based upon the plan of the work, and not upon the execution of the plan. The plan of such a work is in the nature of legislative action, the lawful exercise of which cannot be a wrong. *Lansing v. Toolan*, 37 Mich. 152.

A property owner who continuously sustains damage on account of a sewer cannot recover against the city, where its charter authorized it to make the improvement, and it does not appear that its power was wantonly or unnecessarily exercised. *White v. Yazoo City*, 27 Miss. 357.

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and outlets of a sewer, or the height and grade of a public street, is a purely judicial power, for injuries resulting from the exercise of which by the flowage of surface water upon private property no recovery can be had against a municipal corporation. *Magarity v. Wilmington*, 5 Houst. (Del.) 530.

A municipal corporation is not liable for the flooding of private property due to error of judgment of the city authorities in devising the plan of a sewer whereby the same is inadequate to vent the water directed thereto. *Ibid.*

A municipal corporation is not liable for the flooding of low-lying lands by the construction of a drain under its lawful powers, because of an error of judgment in making a culvert too small, in the absence of wantonness or malice. *Thibodaux v. Thibodaux*, 46 La. Ann. 1528, 16 So. 450.

A municipal corporation is not liable for damages resulting from its mistake of judgment in determining the capacity of a proposed sewer. *Beach v. Scranton*, 5 Lack. L. News, 25.

b. Defective construction.

The municipality cannot shield itself from liability if there is any negligence in carrying out the plan.

A municipal corporation in the construction of sewers acts ministerially, and, if it discharges such duty in such a careless, negligent, and improper manner as to cause large quantities of water to flow upon and damage abutting property, it is responsible therefor. *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Gift v. Reading*, 3 Pa. Super. Ct. 359; *Chicago v. Seben*, 165 Ill. 371, 46 N. E. 244; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Murphy v. Indianapolis* (Ind.) 63 N. E. 409.

A municipality, authorized, but not compelled, to build and maintain sewers, is liable to the party injured if sewage escapes and overflows his lands, provided the damage be due, either to faulty workmanship and material employed in the construction of, or in neglect to repair, the sewer. *Winn v. Rutland*, 52 Vt. 481; *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72.

A municipality is liable for a defect in a conduit made use of in its plan of sewerage. *Butler v. Edgewater*, 2 Silv. Sup. Ct. 3, 6 N. Y. Supp. 174.

A city is answerable for negligent original construction of a sewer or drain, or failure to keep the same in repair, or a discontinuance thereof by walling up the outlet so as to cause water to gather therein and burst out or otherwise escape therefrom in large quantities into cellars and basements, whether located above or below the street grade. *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27.

A municipal corporation is liable to a property owner for injury to his premises from the backing of sewage thereon through his lateral sewer, due to the negligent construction by the city of the sewer into which the latter flows. *Litchfield v. Southworth*, 67 Ill. App. 398.

A municipal corporation, authorized by law to construct sewers, ditches, and drains, is bound to perform that work when undertaken in a skilful and careful manner, and to keep the same in repair thereafter, and is liable for injuries sustained by an inhabitant by reason of its negligence in this particular. *Logansport v. Wright*, 25 Ind. 512.

A municipal corporation is liable for damages caused by the overflowing of property by reason of the insufficiency of the catch basin of a sewer, unless its insufficiency was due to an extraordinary storm such as a person of ordinary prudence would not anticipate and

provide against, although the property damaged was located below the grade of the street. *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27.

In *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463, which was an action by a lot owner to recover for damages resulting from the negligent construction of a sewer, Adams, J., in delivering the opinion of the court, not only held that the plaintiff might recover, in which he was supported by his associates, but went farther, and expressly overruled the case of *St. Louis v. Gurno*, 12 Mo. 414, in which it had been held that a municipality was not liable for damages consequential upon the grading and paving of a street, in pursuance of its charter authority. With him *Sherwood and Ewing, J.J.*, concurred, the latter in the result only, while *Wagner, J.*, wrote a separate opinion concurring in the result, but expressly dissenting from the opinion of Adams, J., so far as it overruled such case. *Vories, J.*, having been of counsel, did not sit in the case.

The construction of a sewer by a municipal corporation, having the statutory power to construct sewers, is not a public work for the benefit of the people at large, so as to shield the city from liability to persons whose property is damaged by the negligent construction thereof. *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729.

A municipal corporation, in the construction of its sewers and drains, is bound to exercise the same degree of care and prudence a cautious individual would do if the whole loss or risk were his own, and is liable, like an individual, for damages resulting from negligence either in the construction or maintenance of such sewers and drains. *Ibid.*

A municipal corporation is liable to one who, for his private benefit, connects his premises with a sewer constructed by the corporation, for injuries resulting from the negligent construction or maintenance thereof. *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743.

The liability of a municipal corporation for the flooding of private property, caused by the unskilful or improper manner in which the work of constructing a sewer was performed, is the same as that of an individual under like circumstances, who is held to competent skill in any work he may undertake that may affect the rights of others. *Magarity v. Wilmington*, 5 Houst. (Del.) 530.

A city is liable for damage caused by the defective construction of a sewer, although a change of plan made was not authorized by the common council, when one of the aldermen directed the change, and the city approved of the construction of the sewer upon settlement with the contractor. *Munk v. Watertown*, 67 Hun, 261, 22 N. Y. Supp. 227.

A municipality, which constructs a sewer in a negligent and improper manner, although the plans and specifications therefor are adequate and sufficient, is liable for injuries sustained to person or property by a property owner whose premises are flooded with sewage, and whose health is thereby impaired because the sewer becomes broken, crushed, disconnected, and filled with solid matter. *Munn v. Hudson*, 61 App. Div. 343, 70 N. Y. Supp. 525.

There is a New Jersey case which appears to be out of line on this question, the court holding that a municipality is not responsible for the consequences of a break in a public sewer due to faulty construction, even though the result of carelessness of its own agents; but, after such break has occurred, and occasions a private nuisance, and the public authorities have notice of the accident, a duty to repair arises, for the breach of which an injured individual

has a private action. *Jersey City v. Kiernan*, 50 N. J. L. 246, 13 Atl. 170.

A landowner need not incur expense, or take precaution, to protect his premises from the possible consequences of the negligent acts of a local board in constructing a defective sewer. *Brown v. Sargent*, 1 Fost. & F. 112.

Abutting property owners and taxpayers cannot enjoin a municipal corporation from accepting a system of sewers constructed for it under contract and from paying therefor, on account of the defective construction thereof, where the manner of constructing and accepting sewers is placed by the statute in the hands of the council and such landowners are afforded a full and complete remedy at law thereunder for such defective construction. *Robinson v. Valparaiso*, 136 Ind. 616, 36 N. E. 644.

Where an injury is inflicted by the negligent construction of a sewer, the person injured need not proceed under the statutory remedy, but may bring an action to recover the damages. *Clothier v. Webster*, 12 C. B. N. S. 790, 9 Jur. N. S. 231.

c. For private benefit.

A municipal corporation cannot make a binding contract to construct and keep in repair a ditch on one of its streets merely for the purpose of draining, reclaiming, and rendering valuable to the owner a parcel of land beyond the city limits. *Peru v. Gleason*, 91 Ind. 566.

So, a municipal corporation has no power to place a limitation upon its powers of local government by contracting to keep a ditch constructed by it in repair so as to afford drainage outlet to private land, in consideration of a grant by the owner of the right of way for the ditch over his land. *Hamilton v. Shelbyville*, 6 Ind. App. 538, 33 N. E. 1007.

The power of a municipal corporation to make a drain in one of its streets to serve as an outlet for drains on wet and swampy land of private owners lying within and outside the corporate limits exists only because it determines that such drain will be for the promotion of the healthfulness and welfare of the city; but it cannot, by contract, prevent the future exercise by the council of its discretionary power to reverse that determination and abandon the ditch. *Peru v. Gleason*, 91 Ind. 566.

A contract to build a sewer for the exclusive use of a state institution located outside the corporate limits, in consideration of the location of the institution at that place, is *ultra vires*, and cannot be enforced against the municipality corporation making it. *Kankakee v. Illinois Eastern Hospital*, 66 Ill. App. 112.

A municipal corporation is not liable for failure to carry out its contract with the owners of certain wet and swampy lands inside and outside the corporate limits, to make a ditch on a public street within the city limits to serve as an outlet for a ditch to be constructed by the several owners on their own land so as to drain the same, which would be of public benefit and make such lands valuable, although the land owners have performed their part of the agreement by constructing their portion of the ditch, and the breach on the part of the municipality has prevented their lands being drained as well as they otherwise would be. Such a contract is not binding on the city because it is an attempt to control its discretionary right to the future exercise of its legislative power. *Peru v. Gleason*, 91 Ind. 560.

A contract on the part of a municipal corporation insuring or guaranteeing a person from water flowing back upon his lands, through a sewer constructed by said municipal corporation, is *ultra vires* in the absence of express charter power so to contract, and will create

no greater liability than exists in the absence of any contract,—namely, the duty to construct such sewer without negligence. *Nashville v. Sutherland*, 92 Tenn. 335, 10 L. R. A. 619, 21 S. W. 874.

A clause in a deed to the right of way for a sewer pipe, requiring the city to construct the sewer with a suitable valve so as to prevent water from flowing back onto the grantor's premises, assumes to insure the grantor against damages from that cause, and, in the absence of express charter power, is *ultra vires*. *Ibid*.

The presumption is that a municipal corporation, when constructing a sewer in its corporate capacity, acts for a public purpose, and for the benefit of the community at large or the people generally in the locality of the improvement, and not merely in the interest of a particular individual who may petition for such improvement, and who may be specially benefited thereby. *McDaniel v. Columbus*, 91 Ga. 462, 17 S. E. 1011.

d. Extension.

Authority in a municipal corporation to construct a drainage ditch or sewer includes the right to make it efficacious by extending it as far as necessary beyond its corporate limits. *Minnesota & M. Land & Improv. Co. v. Billings*, 50 C. C. A. 70, 111 Fed. 972.

But one municipal corporation cannot extend its sewer within the territory of another municipality without its consent, or without taking the statutory steps, even though it holds the fee to the land it would occupy. *Hamilton v. Barton Twp.* 20 Can. S. C. 173, Affirming 17 Ont. App. Rep. 346, Affirming 18 Ont. Rep. 199.

Equity will not compel a city to extend a sewer, even though said city may have entered into contract relative thereto for good consideration, such extension being an administrative act. *Gove v. Biddeford*, 85 Me. 393, 27 Atl. 264.

Authority to a village to extend its sewer into and across the territory of an adjoining township will not include the right to carry it across land lying in a township that does not touch the boundaries of the village. *South Orange v. Whittingham*, 58 N. J. L. 655, 35 Atl. 407.

A return to an alternative mandamus requiring a municipality to extend a sewer which has been stopped by filling in work so that the sewage flows back causing sickness and unwholesome and offensive smells in the relators' homes, which answers that the filling in was by statutory authority; the extension of the sewer across the new land is impracticable and expensive; that the city has no funds for the purpose and no authority to raise them; that there is another sewer in course of construction, nearly complete, available to remedy the ills complained of,—is sufficient on motion to quash it. *State ex rel. Gallager v. Jersey City Bd. of Public Works*, 45 N. J. L. 465.

IV. Outlet.

a. Must be provided.

A proper outlet is a necessary part of a sewer. Any plan which does not provide one must be regarded as defective. The outlet must, moreover, be such as not to involve a trespass on private property.

A village which fails to provide a proper outlet for sewage and surface water, whereby they are collected and thrown upon the premises of a property owner, is liable for the resulting injury. *Gillett v. Kinderhook*, 77 Hun, 604, 28 N. Y. Supp. 1044.

A city has no right to construct a sewer and

make no provision for an outlet, so that it overflows onto private property. *Gage v. Chicago*, 191 Ill. 210, 60 N. E. 896.

It is within the power of the corporate authorities of municipal corporations to provide such outlets for a sewer as the conformation of the ground, the location of existing means of drainage, and other circumstances shall dictate; and the courts will not disturb their determination in that respect, except to correct a clear abuse of such discretion. *Church v. People ex rel. Kochersperger*, 179 Ill. 205, 53 N. E. 554.

A city which, by its charter, is given general power over drainage, has implied authority to contract with a landowner beyond the corporate limits for permission to enlarge, straighten, and keep in repair the ditch through his premises so as to provide a sufficient outlet for the city sewage, where its charter further requires it to keep a river which bounds it free from pollution, and there is no other outlet available, aside from the ditch, extending beyond its limits. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

A city may be enjoined from discharging its sewage on or near inhabited premises, and thereby rendering them untenable, and causing sickness. *Waycross v. Houk*, 113 Ga. 963, 39 S. E. 577.

A municipal corporation having the power, under its charter, to construct local improvements may lawfully extend a sewer beyond the corporate limits for the purpose of securing a suitable outlet for the same, and an ordinance providing therefor is valid. *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

But under the Ontario laws, one township cannot discharge the waters collected within its area, anywhere in another township there to be let loose, without being liable for damages to the parties injured thereby; such liability arising for an act done without any jurisdiction whatever, utterly *ultra vires*, and not merely as for negligence in the mode of performing an act legal in itself. *Ellice Twp. v. Illes*, 23 Can. S. C. 429.

The power of a municipal corporation to extend a sewer or drain beyond the corporate limits when it is necessary to do so in order to obtain a proper outlet, so as to render such sewer available for the object for which it is constructed, is conferred by implication by a statute vesting the corporate authorities of cities and villages with power to make local improvements by special assessment as they shall by ordinance prescribe. *Cochran v. Park Ridge*, 138 Ill. 295, 27 N. E. 939.

A municipal corporation is authorized to construct a drain from a point within its limits to a point outside as an outlet for the waters and sewage of the city, under an act authorizing such construction as an outlet or inlet leading out of or into cities whenever necessary "for the successful drainage" thereof, the word "drainage" not being restricted to the removal of surface and storm water alone,—especially in view of another clause requiring the act to be liberally construed "to promote the drainage of cities . . . and the improvement of the public health." *Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330.

The power of a municipal corporation to condemn private property outside the corporate limits for the necessary outlet to a sewer, is expressly given by statute, where the taking or damaging of such private property is required to complete the improvement provided for. *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

A municipal corporation having the authority to construct sewers and drains for the protection and improvement of its streets, and, as in-

cient thereto, the right to acquire land for that purpose, has the power to acquire an easement in the land from the termination of a street on a river bank down to low-water mark for constructing a gutter as a drainage outlet, and to construct the gutter thereon. *Schipper v. Aurora*, 121 Ind. 154, 6 L. R. A. 318, 22 N. E. 878.

But the English public health act of 1875 does not prevent the local authority from accepting a sewer which has no outfall. *Hornsey Local Board v. Davis* [1893] 1 Q. B. 756, 62 L. J. Q. B. N. S. 427, 68 L. T. N. S. 503, 57 J. P. 612, 4 Reports, 322.

And after a municipal corporation has purchased land for the disposal of sewage under legislative authority, the legislature may change the purpose for which the land may be used. *State, Millburn Twp., Prosecutors, v. South Orange*, 55 N. J. L. 254, 26 Atl. 75.

So where an urban authority acquires more land than necessary for the immediate disposal of sewage, but which will ultimately be required for that purpose, it need not sell the land, but may retain it, and may use it for some other lawful purpose, such as recreation ground or the like, provided nothing is done which will impair the usefulness of the land for the ultimate purpose to which it is to be devoted. *Atty. Gen. v. Teddington* [1898] 1 Ch. 66, 67 L. J. Ch. N. S. 23, 77 L. T. N. S. 420, 46 Week. Rep. 88, 61 J. P. 825.

Where an arrangement was entered into whereby two municipalities were to connect with the sewers of a third which in its turn was to connect with the sewers of Montreal, upon a guaranty by the third municipality against all damages which might result to Montreal whether from the connection of said sewers, or works necessary in connection therewith, and, in case of the Montreal sewer becoming insufficient, to bear the proportional cost of new works, with similar guaranties from the first two municipalities to the third, such guaranty bound the three municipalities, not only for all damages resulting from the act of making the actual connection of the sewers, but also for damages that might be subsequently occasioned from time to time on account of the user by them of the Montreal sewer; and the municipalities are not relieved from contributing to the cost of new works rendered necessary on account of the insufficiency of the sewer, by the postponement of the construction of such works by the city of Montreal. *Montreal v. Ste. Cunégonde*, 32 Can. S. C. 135.

b. Inadequacy or negligent location of.

A municipal corporation having the power to establish public sewers, at the same time acquires the corresponding duties and obligations growing out of the exercise of the power, and must, at its peril, make the outfall of its sewers where the deposits from them will be promptly removed by the influx of the tides, so that they will not create a nuisance either to public health or the right of navigation; or it must provide for their speedy removal in some other mode. *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586.

It is the duty of a municipal corporation to exercise reasonable care in discharging the filth gathered into its sewers; and, when the escape for this filth is stopped, it must provide another, and is liable for damages resulting to private property by reason of its neglect so to do. *Louisville v. O'Malley*, 21 Ky. L. Rep. 873, 53 S. W. 287.

The fact that a local board is required by statute to dispose of the sewage of its district will not authorize it to dispose of it in a man-

ner injurious to its neighbors, and it cannot discharge it into the drainage system of an adjoining district. *Atty. Gen. v. Acton Local Board*, L. R. 22 Ch. Div. 221, 52 L. J. Ch. N. S. 108, 47 L. T. N. S. 510, 31 Week. Rep. 153.

A city, although it builds a sewer with due care and in strict conformity with the plan adopted by the council, is liable for the injury sustained by a property owner whose premises are flooded by water which overflows from a gutter by reason of the inadequacy of the outlet. *Seaman v. Marshall*, 116 Mich. 327, 74 N. W. 484.

Equity will enjoin a municipal corporation from discharging the contents of a permanent sewer upon private property without having acquired the right to do so. *New York C. & H. R. R. Co. v. Rochester*, 127 N. Y. 591, 28 N. E. 416.

A municipal corporation has no right to discharge the contents of a sewer upon the premises of an individual. *Jacksonville v. Lambert*, 62 Ill. 519.

When a city has undertaken to construct a sewer, it is its duty to secure a proper outlet for it; and, if it passes under a railroad right of way, it must acquire the right to repair the sewer after it is built. *Netzer v. Crookston*, 59 Minn. 244, 61 N. W. 21.

The collection and inevitable precipitation, during frequently recurring freshets, of water and sewage upon the private property of an owner in such a way as to constitute a direct invasion of the owner's rights, and to be in the nature of a trespass upon his property, by reason of the plan of construction of the sewerage system, will create a liability against the city, regardless of good faith in the devising of the plan, and of the fact that the best material is used in its construction. *Kling v. Kansas City*, 58 Kan. 334, 49 Pac. 88.

A city must be held liable for damages occasioned by the discharge of one of its sewers near plaintiff's property, although he had agreed that a sewer might discharge there, but had only stipulated for the permission of a mere overflow sewer, and not for such as was placed there, flowing continually. *Loughran v. Des Moines*, 72 Iowa. 382, 34 N. W. 172.

Liability of a municipal corporation for throwing sewage onto private lands is not relieved because the filth is thrown into the sewer by private individuals without authority. *Close v. Woodstock*, 23 Ont. Rep. 99.

Where a municipal corporation under statutory authority changes the channel of a brook for sewer purposes, it cannot empty sewage into the old channel to the injury of the owners of land through which it runs; and they will be entitled to an injunction to restrain such action. *Woodward v. Worcester*, 121 Mass. 245.

That municipal authorities, in constructing the outfall of a sewer, adopted a plan in which there was no defect, and exercised its best judgment as to the proper location of the outfall, being guilty of no negligence, will not absolve the municipality from liability to indictment in case the outfall actually creates a nuisance. *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586.

A city is liable for the damages sustained by a landowner by reason of its failure to complete a sewer entirely across his premises, the owner's consent to the construction of which was given on condition, agreed to by the city, that it should be so constructed, whereby it is allowed to discharge upon and overflow such premises. *McBride v. Akron*, 12 Ohio C. C. 610.

A city is liable for the flooding of private premises caused by the collection and discharge thereon, by means of a sewer, of a greater flowage of water than there was before the sewer

was constructed, and of which the city had notice. *Harrigan v. Wilmington*, 8 *Houst. (Del.)* 140, 12 *Atl.* 779.

A municipality which rebuilds the outlet of a sewer upon a new and different grade, whereby water and sewage are discharged and flooded upon adjacent premises, is liable therefor, where the damage does not directly result to the injured party from his use and occupation of the same for his private advantage and convenience. *Defer v. Detroit*, 67 *Mich.* 346, 34 *N. W.* 680.

A city, in constructing sewers which enter into a river, while not required to anticipate unprecedented floods which are likely to cause the water to back up into the sewers, must, however, guard against those which, while unusual and rare, are not unlikely to occur again. *Kansas City v. King (Kan.)* 68 *1'ac.* 1093.

A municipal corporation is liable for damages occasioned by the construction of sewers and ditches for drainage purposes in such a manner as to divert the water from the streets and discharge it in increased quantities upon, and to the injury of, adjacent lands. *Troy v. Coleman*, 58 *Ala.* 570; *Union Springs v. Jones*, 58 *Ala.* 654.

A municipal corporation is liable for emptying a sewer onto private property, although done by the acts of the common council, which are quasi judicial. *Beach v. Elmira*, 22 *Hun.* 158, 34 *N. Y. S. R.* 522, 11 *N. Y. Supp.* 913.

A complaint alleging that a municipal corporation constructed a drain to plaintiff's lot, upon which it discharged its contents, to the injury of the property, is sufficient to state a cause of action. *Bradt v. Albany*, 5 *Hun.* 591.

Under the power of awarding damages for the location of a sewer outfall, a committee cannot determine whether a cesspool should or should not be constructed, and award annual damages to be paid in the future till such cesspool shall be built by the city. *Jackson v. Portland*, 63 *Me.* 55.

In Canada it has been held that the adoption, by a municipal corporation, of a sewer outfall as planned by the engineer does not constitute negligence in the municipality if it proves insufficient. *Ellice Twp. v. Hiles*, 23 *Can. S. C.* 429.

In one case it was held that the provision of the 5th Amendment to the United States Constitution, that private property shall not be taken for public use without just compensation, does not apply to the act of a municipal corporation of a state in turning the flow of surface water into a public stream beside a wharf in such a way that the adjacent water was made shallow and the wharf rendered of no value. *Barron v. Baltimore*, 7 *Pet.* 243, 8 *L. ed.* 672.

But, notwithstanding that, it has been held that a municipal corporation will be liable for emptying a sewer into a slup in such a way as to fill it up, and prevent the owner, who operates a ferry, from entering the same with his boat. *Sleight v. Kingston*, 11 *Hun.* 594, *Appeal Dismissed* in 73 *N. Y.* 592.

So, a municipal corporation is liable for damage resulting from its negligence in so diverting surface water and constructing its sewers as to destroy a marine railway by the sediment deposited around and upon it; and such result cannot be justified by a discretionary power to construct drains. *Cahill v. Baltimore*, 93 *Md.* 233, 48 *Atl.* 705.

The erection of wharves, and the artificial deepening of adjacent docks to make the property available for use, will not relieve a municipal corporation from liability for consequences resulting from its negligent construction or maintenance of its sewers so that the docks are filled up. *Constitution Wharf Co. v. Boston*, 156 *Mass.* 397, 30 *N. E.* 1134.

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Borough Improvement commissioners are guilty of negligence in connecting a new sewer with a sewer on plaintiff's premises without placing therein a penstock, which would have prevented water backing into the plaintiff's sewer, where the previous connection with the old sewer had such a penstock. *Ruck v. Williams*, 3 *H. & N.* 308, 27 *L. J. Exch. N. S.* 357.

Where a railroad is carried through a deep cut or excavation under a street, which crosses it by a bridge, the municipality will not be allowed to and equity will restrain it from constructing a sewer, which will discharge the water of the street into the cut, under the bridge, thereby endangering the excavation wall and the railroad station supported by it; and the fact that the construction of the railroad in an excavation intercepted the natural drainage of the municipality will not alter the case, where a drain can be constructed that will not injure the railroad though at a greater, but not unreasonable, expense. *Danbury & N. R. Co. v. Norwalk*, 37 *Conn.* 109.

The action of a local authority in the execution of its statutory power in diverting sewage from one drain or sewer into another already surcharged with sewage, whereby damage is occasioned to an individual occupier of premises, is not a mere act of omission, but constitutes the commission of a legal wrong, in respect of which the occupier may maintain an action for the damage sustained. *Dent v. Bournemouth*, 66 *L. J. Q. B. N. S.* 395.

Ejectment will lie against a city which takes possession of the property of a riparian owner and constructs thereon a sewer outlet into the river, and drives and maintains piles along the water front for the purpose of protecting the sewer. *Harrington v. Port Huron*, 86 *Mich.* 46, 13 *L. R. A.* 664, 48 *N. W.* 641.

Substantial damages need not be shown to entitle a board of public works to an injunction restraining the discharge of sewage into its sewage system by an adjoining district, where the wrong is done under a claim of right, not only to discharge such sewage, but to increase the number of drains, claiming such a right by prescription on behalf of all the inhabitants of the district. *Atty. Gen. v. Acton Local Board*, *L. R. 22 Ch. Div.* 221, 52 *L. J. Ch. N. S.* 108, 47 *L. T. N. S.* 510, 31 *Week. Rep.* 153.

An owner of land may enjoin a municipal corporation and highway commissioners from extending an outlet for the sewage of the municipality along a highway in a direction different from that of the natural flow, and discharging the same at a point where it will flow across his land, where the injury resulting from the noxious odors therefrom is irreparable, and its continuance will permanently injure the property and health of such owner and his family. *Dierks v. Addison Twp. Highway Comrs.* 142 *Ill.* 197, 31 *N. E.* 496.

An injunction will be granted against a city discharging sewage on lands of an adjacent town under provision of the statute authorizing a board of health to restrain by injunction such nuisance. *Gould v. Rochester*, 105 *N. Y.* 46, 12 *N. E.* 275, *Reversing* 39 *Hun.* 79, where the right to maintain the action was denied because proper service had not been obtained upon the city.

Equity will not restrain a municipal corporation from connecting its street drains with a private sewer constructed to carry off surface water which naturally flowed through a gully on the same land, when the street formerly drained through the gully, and the natural flowage is not to be increased. *Keating v. Pittston*, 8 *Kulp*, 421.

In an action by a board of public works against an adjoining district to restrain the discharge of sewage into its system, the court,

while restraining the defendant from increasing the burden cast upon the district, refused to restrain it from discharging sewage through the drains already constructed, upon the ground of the plaintiff's delay in commencing the proceedings, and the great inconvenience that would be cast upon the defendant, while the plaintiff was not shown to be likely to suffer any substantial injury therefrom. *Atty. Gen. v. Acton Local Board*, L. R. 22 Ch. Div. 221, 52 L. J. Ch. N. S. 108, 47 L. T. N. S. 510, 31 Week. Rep. 153.

Uninterrupted use is necessary to acquire a prescriptive right to empty a town drain on the land of an individual, and the drain must be continued all the time in the same condition. *Cotton v. Pocasset Mfg. Co.* 13 Met. 429.

Where a prescriptive right has been acquired to drain certain houses of a local district into its sewage system, and thence into the system of an adjoining district, the local board cannot increase the burden thereby cast upon the adjoining district by draining or permitting other houses to be drained into its system, and then casting the increased sewage into the adjoining system. *Atty. Gen. v. Acton Local Board*, L. R. 22 Ch. Div. 221, 52 L. J. Ch. N. S. 108, 47 L. T. N. S. 510, 31 Week. Rep. 153.

c. Use of stream as.

1. Increasing flow.

A city is not entitled to the use of a natural water course across the land of an individual to carry off water collected by drainage from the neighborhood greater in quantity than would naturally have flowed there. *Flanders v. Franklin*, 70 N. H. 168, 47 Atl. 88.

If a municipal corporation drains its sewers into a natural stream, and thereby causes more water to flow through the lands of an individual, to his damage, it is liable. *O'Brien v. St. Paul*, 18 Minn. 182, Gil. 163.

A city cannot turn surface water from a large section of territory into a stream, and provide an insufficient culvert to carry the stream under a highway, so that the water is turned upon the land of a riparian owner. *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703.

A city which, in the improvement of its streets, increases the territory discharging water into a stream so as to bring down water onto an owner's premises, which does not naturally flow in that direction, is liable for damages resulting therefrom. *McBride v. Akron*, 12 Ohio C. C. 610.

A municipal corporation is liable for damages to a landowner, where it so drains its streets as to increase the natural flow of waters into a stream as to make the overflow of such land greater, or make an overflow where there was no overflow, thus increasing the servitude on the land below. *Ibid.*

A city is liable for each overflow of property caused by its diverting surface water into a stream without providing a sufficiently large culvert for its escape, as for a separate trespass; and the statute of limitations begins to run at the time of each trespass, and not at the time of the act of the city in diverting the water. *Finley v. Williamsburgh*, 24 Ky. L. Rep. 1336, 71 S. W. 502.

Whether an overflow was caused partly by reason of the insufficiency of a culvert, and partly by the diversion of surface water, and the proportionate part of the damage caused by the diversion, are not proper questions for the jury, in an action to recover for damages resulting from overflow caused by the diversion of surface water into a stream by a city without providing a sufficient culvert for its escape. *Ibid.*

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But a municipal corporation may, without incurring responsibility, permit sewers and drains to be emptied into a natural water course, if the damage thereof is not unreasonably increased. *Flynn v. Shenandoah*, 19 Pa. Co. Ct. 622.

So, it has been held that a municipal corporation has a right to use a water course crossing streets, as laid out on a plot, as an outlet for the drainage water of the streets; and riparian owners on the stream will hold their right subject thereto, so far as the increased flow of water is caused merely by improvements. *Niles' Works v. Cincinnati*, 2 Disney (Ohio) 400.

And in the case of *Blitz v. Ashland*, 3 Pa. Co. Ct. 412, an injunction was refused against concentrating sewage into an insufficient culvert so as to injure the plaintiff by its overflow, as these matters belonged to the discretion of the borough, and no negligence was charged, and there was adequate remedy at law; and the culvert was made by private parties along the water course.

A municipal corporation is not liable to the owner of land upon a stream for the overflow of his property by the stream into which it has conducted its surface drainage, if no more than the natural amount of water finds its way into the stream, although the flow is hastened and a considerable amount of soil is washed into the stream, which to some extent obstructs its flow. *Wheeler v. Worcester*, 10 Allen, 603.

And it has been held that equity will not restrain a municipal corporation from tearing down a wall constructed over a water course by the riparian proprietor, as he has an adequate remedy in damages if it is done illegally. *Flynn v. Shenandoah*, 19 Pa. Co. Ct. 622.

Some courts have gone even to the extent of holding that streams are natural outlets for drainage, and that there is no liability for using them as such. Such holdings are not in accord with the general rule regulating the flow of streams, or with the maxim, *Sic utere tuo ut alienum non laedas*.

A municipal corporation has a right to pour its sewers and drains into a water course, without being under any obligation to keep it clear to its mouth on the private property through which it flows. This right is not lost when the water is conducted through a covered passageway. *Munn v. Pittsburgh*, 40 Pa. 364.

In opening and paving streets and gutters, a municipality performs a governmental duty; and the fact that the waters of a brook are considerably increased thereby does not render it liable for injuries caused by the overflow of the brook. *Wilson v. Waterbury*, 73 Conn. 410, 47 Atl. 687. And in that case it was held that where a municipality, by its charter, is given power to use any water course as a sewer, and, acting under such authority, adopts a plan for a sewage system which provides for deepening and widening the channel of a brook, its subsequent conduct in carrying the plan only partially into execution, leaving the brook in its natural condition, does not render it liable for injury to property caused by the overflow of the brook, where its waters are not increased by the part of the plan executed.

A municipal corporation is not liable for consequential damages from the draining of surface water into a stream by the extensive grading and paving of streets in the exercise of its powers, and with no want of reasonable care and skill in making the improvements, whereby the flow is increased to the injury of proprietors below. *Cumberland v. Willison*, 50 Md. 138, 33 Am. Rep. 304.

2. Pollution.

The general rule, supported by the great weight of authority, is that municipal corporations have no right to cast their sewage into streams so as to pollute them to the injury of lower riparian proprietors. See *note* to *Platt Bros. & Co. v. Waterbury* (Conn.) 48 L. R. A. 691, to which reference is made for the general law on the question. Authorities are collected here only so far as they were decided subsequently to the time that note was compiled, or as they shed some collateral light upon the general question.

"The great weight of authority, American and English, supports the view that legislative authority to install a sewer system carries no implication of authority to create and maintain a nuisance; and that it matters not whether such nuisance results from negligence, or from the plan adopted. If such a nuisance be created, the same remedies may be invoked as if the perpetrator were an individual." *Winchell v. Waukesha*, 110 Wis. 101, 85 N. W. 668.

As said in an Illinois case, it may be true that a city is liable to be compelled to afford sufficient drainage for health and comfort of the people, but that would not authorize it so to construct the work as to destroy or seriously impair the value of the property of an individual. If there is no means of making proper drainage without injury to individuals, let the community for whose benefit it is constructed, through their corporate government, by condemnation or otherwise, make compensation. Every principle of justice, and the dictates of reason, would say that it is wholly wrong to impose the burden of the nuisance on one or a few citizens. *Jacksonville v. Lambert*, 62 Ill. 519.

The legislature will not be presumed to have "concealed," in words merely authorizing municipalities to raise and expend money for the construction of sewers, a declaration of policy that each municipal corporation might, in its discretion, without liability to individuals, take practical possession of the nearest stream as a vehicle for the transportation of its sewage in crude and deleterious condition. *Winchell v. Waukesha*, 110 Wis. 101, 85 N. W. 668.

The right of a municipal corporation to construct sewers does not include the right to create a nuisance, public or private. *Brayton v. Full River*, 113 Mass. 218, 18 Am. Rep. 470.

A city which conducts sewage into a natural stream to the injury of a riparian owner is liable just as a private individual would be. *Chapman v. Rochester*, 23 N. Y. Wek. Dig. 424.

A municipal corporation is liable for injury to the property of a riparian owner from the pollution of a stream by the discharge of sewage therein. *Kewanee v. Gullfoll*, 81 Ill. App. 490.

A municipal corporation is liable to an abutting landowner for negligently allowing sewage to flow into a stream and pollute the water, whereby his land is rendered unhealthy for habitation. *San Antonio v. Pizzini* (Tex. Civ. App.) 58 S. W. 635.

The legislature cannot authorize the pollution of the water of a nontidal stream by the discharge of sewage therein, except upon the making of compensation. *Grey ex rel. Simmons v. Paterson*, 60 N. J. Eq. 385, 48 L. R. A. 717, 45 Atl. 905.

Although a city has power, under its charter, to provide a system of sewerage, it has no authority to maintain a nuisance in the construction and maintenance of its sewers, and must exercise care not to pollute the waters of a stream so as to render them unfit for use. *Donovan v. Royall* (Tex. Civ. App.) 63 S. W. 1054.

A municipal corporation makes neither nat-

ural nor reasonable use of a nontidal and non-navigable river when it discharges by its sewerage system vastly more than the mere natural drainage of riparian owners. *Grey ex rel. Simmons v. Paterson*, 58 N. J. Eq. 1, 42 Atl. 749.

Statutory authority to construct a system of sewers, and the approval of the state board of health thereof, do not justify a village in polluting the waters of a stream by the discharge of sewage to the detriment of a lower riparian proprietor. *Butler v. White Plains*, 59 App. Div. 30, 60 N. Y. Supp. 193.

A city which, through a properly constructed sewer, discharges sewage into public waters and upon an oyster bed, which is thereby destroyed, inflicts an injury which is not consequential and incidental to the maintenance of the sewer, but constitutes a direct invasion and appropriation of the property for public use; and the owner is entitled to just compensation in damages therefor. *Huflmire v. Brooklyn*, 162 N. Y. 584, 48 L. R. A. 421, 57 N. E. 176.

The discharge of sewage by a city into a stream to the injury of a riparian owner is a taking of private property within the constitutional meaning, although the sewer was constructed under legislative authority. *Sammons v. Gloversville*, 34 Misc. 459, 70 N. Y. Supp. 284.

A riparian owner, who has not objected to the discharge of sewage into a stream running through his premises, may object, where it is proposed to increase the quantity of the discharge. *Gale v. Syracuse*, 35 Misc. 465, 71 N. Y. Supp. 986.

A city attempting to discharge a public sewer, carrying sewage besides surface drainage, into a private mill pond situated on a brook which is the natural outlet for the surface drainage of that part of the city where the sewer is, makes itself liable in damages to the owner of such mill pond, where it appears, also, that the city is not a riparian proprietor on the brook, and that it never acquired the right to discharge the sewer into the mill pond in some way authorized by law, and that no reasonable necessity exists for discharging the sewer upon the premises of the pond owner. *Vale Mills v. Nashua*, 63 N. H. 136.

When a municipal corporation empties its sewage into a stream to the injury of its reasonable use by lower riparian proprietors, it "takes" property, for which compensation must be made. *Mansfield v. Balliett*, 65 Ohio St. 431, 58 L. R. A. 628, 63 N. E. 86.

If riparian rights are property for which, when injured by an individual, the latter may be held liable in an action, they are none the less property when so injured or taken by the public. *Ibid.*

A municipal corporation is liable if the sewage carried to its sewage farm is diverted from its filters and emptied into a water course to the injury of lower proprietors. *San Antonio v. Smith*, 94 Tex. 266, 59 S. W. 1109.

A municipal corporation is not relieved from liability for injuries to riparian owners by sewage which it casts into the stream on the ground that, in constructing and operating its sewers, it exercised a governmental function. *San Antonio v. Pizzini* (Tex. Civ. App.) 58 S. W. 635; *San Antonio v. Diaz* (Tex. Civ. App.) 62 S. W. 549.

A municipal corporation cannot empty a sewer into a tall race running over private land so as to constitute a nuisance to the owner of the property. *Nevins v. Fitchburg*, 174 Mass. 545, 47 L. R. A. 312, 55 N. E. 321.

A municipality is liable for the pollution of a water course by discharging sewage into it, where the sewer, although constructed without an ordinance authorizing it, was accepted by the city, and the action of its officers in con-

structing it was ratified. *Foncannon v. Kirksville*, 88 Mo. App. 279.

A municipality has power to construct a sewer, and is liable for discharging its contents into a water course, under a statute authorizing it to establish a system of sewerage, one section providing for a general system and another for district sewers, although at the time of constructing such sewer a general system had not been adopted. *Ibid*.

A city is liable for the damages to the land of a lower proprietor resulting from the drainage, by its direction and consent, of out buildings and privies of private individuals into a stream flowing over it; and that a new channel was made for the stream after permission given so to drain, and drainage in pursuance thereof, do not make such land subject thereto as an incident attaching to the natural stream, even if the owner consented to the change of channel. *McBride v. Akron*, 12 Ohio C. C. 610.

A city authorized to construct a system of sewers is responsible for a nuisance caused by the discharge of sewage into a stream crossing the plaintiff's premises, whereby he suffers injury. *Carmichael v. Texarkana*, 94 Fed. 561.

A city erecting and controlling a workhouse, and constructing a sewer therefrom to a stream, is liable for damages to a lower proprietor on account of the corruption of the water course, depriving him of the use of the water, injuring his premises, and causing sickness in his family. *Cleveland v. Beaumont*, 4 Ohio Dec. Reprint, 444.

That other causes contributed to the pollution of the water of a stream will not relieve a city from liability to a lower owner damaged thereby, if the impurities would not have existed but for the drainage into the stream from a city workhouse, but it will be relieved only in case such other causes are sufficient, in and of themselves, independent of its acts, to account for the damage done. *Ibid*.

A municipality using a natural stream as a sewer, when sued for permitting filth to escape therefrom, and flow the plaintiff's lands, may not show, in defense, that the overflowing of the water course in times of freshet occasioned as much damage; because the upper proprietors had only a right to use the stream for surface drainage, not to befoul it; and to make plaintiff's land a place of deposit for the offal of sewers imposes an additional burden upon it, and is in effect taking it, within the purview of the Constitution, requiring compensation for private property taken for a public use. *Winn v. Rutland*, 52 Vt. 481.

But a municipal corporation is not liable for the pollution of a stream by the construction of private drains within its corporate limits, unless control over them is conferred upon it by its charter or the general law. *Martinowsky v. Hannibal*, 35 Mo. App. 70.

It is not necessarily, *nor prima facie*, an act of nuisance to cast the garbage of a city upon one of the great lakes 15 miles from the shore. *Kuehn v. Milwaukee*, 92 Wis. 203, 65 N. W. 1030.

There can be no prescriptive right in a municipal corporation to neglect to protect riparian owners from being injured by the lawful emptying of municipal sewers into a water course. *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858.

Sand and silt discharged into a water course by a local authority is not deleterious matter, within a provision of the public health act forbidding a local authority to convey sewage or filthy water into a stream until it is free from deleterious matter. *Durant v. Branksome Urban Council*, 66 L. J. Ch. N. S. 517, 76 L. T. N. S. 486.

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is not sufficient to estop parties injured from complaining of a nuisance caused by the sewer emptying into a stream and polluting the waters thereof. *Donovan v. Royall* (Tex. Civ. App.) 63 S. W. 1054.

Where a city discharges the outlet of its sewer system into a stream, thereby polluting its waters and injuring a lower riparian owner, if it does not appear that the city has acquired any continuing right to empty its sewage therein, the injury cannot be considered permanent so as to render the city liable for the difference in the value of the property before and after its commission. *Umscheid v. San Antonio* (Tex. Civ. App.) 69 S. W. 496.

Where a failure to connect with a sewer was made an offense by ordinance, parties so connecting are not thereby estopped from complaining of a nuisance caused by the sewer emptying into a stream and polluting the waters thereof. *Donovan v. Royall* (Tex. Civ. App.) 63 S. W. 1054.

A prescriptive right to deposit sewage in a natural water course which has been covered and used as a public sewer is not lost when the municipality diverts the flow thereof into an artificial sewer. *Masonic Temple Assn. v. Harris*, 79 Me. 250, 9 Atl. 737.

A city which drains into a swamp which connects with the lake beyond cannot be said to drain into a bayou to the detriment of the landowner, where, from natural causes, some of the swamp water is thrown back so that through certain outlets it reaches the bayou, but not in an offensive condition. *State ex rel. Gagnet v. Public Accounts*, 26 La. Ann. 336.

A municipal corporation is not relieved from liability for injuries to riparian property by sewage negligently permitted to flow into the stream by the fact that at the time the land was purchased the sewer system was already constructed. *San Antonio v. Pizzini* (Tex. Civ. App.) 58 S. W. 635.

In an action against a city for injury to land by emptying a sewer into a creek flowing through the land, in instructing the jury the court may assume that the injury to the land is permanent where there is evidence sufficient to warrant such assumption. *Paris v. Allred*, 17 Tex. Civ. App. 125, 43 S. W. 62.

The measure of damages for a permanent injury to land by the deposit of sewage into a stream flowing through it is the resulting depreciation in the property, and the whole damage may be recovered at once. *Ibid*.

A city which pollutes a stream by turning its sewage system into it cannot complain because the injured riparian owner elects to treat it as a temporary nuisance, and ask for damages on that basis, rather than as a permanent one. *Hollenbeck v. Marlon* (Iowa) 89 N. W. 210.

Injunction.

The pollution of a natural stream by the discharge of sewage is a continuous nuisance for which the allowance of damages would be an inadequate remedy, and the award of a permanent injunction in the same action is proper. *Chapman v. Rochester*, 23 N. Y. Week. Dig. 424.

The discharge by a city, into a stream, of an additional quantity of sewage will be restrained at the suit of a riparian owner whose lands are annually overflowed by the sewage-laden waters, which, as they recede, deposit offensive matter thereon. *Gale v. Syracuse*, 35 Misc. 465, 71 N. Y. Supp. 986.

A city will be enjoined from discharging sewage into a stream to the injury of a riparian owner, although great public inconvenience may result; but the operation of the injunction should be postponed for a reasonable time to enable the city to establish a different system

of sewage, or to obtain appropriate legislation giving it the right to condemn the lands. *Sammons v. Gloversville*, 34 Misc. 459, 70 N. Y. Supp. 284.

A riparian owner, who suffers substantial injury from the pollution of a stream with sewage by a city, may enjoin the city alone, although sewage from other sources contributes to the damage. *Ibid.*

Where sand or silt is discharged into a stream by a local authority in a proper exercise of its right to discharge sewage into the stream, the damage resulting from the same, while a matter for compensation under the statute, forms no ground for an injunction against the local authority. *Durrant v. Branksome Urban Council*, 66 L. J. Ch. N. S. 517, 76 L. T. N. S. 486.

A preliminary injunction restraining a city from discharging sewage into a stream, whereby it is alleged that the plaintiff's ice pond, 13 miles down the stream, is polluted, will be vacated, where the evidence preponderates in favor of the absence of injury, and the action can be tried upon the merits before another winter. *Finger v. Kingston*, 29 N. Y. S. R. 703, 9 N. Y. Supp. 175.

A village will be enjoined from discharging sewage into a stream, thereby producing at times a foul and offensive odor, over the premises of the plaintiff, and adding to the discoloration and pollution of the water, although the plaintiff's damage is slight; nor is the plaintiff deprived of equitable relief by the fact that the waters of the stream are made unfit for domestic or agricultural uses by other pollutions before receiving the discharge of the village sewer. *Butler v. White Plains*, 59 App. Div. 30, 69 N. Y. Supp. 193.

A decree restraining a borough corporation from allowing sewage to flow into a river is not binding upon the corporation's successors, consisting of a board created by act of Parliament under a statute which provides that they shall not be subject to any liability of their predecessors, except those attaching under the act. *Atty. Gen. v. Birmingham Drainage Board*, L. R. 17 Ch. Div. 885, 50 L. J. Ch. N. S. 788, 44 L. T. N. S. 906, 29 Week. Rep. 793, 46 J. P. 36.

Injunctive relief to abate a nuisance caused by the discharge of sewage into a stream will not be denied because the plaintiff, pending the suit, has sold a part of the premises affected by the nuisance; nor is it an objection that the injunction will beneficially affect the lot he sold and all the other lots in the neighborhood. *Demby v. Kingston*, 60 Hun, 294, 14 N. Y. Supp. 601.

It is no defense to the granting of an injunction requiring a city to abate a nuisance due to the discharge of a sewer into a stream, that it cannot lawfully enter upon the premises of the parties who discharge offensive matters into the sewer, since the city can either extend the sewer along the stream, or embrace it within it. *Ibid.*

Equity has power to restrain a city from discharging sewage into a stream, in consequence of which the waters thereof are polluted, rendered unfit for use, and, by emitting noxious gases and vapors, are a source of danger to health, and the use and enjoyment of property along the stream is materially interfered with. *Todd v. York (Neb.)* 92 N. W. 1040.

In *North Staffordshire R. Co. v. Tunstall Local Board*, 39 L. J. Ch. N. S. 131, the court followed *Atty. Gen. v. Halifax*, 39 L. J. Ch. N. S. 129, 21 L. T. N. S. 52, 17 Week. Rep. 1088, and directed that the same order be entered as was made in that case, where the court, after declaring that the defendant's discharge of its sewage into a water course was a nuisance, which the defendant agreed to abate by the con-

struction of works which would take some time, made an order restraining it from increasing the nuisance, and from continuing to discharge its sewage into the water course from and after the expiration of one year.

An injunction will lie to restrain a nuisance which will arise from the construction by a municipal corporation of a sewer discharging sewage into a stream of pure water running through plaintiff's land, which it is alleged will be polluted and rendered unfit for use, and the noxious vapors and odors from which are likely to endanger the health and life of his family, where the nuisance is continuing and likely to be permanent. *Butler v. Thomasville*, 74 Ga. 570.

The discharge by a municipality of sewage into a creek so as to create a public nuisance may be enjoined. *People ex rel. Lind v. San Luis Obispo*, 116 Cal. 617, 48 Pac. 723.

Even though redress may be had, on indictment, by abatement of the nuisance. *Grey ex rel. Simmons v. Paterson*, 58 N. J. Eq. 1, 42 Atl. 749.

But an injunction against emptying sewage into a river from which, at a lower point, a municipal water supply is taken, will not be granted when it appears that the public health of the lower municipality will not necessarily be jeopardized. *Newark Aqueduct Board v. Pasalic*, 45 N. J. Eq. 393, 18 Atl. 106.

Equity will not order the demolition of a dam that a municipality or individuals may have a more convenient place to empty sewage; and, if the dam causes a menace to the public health by reason of such pollution, the pool will be ordered cleansed and further pollution prevented, rather than that the dam be demolished. *New Castle City v. Raney*, 6 Pa. Co. Ct. 87.

d. Use of canal.

There is no right to use a canal as a sewer outlet in the absence of contract or legislative authority. The authorities on this subject will be found in *note* on construction and management of canals, *post*, 817.

V. Maintenance.

a. Repair.

If the municipality undertakes to provide a sewer system, it must, so long as it permits the use of the sewer, use reasonable care to keep it in such a state of repair that it will not inflict injury on individuals.

A municipal corporation is bound to keep a sewer constructed by it, in the public streets within the corporate limits, and exclusively under its control, in repair, and one outside the corporate limits, permitted to connect with the sewer, can compel it to abate a nuisance by making needed repairs thereon. *Kankakee v. Illinois Eastern Hospital*, 66 Ill. App. 112.

The legal obligation of a municipal corporation to construct gutters and sewers is one voluntarily assumed; but, having assumed the obligation by constructing a sewer, it must keep the same in repair, and is liable in damages for failure so to do. *Chicago v. Seben*, 165 Ill. 371, 46 N. E. 244.

A city is bound to keep such drains and sewers as it constructs in proper repair and unobstructed to the full extent of their original capacity, and is liable for the flooding of adjoining premises during such a season as might be reasonably anticipated, due to the want of repair or existence of obstructions in a drain having sufficient capacity. If unobstructed, to carry off such waters without injury to such lands. *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

Under a statute giving a municipality author-

ity to construct sewers, it is bound to repair those which it constructs, and will be liable for the negligence of its officers so to do. The owners and occupiers of houses and lots in the neighborhood, having been charged with the expense of the sewers, acquire a right to the common use of them, and a corresponding duty devolves upon the corporation to keep them in proper condition and repair. *New York v. Furze*, 3 Hill, 612.

The duty of a municipal corporation with reference to the keeping of its sewers in repair involves a reasonable degree of watchfulness in ascertaining their condition from time to time, and preventing them from becoming dilapidated and obstructed. *McCarthy v. Syracuse*, 46 N. Y. 194.

In the maintenance of its public sewers, a city is bound to exercise that care and prudence to keep them free from obstructions which a discreet or cautious individual would or ought to use if the whole risk or loss were to be his alone. *Rowe v. Portsmouth*, 56 N. H. 201, 22 Am. Rep. 464.

A city is liable for any omission of reasonable or ordinary care in the management of its sewers. *Fuchs v. St. Louis*, 133 Mo. 168, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508.

A municipal corporation is not an insurer of the condition of its sewers, but it is bound to use ordinary care and skill in constructing and maintaining them; and this care and skill require it to take notice of the liability of timbers to decay from time to time, and to take such measures as ordinary care and skill indicate to guard against the sewer becoming unsafe because of the decay of timbers used in its construction. *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743.

When a municipal corporation has evidently taken charge of the drainage of certain lots, it is liable for damages resulting from failure to maintain its works in repair. *Fitzgerald v. Ottawa*, 22 Ont. App. Rep. 297.

A municipal corporation is liable, not only for negligence in the construction of a sewer, but also for negligence in failing to keep it in proper repair. *Frostburg v. Duff*, 70 Md. 47, 16 Atl. 642.

The provision of a city charter, that no suit for damages shall be sustained against the city for injuries caused from streets, sewers, etc., being out of repair from the "gross" negligence of the city, unless the same have remained so for ten days after special notice in writing given to the mayor or city engineer, does not apply to a case where damage is caused by the caving in of a sewer about 20 feet distant from a place where the sewer had two months previously caved in, and had not been repaired, as in such a case the city is guilty of "ordinary," and not "gross," negligence. *Dallas v. McAllister* (Tex. Civ. App.) 39 S. W. 173.

A corporation constructing sewers under a statute authorizing them so to do, and empowering them to cleanse and repair the same, is liable to persons injured by its failure to exercise due care in keeping the sewers repaired and cleansed, and to exercise due care in discovering defects in the same. *Fleming v. Manchester*, 44 L. T. N. S. 517, 45 J. P. 423.

A municipality is liable for damages to land and a building thereon, although below the level of the street, flooded during a rainy season in which there was an unusual and extraordinary fall of water which could not be carried off because of its failure to keep in repair a sewer which received the water of a natural stream, with the flow of which the grading of a street had interfered, and surface water accustomed to flow into the bed thereof, where the sewer was of sufficient capacity to have carried off all the

water that fell had it been in proper repair. *Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091.

A city is liable for its failure to keep sewers safe, whereby a property owner is damaged by their overflow. *Burnett v. New York*, 36 App. Div. 458, 55 N. Y. Supp. 803.

If sewers and drains are originally of adequate capacity, and subsequently become obstructed, no responsibility therefor devolves upon the municipal corporation, except after notice and neglect to redress the evil. *Bannagan v. District of Columbia*, 2 Mackey, 285.

In *Kranz v. Baltimore*, 64 Md. 491, 2 Atl. 908, it is recognized as true that, to entitle one to recover for damages occasioned by a defect in a public sewer, it is incumbent upon him to show that the corporate authorities had notice of it, or knew of its existence, or show lapse of time or other state of circumstances from which notice can be implied.

But when a municipal corporation can have notice of an obstruction in no other way, it must inspect its sewers from time to time, and is liable for damage resulting from its neglect so to do. *District of Columbia v. Gray*, 6 App. D. C. 314.

An example of the fine distinctions which are made on this question is afforded by *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680, and *Barry v. Lowell*, 8 Allen, 127, 85 Am. Dec. 690. In the former a plan was adopted for the drainage of a section of Boston, a portion of which was below high tide. The plan contemplated an emptying of the sewers at low tide, with a provision for an emergency outlet in case of storms during high tide. The right and duty to provide the drainage were conferred by statute, which was duly accepted. After plaintiff had connected his premises with the sewer, the emergency outlet became stopped up, and his property was injured in consequence. The court held that a municipal corporation is liable for permitting a sewer to become a nuisance to the estates of persons whose private drains enter into it, if the nuisance does not result from the original plan of construction, or could be avoided by keeping it in proper condition. The charge of sewers and drains is not an obligation imposed upon the city by legislative authority exclusively for public purposes and without its corporate assent. It was voluntarily assumed by the acceptance of the act conferring the power.

In the latter case the catch basin of a sewer, with which plaintiff's property was not connected, became stopped up, and storm water flowed onto plaintiff's property. The court held that no action lies against a city for failure to keep a public sewer and cesspool in repair, whereby waste water accumulates and flows into the cellar of a neighboring house which is not connected by a drain with the sewer. This is put upon the ground that no action lies against a municipal corporation at common law for negligence, and no action has been given by statute. It was the duty of the adjoining landowner to protect his property from such flooding as best he could.

The court distinguishes the *Child* Case upon the ground that in it the city ordinance required all the particular drains from private estates to be entered into the common drains of the city, and to be laid and constructed under the direction of the board of aldermen. The owner of a private estate had, therefore, in such case, no means of protecting it against the accumulation of water by the fall of rain, by the melting of snow, if the city suffered its common sewer to be out of repair or negligently stopped up and obstructed. As the city assumed to regulate the whole subject, and compelled in-

dividuals to conform to and comply with its ordinances, it results by necessary implication that it made itself liable for whatever mischief or injuries necessarily result from any negligence or omission of duty on its part. But in the Barry Case the city never required plaintiff to drain water from his land, or connect with the common sewer, but left him to manage his estate as he should think most for his own interest or advantage.

The Barry decision violates many of the principles and maxims of the law with reference to surface water, unless it can be regarded as merely a case of temporary clogging, as to which, see *infra* V. d, and it is doubtful if it would be recognized as authority outside of Massachusetts, except in states whose law is derived from that source.

The fact that premises injured by leakage from a street sewer are not connected with the sewer will not prevent a recovery for the injuries thereby caused if it was negligently constructed or maintained. *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519.

The New York act of 1862 exempted the city of Brooklyn from liability for injuries caused by the negligence of its officers in permitting a sewer to become out of repair so that private premises were flooded. The court defends this statute upon the ground that the officers are not appointed by the municipality, but elected by the people. *Gray v. Brooklyn*, 50 Barb. 365.

For violation of a statute making it the duty of the officers to make all needed sewers, the guilty individuals may be indicted and punished; but there is no civil remedy against them on behalf of persons injured by the default. *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719.

b. Keeping unobstructed.

A town is liable to a landowner for injury resulting from neglect to keep its sewers free from obstructions. *Bates v. Westborough*, 151 Mass. 174, 7 L. R. A. 156, 23 N. E. 1070.

A municipal corporation is liable for failure to exercise due diligence to keep a sewer free from obstructions, so that it fails to carry off the water of a stream, to the injury of an abutting landowner. *McCarthy v. Syracuse*, 46 N. Y. 194.

If the necessary and reasonable result of the flow of water and filth into a sewer is to cause it to become obstructed, an omission to guard against such result will be negligence which will render the municipal corporation liable for the injuries caused thereby. *Barton v. Syracuse*, 37 Barb. 292.

A municipal corporation is liable for injury caused by its negligently permitting a sewer to be filled with dirt and rubbish, and back the water through laterals into adjoining cellars. *Barton v. Syracuse*, 36 N. Y. 54, Affirming 37 Barb. 292.

A city will be charged with notice of the existence of an obstruction in a sewer, and of its negligence with respect thereto, if the same was placed in the sewer by city workmen under charge of the city engineer, or if the obstruction had remained such a length of time, that under the circumstances, its officers, in the exercise of reasonable care and diligence, should have known of it. *Kiesel v. Ogden City*, 8 Utah, 237, 30 Pac. 758.

A city authorized by its charter to build and repair sewers is liable to a property owner whose cellar is flooded with filth because the city negligently permits the sewer to become obstructed, although it was originally constructed by commissioners under a special act, and thereafter turned over to the city. *Evers v. Long*, 41 L. R. A.

Island City, 78 Hun, 242, 28 N. Y. Supp. 825.

A municipal corporation is liable for damages from an overflowing of a public sewer superinduced by obstructions negligently permitted to remain therein. *Boehm v. Bethlehem*, 4 Pa. Super. Ct. 385.

A municipal corporation maintaining a canal for drainage purposes, constructed under an act requiring any private canal taken as part of the drainage system to be kept open and in such order as to protect the proprietors of adjacent lands, which permits the obstruction of such canal by dirt falling into it, and grass or weeds growing up in it, or in any other manner, whereby the water is caused to overflow and break through its banks and overflow adjacent lands and destroy crops thereon,—is liable for the damage so occasioned, even if obstructions were put in the canal for the purpose of enabling it to make repairs thereon. *Savannah v. Cleary*, 67 Ga. 153.

Even though the duty of constructing or altering a sewer be a governmental one, relieving the municipality from liability for negligence in its performance, the duty of removing an obstruction left in the sewer is ministerial, and the municipality negligently permitting it to remain is liable for an injury resulting from it, causing the water to back up and flood the adjacent property. *Judd v. Hartford*, 72 Conn. 350, 44 Atl. 610.

When a city is liable for certain damages arising from the stopping up or lack of repair of a sewer, the capacity of the sewer is immaterial. *Markle v. Berwick*, 142 Pa. 84, 21 Atl. 794.

A municipal corporation is liable for damages sustained by a citizen, resulting from an obstruction in a public sewer from sand, filth, and refuse negligently permitted by the city to be and remain in the sewer to such an extent that the water was dammed up and forced back upon the premises of such citizens, or from the imperfect and unworkmanlike manner in which the work of constructing the sewer was actually performed. *Hession v. Wilmington (Del.)* 27 Atl. 830, 1 Marv. (Del.) 122, 40 Atl. 749.

A city is liable to a property owner for permitting a sewer to become so obstructed as to cause his premises to become overflowed, if the obstruction or inadequacy of the sewer was known, or could have been inferred, from the frequent recurrence of overflows and of the use of a boat on the street. *Louisville v. Gimpeel*, 22 Ky. L. Rep. 1110, 59 S. W. 1096.

It is the duty of a city to inspect its sewers as often as may be necessary to ascertain obstructions; but it need only act in this regard as would a person of ordinary care. *Daggett v. Cohoes*, 27 N. Y. S. R. 630, 7 N. Y. Supp. 882.

A finding of negligence on the part of a city for failure to keep a sewer in safe condition is justified where a property owner's premises were flooded because of obstructions in the sewer due to its ordinary use, and at a time when no rain storm or other unusual conditions was present. *Talcott v. New York*, 58 App. Div. 514, 69 N. Y. Supp. 360.

When a municipal corporation negligently permits its sewer to become clogged so that the water it should drain runs through a sidewalk grating into one cellar and thence into another, it is liable for damage done to the latter, the owners not having contributed to their injury. *Scroggie v. Guelph*, 36 U. C. Q. B. 534.

But a municipal corporation is not answerable for the action of nature, by which dirt or sand is washed from a higher to a lower level and deposited in ditches or drains, except where it occurs by reason of some neglect on the part of the city officers, or, having occurred, is neg-

illegently allowed to continue. *Beach v. Scranton*, 5 Lack. L. News, 25.

So, a municipal corporation is not liable for injuries caused by the overflow of a sewer on account of its obstruction by sand washed in from the street during a heavy shower, where there is no proof of any prior obstruction, or of any defect in the construction of the sewer. *Smith v. New York*, 66 N. Y. 295, 23 Am. Rep. 53, Affirming 4 Hun, 637.

And a plaintiff is not entitled to recover, in a case of negligence on the part of a municipality in the performance of a duty in reference to sewers and drains, if he knew of the obstruction, and took no steps to have it abated. *Parker v. Laredo*, 9 Tex. Civ. App. 221, 28 S. W. 1048.

The owner of premises, whose goods are damaged by the backing of water in a drain, cannot recover against the municipality which cut the drain, if the stopping up of it was caused by his improper use thereof, even if the municipal authorities may have been negligent in making repairs. *Macon v. Small*, 108 Ga. 309, 34 S. E. 152.

A market gardener, whose premises are flooded because of the inadequacy or clogging up of a drain, cannot recover therefor in the absence of negligence on the part of the city, which had no notice of the insufficiency of the drain or of its obstruction. *Schreiber v. New York*, 11 Misc. 551, 32 N. Y. Supp. 744.

A superintendent of streets and his deputy, although acting in their official capacity in the repair of sewers, are liable to the owner of premises for damages caused by the backing up of sewage into her house on account of the stopping up of the main sewer due to their negligence and unskilfulness in making repairs. *Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922.

Where a city in the performance of its duty to keep a stream, used as an open sewer, free from dirt and refuse, dug a ditch down to the center of the bed of the stream to a dam, and cut a V shaped section out of the dam, it is a question for the jury, in an action of trespass to recover damages for injuries, whether such acts on the part of the city were not the proximate cause of the subsequent washing away of the dam by an unusual flood. *Shaughnessy v. Pittsburg*, 20 Pa. Super. Ct. 609.

A sewerage company having entered into an agreement with a local board whereby it leased the sewerage works of the town, covenanting to keep the works in proper order to admit the free flow of the sewage, will be restrained from permitting the sewage to remain in the sewers or drains, and from preventing its free flow. *Nuneaton Local Board v. General Sewage Co. L.* R. 20 Eq. 127, 44 L. J. Ch. N. S. 561.

It is sufficient notice to a municipality of the obstructed condition of a sewer where the superintendent of streets and the mayor are informed that a certain cellar is flooded with water and sewage. *Daggett v. Cohoes*, 27 N. Y. S. R. 630, 7 N. Y. Supp. 862.

Where two members of the board of public works and the engineer of a city who has charge of the construction of a sewer know of the existence of an obstruction to one of the street gutters by earth and other materials placed there in constructing a sewer, and of its dangerous character, is ample time to remove it, the city will be held to have had sufficient notice of its presence to render it liable for an injury caused thereby. *Harper v. Milwaukee*, 30 Wis. 365.

Damages may be recovered for injury from a sewer being out of repair, although at some periods during the time referred to the sewer was not out of repair. *Cohen v. Belenot*, 1 Va. S. C. Rep. 82, 32 S. E. 453.

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c. Sanitary precautions; odors; gases.

The maintenance of the sewer in proper condition involves to some extent its sanitary condition and its freedom from deleterious odors and gases. A drainage system certainly could not be tolerated which should gather filth and permit it to fester and decompose, spreading sickness and death through the atmosphere.

A municipal corporation is liable for the special damages sustained by a landowner from the odors arising from a sewer so constructed that during dry weather, when but little water is flowing in the natural creek forming the outlet, the solid matter in the sewage accumulates there, and does not flow off. *Bloomington v. Murnin*, 36 Ill. App. 647.

The construction of a wooden sluice to carry the contents from a sewer so far as constructed, which, according to the plan, is to be a main or trunk sewer, by reason of which deadly fumes and gases are emitted, causing a nuisance to adjoining property, is not a mere exercise of discretion on the part of officials, but a neglect of duty, for injury arising from which the municipal corporation will be liable; nor is it within the terms of a statute providing that the municipal corporation will not be liable for any misfeasance, upon the part of the officers of the city, of any duty enjoined upon them as officers of government; because the primary duty to keep the sewer in condition is imposed upon the municipal corporation. *Hardy v. Brooklyn*, 90 N. Y. 435, 43 Am. Rep. 182.

A municipal corporation emptying its sewers into a stream is liable for injury inflicted by its negligently allowing offensive and injurious odors and smells to issue from the polluting substances discharged. *Owens v. Lancaster*, 182 Va. 257, 37 Atl. 858.

Where a city exercises the power given it by statute to construct a sewer, it is its duty, not only properly to construct the sewer in the first instance, but it must keep it in proper repair and condition, so that it will not become a nuisance to adjacent property owners by the emission of unhealthy odors from the manner in which it is used. *Lindsay v. Sherman* (Tex. Civ. App.) 36 S. W. 1019.

A municipality may be liable to one living in contiguity to a defective sewer that it has negligently permitted to become a nuisance, for illness caused by sewer gas, although there is no direct discharge of sewage upon the lands of the injured party; but exemplary damages are not recoverable. *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72.

A municipal corporation cannot acquire a prescriptive right to discharge a sewer into a ravine so as to be of great injury to a property owner residing in the vicinity, on account of noxious odors. *Litchfield v. Whitenack*, 78 Ill. App. 364.

But, from the fact that it cannot be absolutely known what is the source of a particular disease, or what sanitary precautions might or might not have averted it, this doctrine cannot be carried too far; and it has been held that a city is not liable in damages for disease suffered by an individual in consequence of the neglect of the city authorities to observe proper sanitary precautions in the construction or maintenance of a sewer system. *Hughes v. Auburn*, 161 N. Y. 96, 46 L. R. A. 636, 55 N. E. 389.

So, a municipal corporation is not liable for injuries to an owner's premises abutting on a street outside the corporate limits, from noxious smells, caused by the construction by the municipality of an open drain in the street through which the waters of a stagnant pond, city sewage, and polluted water from woolen

mills within the city limits, are made to flow in a direction other than the natural flow, or from interference with the use of the highway. In the absence of anything to show that the ditch is a permanent one, or that it is to be kept open, or that there was a lack of diligence, skill, or care in its construction. *Cummins v. Seymour*, 70 Ind. 491, 41 Am. Rep. 618.

A statute imposing upon a district board the duty of keeping its sewers so as not to create a nuisance does not impose an absolute duty, but only requires them to use reasonable care and diligence; and they are not liable for a nuisance created by the sewer by the emission of noxious odors in the absence of negligence on their part. *Bateman v. Popular Dist. Bd. of Works*, L. R. 37 Ch. Div. 272, 57 L. J. Ch. N. S. 570, 58 L. T. N. S. 720, 36 Week. Rep. 301.

No such imminent danger as will justify interference by injunction with the construction of proposed sewers is shown by the fact that fecal matter may possibly settle in such sewers, and that the gas generated therefrom will escape and operate as a nuisance, because of present insufficiency of the water supply to force the sewage through them. *Johnson v. Avondale*, 1 Ohio C. C. 229.

The public health act of 1891, declaring foul water courses or drains to be a nuisance to be summarily dealt with, does not apply to nuisances arising from defects in the sewers of London, which are vested in the county council, but applies only to nuisances arising from private sources. *Fulham v. London County* [1897] 2 Q. B. 76, 66 L. J. Q. B. N. S. 515, 76 L. T. N. S. 691, 45 Week. Rep. 620, 61 J. P. 440.

Indictment will lie against the councilmen of a municipal corporation for a nuisance existing by reason of the filthy condition of a sewer, when the power to abate nuisances vested exclusively in them. *Com. v. Bredin*, 165 Pa. 224, 30 Atl. 921.

A very interesting case arose in Missouri involving the duty of the city with respect to gases in the sewer. A fire had caused some petroleum to flow into the sewer, and high water in the river into which the sewer emptied prevented its escape. The weather was warm, and gas formed, which exploded causing injury, for which the suit was brought. On the first hearing the supreme court held that the fact of the explosion of a sewer is itself evidence of negligence in its care. *Fuchs v. St. Louis*, 133 Mo. 168, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508.

That the facts that a city makes no attempt to remove the covers to the vents, manholes, or inlets to a public sewer, or to free the outlet of such sewer, blocked by high water, for four days after a large quantity of inflammable oil has been turned into such sewer by the engineer of the fire department of the city while attempting to extinguish a large fire attracting general public attention, and that the sewer runs under large buildings in a populous part of the city, are evidence of negligence on the part of the city in its care of the sewer. *Ibid.*

That a jury must be permitted to pass upon the question of due care by a municipal corporation which in midsummer turns a large quantity of crude petroleum into a public sewer, the natural outlet of which is obstructed, and leaves it four days without taking any precaution to avoid a resulting explosion. *Ibid.*

But when the case reached the court the second time, it held that the mere fact of an explosion of gases in a sewer is not sufficient to charge the municipality with liability for the injury caused thereby. *Fuchs v. St. Louis*, 167 Mo. 620, 57 L. R. A. 136, 67 S. W. 610.

That the explosion of gases in a sewer, to the injury of abutting property owners, cannot rea-

sonably be anticipated from the fact of the escape of a quantity of crude petroleum into it, so as to charge the municipality with negligence in failing to provide for the escape of the gases generated thereby. *Ibid.*

That a city is not bound to open vents and manholes leading to its sewers, to permit the escape of gases which are generated therein, as a means of avoiding an explosion, although it may have notice that a quantity of crude petroleum has found its way into the sewer as a result of a fire at the refinery. *Ibid.*

That no recovery can be had against a city for injuries caused by an explosion in a sewer, which is alleged to have resulted from negligently permitting petroleum to be turned into it, where the evidence shows that the explosion might have resulted from another cause, and there is nothing to show that it did not do so. *Ibid.*

And that, under an allegation of negligence on the part of a municipality in failing to prevent the formation and accumulation of gases in a sewer, and in failing to open the vents to permit their escape, which resulted in an explosion, evidence is not admissible that the explosion might have been prevented by the use of ventilating apparatus. *Ibid.*

d. Other matters.

A city may not be held liable for damage caused to property by the temporary clogging of the catch basin of a sewer which was not negligently constructed, when the injury was occasioned by the overflow of water, if the city did not have sufficient notice of the clogging to enable it to remedy the difficulty. *Knostman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887.

A municipal corporation will not be enjoined from maintaining a grating over the inlet from a street to a sewer, although the effect of it is, in time of storms, by reason of becoming filled with sticks and leaves, to cause the overflow of water onto adjoining property, and although some better device might have been adopted; where the effect of leaving the grating off would be to leave an open hole which would endanger the safety of the public. *Paine v. Delhi*, 116 N. Y. 224, 5 L. R. A. 797, 22 N. E. 405.

A municipal corporation is liable for the flooding of premises caused by the overtaxing of a drain constructed as an outlet to surface waters by the collecting of large quantities of water therein by means of lateral drains and grading of streets; and in such case the owner is not required to negative contributory negligence. *Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. 844.

Although a city may not be liable for error in judgment in devising and adopting a plan for taking care of sewage, as in so doing the city is exercising a legislative or quasi-judicial power, and not merely discharging a ministerial duty, yet, where the city has once adopted a system of sewers, and constructed sewers in accordance therewith, the judicial discretion ends, and the ministerial duty begins, and the city is liable for a negligent discharge of that duty. Hence, where a city constructs a sewer of sufficient capacity for the purpose contemplated when constructed, it is liable for overflow of property connected with it, where it subsequently changes the grade of streets, and diverts sewage and surface water into the sewer, which formerly flowed in a different direction. *King v. Granger*, 21 R. I. 93, 41 Atl. 1012.

The turning of waste water into the drains and sewers of a city from a canal constructed for the introduction into the city of water,

whereby a greater flow or quantity of water is thrown upon lands through which the drains run, renders the city liable for damages caused by the flooding of such lands thereby, although the water may run in its natural course in the drains and sewers of the city. *Phinlzy v. Augusta*, 47 Ga. 260.

Although a city may not be liable for the incapacity of a sewer, when constructed, where it constructs one which is of sufficient capacity to serve the purpose contemplated at the time of its construction, it is liable where the premises of one connected with the sewer are damaged by an overflow which results from the subsequent change of the grade of streets, whereby sewage and surface water which formerly flowed in another direction are diverted into the sewer. *King v. Granger*, 21 R. I. 93, 41 Atl. 1042. This case is distinguished from *Baxter v. Tripp*, 12 R. I. 310, on the ground that in that case the incapacity of the sewer, when constructed, to serve the purpose then contemplated, was complained of.

But a municipal corporation, having provided a system of drainage which at the time was amply sufficient, is not responsible to the purchaser of a lot for damages from the overflowing of such lot because of the subsequent insufficiency of such drainage in time of heavy rains, due solely to the increased quantity of surplus water caused to flow into such system by the improvement of lots by the individual owners thereof. *Springfield v. Spence*, 39 Ohio St. 665.

So, where a state statute provides that a city council shall have power to open and construct and keep in repair sewers and drains, the city is not bound to enlarge a drain, where, by the grading of a street, more surface water is turned into it; and where the drain overflows as a result of the increased amount of surface water, the city is not liable for the damage to adjacent lands. *Little Rock v. Willis*, 27 Ark. 572.

A municipal corporation may regulate the use of its sewerage system by requiring any connection to be made by its licensed officer, that material shall be proper and subject to inspection and approval by its inspector, and that the work be done under his supervision; but it cannot compel the property owner to purchase the material from it, or prevent him from doing the work himself if he so desires. *Slaughter v. O'Berry*, 126 N. C. 181, 48 L. R. A. 442, 35 S. E. 241.

In *Bloomfield Twp. v. Glen Ridge*, 54 N. J. Eq. 276, 33 Atl. 925, 928, it was held that the right to use and regulate sewers constructed within its territory by one municipal corporation passes without legislative grant with the land when it is incorporated within another municipal corporation.

But on appeal it was held that the title to sewers remains unchanged; and the right to control, regulate, and maintain them is vested exclusively in the municipal corporation which erected them within its limits, notwithstanding they are on land which has been annexed to another municipality. 55 N. J. Eq. 505, 37 Atl. 63, Overruling 54 N. J. Eq. 276, 33 Atl. 925, 928.

An act of the legislature creating a sanitary district, embracing within its territory a municipal corporation, for the purpose of constructing a main channel so as ultimately to change the direction of the flow of sewage of such municipality and other territory within the district so that the same will flow away from, instead of into, a lake, with power to construct adjuncts or additions so as to carry such sewage and drainage into such main channel, does not operate as a repeal of the statute authorizing such municipal corporation to con-

struct drains, ditches, etc., or require the corporate authorities thereof to surrender control of its sewer system to the drainage trustees,—especially until such main channel is constructed, and the adjuncts are so extended as to drain all parts of the territory of the district. *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255.

A municipal corporation which attempts to carry a drainage ditch across a highway must bridge it in such a way as to render it safe for ordinary travel. *Odon v. Dobbs*, 25 Ind. App. 522, 58 N. E. 562.

In *Sandgate Local Board v. Leney*, L. R. 25 Ch. Div. 183, note, which was an action to compel the pulling down of a shed erected over a sewer so as to interfere with the plaintiff's right of access to it, the court refused a mandatory injunction upon the ground that the interference with the right of access was not sufficient to warrant the issuance of a mandatory injunction, the utmost proved on the part of the plaintiff being that it might take an hour or two longer to cut down to the sewer.

VI. Liability for injuries.

a. In general.

If a municipal corporation wrongfully permits water to flow from its sewers upon abutting property, causing damage thereto, it is liable therefor. *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

A municipal corporation is responsible for its negligence in so constructing a sewer as to overflow abutting property, unless the owner thereof is himself guilty of contributory negligence. *Valparaiso v. Ramsey*, 11 Ind. App. 215, 38 N. E. 875.

Where private property, whether it be on the grade of the street or below such grade, is flooded, either by water and sewage, after having been collected in a sewer or drain, escaping therefrom to such property by reason of the negligent construction of such sewer or drain, or by want of proper repair of the same, or by negligent discontinuance thereof by closing up the outlet,—the city is liable. *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27.

A municipal corporation is not liable for damages to goods in a cellar from the flooding thereof by back water, by the cutting, either of a private drain established by permission, or of a public sewer, unless the cutting was unnecessary, or the repairing thereof by the municipal authorities was done in a negligent, unskillful, and unworkmanlike manner. *Macon v. Small*, 108 Ga. 309, 34 S. E. 152.

No user of private lands can justify a municipal corporation in sending down upon those lands refuse or noxious matter; hence, the municipality is liable for the escape of drainage from the outlet or breaks in sewer into an excavation rightfully made on the private lands. *Close v. Woodstock*, 23 Ont. Rep. 90.

The city and county of San Francisco is held, in *Bloom v. San Francisco*, 64 Cal. 503, 3 Pac. 129, to have such proprietorship of the city and county hospital as to render it liable for damages to land caused by its failure to abate a nuisance created by a defective sewer, which burst and discharged its contents over such premises.

It is no defense to an action against a municipality for damages caused by the flowing of the contents of a sewer onto plaintiff's land through openings left therein, that such openings were a part of the general plan of construction adopted by it. *Lehn v. San Francisco*, 66 Cal. 76, 4 Pac. 965.

But a municipal corporation can only be made liable for injuries caused by the overflow of a

sewer upon proof of some fault or neglect upon its part, either in the construction of the sewer, or in keeping it in proper repair. *Smith v. New York*, 66 N. Y. 295, 23 Am. Rep. 53, Affirming 4 Hun, 637.

The mere fact that water came into a cellar from a drain running from thence into the city drain is not sufficient to establish a prima facie case of negligence against the city; a specific ground of negligence must be proved. *Noble v. Toronto*, 46 U. C. Q. B. 519.

A municipal corporation is liable for damage from sewage which percolates to private property from its sewer. *Chalkley v. Richmond*, 88 Va. 402, 14 S. E. 339.

A city is liable for injuries resulting from the making of drains or sewers, if, by making them to prevent a nuisance it creates a nuisance in another place, and merely transfers it from one locality to another; but no action for such nuisance can be maintained in favor of an individual, simply because the city may be indicated. An individual is only entitled to sue when he has suffered some special damage above that arising to the public generally. *Clark v. Peckham*, 9 R. I. 453.

Ordinarily, a city will be enjoined from using or constructing a sewer or drain so as to create a nuisance by causing a deposit of filth or noisome smells adjacent to private property. *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Stoddard v. Saratoga Springs*, 127 N. Y. 201, 27 N. E. 1030; *Beach v. Elmira*, 22 Hun, 158; *Dierks v. Addison Twp. Highway Comrs.* 142 Ill. 197, 31 N. E. 496; *Butler v. Thomasville*, 74 Ga. 570; *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109; *Mootry v. Danbury*, 45 Conn. 350, 29 Am. Rep. 703; *Flower v. Low Leyton Local Board*, L. R. 5 Ch. Div. 347, 46 L. J. Ch. N. S. 621, 36 L. T. N. S. 760, 25 Week. Rep. 545.

But in Massachusetts, in accordance with the doctrine of *Barry v. Lowell*, 8 Allen, 127, 85 Am. Dec. 690 (see *supra*, V. a), it is held that a town is not liable for injury to property owners by the percolating of water from its catch basins or gutters through the soil into adjoining closes. The only remedy of the land-owners is to raise such barriers against the water as will prevent its injuring them. *Kenison v. Beverly*, 146 Mass. 467, 16 N. E. 278.

The liability of a municipal corporation is that of an insurer, under a duty to maintain a drain in such condition as to afford suitable and sufficient flow for all drainage entitled to pass through it. *Blood v. Bangor*, 66 Me. 154.

Under a statutory obligation to maintain a public drain in repair so as to afford sufficient and suitable flow for all drainage entitled to pass through it, a municipal corporation is liable for damage resulting from so overcharging a drain that in time of excessive rains premises entitled to drainage are flooded thereby. *Ibid.*

In England, in the absence of negligence, a municipal corporation is not liable for the flooding of cellars caused by the overflow from the sewer backing into them, unless made so by statute, either by express provision or by reasonable intendment. And a statute requiring them to keep the sewers so as not to create a nuisance does not make them liable in the absence of negligence. *Stretton's Derby Brewery Co. v. Derby* [1894] 1 Ch. 431, 63 L. J. Ch. N. S. 135, 8 Reports, 608, 69 L. T. N. S. 791, 42 Week. Rep. 583.

A right of action against municipal corporations does not exist at common law; and their liability to a private action for failure to enlarge a drain where an increased amount of surface water is caused to flow therein by the grading of a street must be determined by the stat- 61 L. R. A.

ute which creates the corporation. *Little Rock v. Willis*, 27 Ark. 572.

Where, as a necessary and unavoidable consequence of the grading and sewerage of a street, and not through lack of care or negligence, a space formerly occupied by the plaintiff's drain was filled up, thus cutting off his drain, his remedy is not by an action of trespass, but by a proceeding before viewers, as his injury must be regarded on the same footing as a taking for public use; and in the proceeding before viewers the question is, Was the injury the necessary consequence of the plan adopted? and whether a better plan might have been adopted cannot be considered. *Curran v. East Pittsburgh*, 20 Pa. Super Ct. 590.

It is not necessary to give the statutory month's notice for a cause of action against a local board, where the object of the action is an injunction to restrain the board from permitting its sewage ditch to overflow onto the plaintiff's land, as that entitles him to immediate relief. *Flower v. Low Leyton Local Board*, L. R. 5 Ch. Div. 347, 46 L. J. Ch. N. S. 621, 36 L. T. N. S. 236, 25 Week. Rep. 545.

A former recovery against a municipality for damages to property caused by the maintenance of an insufficient sewer is no bar to an action afterwards brought for damages sustained from the same cause subsequent to the former recovery when, so far as appears, the first suit was brought to recover such damages only as had been sustained up to the time of the filing thereof. *Mulligan v. Augusta*, 115 Ga. 337, 41 S. E. 604.

Where a municipality entered into a contract for the construction of a sewer, providing that it should be done according to the directions and to the satisfaction of the city engineer; and where, during the progress of construction, in order to get rid of water coming down, it was dammed back to raise it to the level of another sewer which was used as an outlet, and, in consequence of heavy rains, the water thus penned back overflowed into plaintiff's cellar,—the city, and not the contractor, is liable, as the work was done under the city's control and supervision. *Grassick v. Toronto*, 39 U. C. Q. B. 306.

b. By reason of private or adopted drain.

In an action against a municipal corporation for injury to land by flooding caused by the negligent manner in which a sewer was constructed in the streets of the city, it will be presumed that the work was done by the proper authorities, and no proof of that fact will be necessary to entitle a recovery. *Peoria v. Crawl*, 28 Ill. App. 154.

The transfer of property connected by a private drain with a sewer to a city as a site for one of its structures does not make the city responsible for injuries caused to a neighboring owner who has, under license from the city, connected his property with the private drain, by reason of water backing up, since the drain is owned by the city in its private, and not in its governmental, capacity, and it is not bound to maintain it in an effective condition. *Kosmak v. New York*, 117 N. Y. 361, 22 N. E. 945, Affirming 33 Hun, 329, 6 N. Y. Supp. 453.

A village is responsible for the flowage of polluted water through drains constructed by private persons with which it has connected its sewers or surface drains, to the same extent as if it had originally constructed them. *Kewanee v. Ladd*, 68 Ill. App. 154.

A municipal corporation, by flowing its sewer through private drains, thus contributing to an injury to another from the pollution of the waters thereof, becomes a joint tortfeasor, and as such is liable for the whole damage. *Ibid.*

But a municipal corporation does not assume responsibility for a private or state sewer by connecting its own sewer therewith. *Munn v. Pittsburgh*, 40 Pa. 364.

A municipal corporation is not liable for defects in a private sewer or passageway for a natural water course into which it empties its sewer when not due to its negligence. *Ibid.*

A village which maintains a sewer in such a manner as to render neighboring property uninhabitable is liable for the damages resulting from the nuisance, although the sewer was in the first instance constructed by an individual upon his own property. *Bolton v. New Rochelle*, 84 Hun, 281, 32 N. Y. Supp. 442.

A municipal corporation, which has controlled a sewer for a long series of years, is responsible for damage from its want of repair, although it may not have been a party to its construction. *Chalkley v. Richmond*, 88 Va. 402, 14 S. E. 339.

A municipal corporation is liable if a public culvert is extended, by its permission, by private parties, and damage results because such extension is not of sufficient capacity to drain off the ordinary flow of water. *Haus v. Bethlehem*, 134 Pa. 12, 19 Atl. 437.

When a city assumes the control and management of a sewer, it becomes its duty to use reasonable diligence to keep it in proper repair. *Taylor v. Austin*, 32 Minn. 247, 20 N. W. 157.

A municipal corporation, which has knowledge of, and adopts, a change made by a private individual in the outlet of a sewer, by which the sewage is turned into a new channel and the old channel closed up, by reason of which the new outlet, because of its insufficiency, becomes clogged up and causes a backing up of water to the injury of private owners, will be liable for the injury. *Nims v. Troy*, 59 N. Y. 500.

A municipal corporation occasionally and voluntarily making repairs to a sewer, does not thereby assume the duty of maintaining it. *Munn v. Pittsburgh*, 40 Pa. 364.

A municipality using a private sewer with the consent of the owner, as part of its drainage system, is liable for negligently connecting it with two large drains of more than double its capacity, thereby causing the water to back into and flood a cellar of the owner of the private drain. *Coghlan v. Ottawa*, 1 Ont. App. Rep. 54.

The city is not liable for damages caused by a sewer from a private enterprise, which, though put in by aldermen, was an unauthorized act on their part, and *ultra vires*. *Barger v. Hickory*, 130 N. C. 550, 41 N. E. 708.

A property owner may not recover for injuries to his property caused by the defective construction of a sewer, when the sewer in question was extended to the premises by his predecessor in title at his own expense and in violation of city ordinances, requiring the consent of the city authorities to be first obtained, the payment of a fee for the privilege of connecting, and that the construction shall be done under the supervision of the city engineer; and the fact that the city supervisor afterwards connected with the extension for the purpose of preventing rubbish from being carried into the sewer, but without his action being authorized or ratified by the proper municipal authorities, is not sufficient to impose liability for the damages sustained upon the city. *Dasher v. Harrisburg*, 20 Pa. Super. Ct. 79.

A town is not liable for the defective construction or want of repair of a tile drain established and constructed almost wholly within its corporate limits upon petition of landowners in pursuance of a drainage law, and for which the town was assessed for benefits to 61 L. R. A.

certain highways, but with the construction of which it had nothing to do, and which it never repaired or drained into, or otherwise assumed control of; as no liability exists for failure of a municipal corporation to exercise its power to provide drainage. *Monticello v. Fox*, 3 Ind. App. 481, 28 N. E. 1025.

A city which, by the consent of the owners, constructs a box drain from private property, which is used as a sewer, is not bound to keep it in repair or remove obstructions from it, since the city has no right to enter upon the property for the purpose of making the repairs. *McCaffrey v. Albany*, 11 Hun, 613.

Although a sewer was constructed by public officers, when a municipality has assumed to maintain it, it is liable for damages resulting from its failure to keep it in proper repair. *Hamlin v. Bliddeford*, 95 Me. 308, 49 Atl. 1100.

c. By using stream as sewer.

A municipal corporation having exclusive power, under the law, to keep open streams passing through or bordering upon its corporate limits, and control over public sewers, is bound so to construct and keep in repair a sewer provided by it for the flow of the water of a stream under a street as to permit the free and unobstructed flow of such water, and is liable for the overflow of an owner's premises caused by its neglect in allowing such sewer to become obstructed and out of repair. *South Bend v. Paxon*, 87 Ind. 228.

While a city has the power, where it is deemed necessary, to divert a stream passing through its limits from its natural course and confine it to a narrower channel, in doing so it must use reasonable care to prevent injury to others; and, if damage results to the owners of private property from its negligence or wrong in this respect, it will be liable for the loss. *Kansas City v. Slangstrom*, 53 Kan. 431, 38 Pac. 706.

A mill owner on a stream into which flows a brook which has been taken by a municipal corporation for a common sewer is entitled to damages for the diminished value of the water for his purposes because of such use. *Washburn & M. Mfg. Co. v. Worcester*, 153 Mass. 494, 27 N. E. 664.

Where, after a landowner had constructed a covered channel for a brook running through his land, a municipality instituted proceedings to take it for a sewer, the liability, as between the city and the landowner, for injuries to adjoining land, arising from an overflow of the water of the brook, rests upon the party in possession and control of the channel; and the city, and not the landowner, is liable if it has assumed such possession and control, although the proceedings instituted by it were irregular. *Sellick v. Hall*, 47 Conn. 260.

A city is bound to keep in repair, and is responsible for injuries to, property through which a stream flows, resulting from negligence in making necessary repairs, as well as from the negligent and unskillful manner in which the work of repairing is actually done, where, for many years, it has used the stream as a common sewer, has arched and paved over it when crossed by streets on the extension of the city, or, when running within the limits of a street, has provided by ordinance for tunneling and paving of the stream between streets on their being gradually built up, and has controlled the connection of private drains therewith, acquiring the right to the sewer by virtue of its power to open and condemn streets where crossing or flowing along streets, and by adoption wherever it passes through private property whereon it was originally arched or cov-

ered by private owners; so that the stream has for a long time been made a complete and continuous arched, covered, and underground drain or sewer, and has come to be as completely under the control and management of the city as any other public sewer within its limits. *Kranz v. Baltimore*, 64 Md. 401, 2 Atl. 908.

A mill owner, who, for more than twenty years, has utilized the flow of a brook as it has been regulated by natural obstructions and by culverts, is within the meaning of a statute giving a municipal corporation power to remove such obstructions for the purpose of surface drainage, making compensation to any person injured in his property by any of the acts done, the effect of which is to hasten the discharge of the water so that he is deprived of its flow during certain seasons of the year. *Boston Belting Co. v. Boston*, 152 Mass. 307, 25 N. E. 613.

d. By negligence generally.

A city is liable for the act of its employees sent to close up an outlet leading into a sewer, who, through forgetfulness or inattention, closed up the inlet flowing from a house, whereby the premises were flooded. *Semple v. Vicksburg*, 62 Miss. 63, 52 Am. Rep. 151.

A municipal corporation, having the power to construct and keep its sewers in repair and regulate the use thereof, is liable for the flooding of the cellar of private premises connected with a sewer by back water therefrom caused by obstructions negligently placed in such sewer by workmen of the city under direction of the city engineer. *Kiesel v. Ogden City*, 8 Utah, 237, 30 Pac. 738.

One whose private drain, which discharges into a public sewer in a city highway, is cut into by a private contractor, acting under the orders of a city superintendent, in charge of the work of laying water pipes in the street, so that the drain is obstructed and turns back the sewage to its owner's injury, may recover therefor of the city. *Bragg v. Rutland*, 70 Vt. 606, 41 Atl. 578.

A city need not, in permitting a gas pipe to be laid through a sewer, act through its city council while in regular session, to be liable for the result; but it is sufficient if the council had notice of the proposed action, and of its effect, and assented thereto. *Powers v. Council Bluffs*, 50 Iowa, 197.

A municipality is liable to a property owner for injuries resulting from the negligent reconstruction of a sewer by a tunnel company acting under a statute authorizing it to build the tunnel, and requiring it to reconstruct, under the supervision of the city engineer, any sewer cut in so doing; and the fact that neither such officer nor the municipality exercised any control over such reconstruction does not relieve the city, as it was their duty to have done so. *Fink v. St. Louis*, 71 Mo. 52.

A municipal corporation is liable for damages to private property from flooding caused by the negligent work of a plumber, acting under a license from the city, in connecting a house drain with that in the street, which could have been prevented if the city had exercised that supervision over the work incumbent upon it in the proper maintenance of its public streets. *Anderson v. Wilmington*, 8 Houst. (Del) 516, 10 Atl. 509.

A city is not liable for damage done to an iron foundry and machine shop which was overflowed because of the failure of the municipality to keep in operation the draining machine erected for public utility. A city is not responsible for the injury of private property by 61 L. R. A.

an act of omission or commission, unless such act is without the authority of, or against, law, or is improperly or wantonly executed. *Bennett v. New Orleans*, 14 La. Ann. 120.

But a municipal corporation is not liable for the misuse, or the improper use, of its drains or sewers by third parties, so as to injure another, unless it has consented to such use, or negligently permitted its continuance after knowledge thereof. *Champaign v. Maguire*, 56 Ill. App. 618.

A city cannot construct a sewer in a street in such manner as to drain the fish pond of an abutting owner, who owns the fee of the street, without first compensating him. *Ambrose v. Buffalo*, 29 Abb. N. C. 140, 20 N. Y. Supp. 120.

A town which, by the construction of a sewer, cuts off the supply of water percolating into the well of an adjoining landowner, is liable to him for the consequential damage. *Trowbridge v. Brookline*, 144 Mass. 139, 10 N. E. 796.

Permission from a municipality to use a public street for a private drain is, at most, a revocable license, and cannot create a vested right to maintain the drain. Hence, when a city, in building a sewer as part of its sewerage system, cut off a private drain which had been laid in a street by permission of the town before its incorporation as a city, and the water and sewage which had flowed through the drain were, in consequence, thrown back on the premises of the plaintiff, it was held that an action would not lie against the city for cutting off the drain and neglecting to provide for the drainage which had previously flowed through it. *Eddy v. Granger*, 19 R. I. 103, 28 L. R. A. 517, 31 Atl. 831.

Where, before a sewer was constructed by a city, an owner of land abutting on the street had the use of an aqueduct as a sewer, and no injury to such land resulted therefrom, and such owner sues the city for injury to his estate by reason of the insufficient size of the sewer, he cannot in such action recover for the destruction of the aqueduct, as there is no principle of law by which he can transmute his claim for damages for the destruction of the aqueduct into a claim for damages for the insufficiency of the sewer; and if, instead of suing for the destruction of the aqueduct, he sees fit to connect with the sewer, he can have no better right of action than if the aqueduct had never existed. *Baxter v. Tripp*, 12 R. I. 310.

A municipal corporation is liable for negligence, which constructs a new sewer over a broken one, but does not compel the people to connect therewith. *Betterly v. Scranton*, 5 Lack. L. News, 179.

Unsafe street.

The duty of the city to maintain its streets in a safe condition has been the occasion of some cases involving negligence in respect of drains and drainage.

A municipal corporation which maintains a catch basin in a highway in such a manner that the cover is liable to be floated off by heavy rains will be liable to one who falls into it while the cover is off from such cause. *Post v. Boston*, 141 Mass. 189, 4 N. E. 815.

A municipal corporation may be found negligent in case its street commissioner, upon finding a gutter stopped and standing full of water, merely cleans out the gutter without removing the obstruction which prevents the flow of the water, so that the gutter again fills, obscuring the location of the curb, so that one attempting to cross the street falls in the gutter and

is injured. *Bly v. Whitehall*, 120 N. Y. 506, 24 N. E. 943.

A municipal corporation is liable for injury to a person, received from falling, in the nighttime, into a sewer manhole in a public street nearly in the line of a sidewalk, without guards or lights, left open while being cleaned under the supervision and authority of the municipal corporation. *Kankakee v. Linden*, 38 Ill. App. 657.

When the orifice of a highway culvert originally sufficient becomes, by the action of frost or other natural forces contracting its walls, insufficient, so that the water it should carry off flows across and makes a gully on the highway at that location, a traveler injured thereby may recover of the municipality, when the public authorities have notice of the defects in the sluiceway and neglect to remedy them. *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280.

A village is chargeable with negligence where it permits a water company to obstruct a drain for over five years by means of a water pipe, whereby a street corner is frequently flooded, and the crosswalk, which runs in a diagonal direction, is covered by muddy surface water, which renders the crossing dangerous. *Lloyd v. Walton*, 57 App. Div. 288, 87 N. Y. Supp. 929.

A city which permits rubbish, washed upon the surface of a street by reason of the insufficiency of a culvert, to remain for such length of time that its presence must have come to the knowledge of the officers of the city, will be responsible for injuries to travelers caused by such obstruction. *Hazard v. Council Bluffs*, 87 Iowa, 51, 53 N. W. 1083.

A municipal corporation is liable for damages resulting from its negligence in causing surface and drainage waters to flow across a sidewalk, forming an open gutter. *Navarre v. Benton Harbor*, 126 Mich. 618, 86 N. W. 138.

A city which so constructs a sewer basin in the highway that surface water flowing toward it will wash away the earth and make a deep impression is liable to one injured thereby, when the wheel of his wagon sinks therein, where the hole has existed for at least six weeks. *Lehmann v. Brooklyn*, 80 App. Div. 305, 51 N. Y. Supp. 524.

A municipal corporation is bound to keep a covered drain across a street, and used as a public crosswalk, in repair so that persons using the same will not fall through. *Champaign v. Patterson*, 50 Ill. 61.

Where a sewer caves in and leaves a depression in a street 12 feet in length, and the street is negligently left by the city in that condition for two months, when a person is injured by the caving in of the sewer near the depression, the city cannot, in an action by the person injured, successfully defend on the ground that it did not have notice of the defect in the sewer, where it appears that had the city repaired the street at the place of the depression it would have discovered the defect which caused the injury. *Dallas v. McAllister* (Tex. Civ. App.) 39 S. W. 173.

A city negligently maintaining an insufficient culvert in the street, which causes the water to dam up above it, is liable for the death of a child seven years of age, who is attracted by the water and falls therein and is drowned. *Elwood v. Addison*, 26 Ind. App. 28, 59 N. E. 47.

But the death of a child by its falling into a gutter in the street and being washed into the opening into a sewer under the sidewalk is such an unusual occurrence that a city is not liable for such death, because of its failure to place a grating over the opening, where a grating would have obstructed the water and damaged property. *Rome v. Cheney*, 114 Ga. 194, 55 L. R. A. 221, 39 S. E. 983.

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A gutter beside a sidewalk, 4 feet wide and not over 2 feet deep, made to carry off surface water, is not such an alluring object to children that a city is liable for injuries to children playing in it, in case it fails to make provision against such injuries. *Ibid*.

And a municipal corporation will not be liable for the death of a child which falls into a stream which has been covered and transformed into a sewer, near the head of the sewer, so that it is carried into the sewer and drowned, although a platted, but unopened, street crosses the stream a few feet from the end of the sewer, on the ground, either that railings were not placed so as to prevent children from going to the head of the sewer from the street, or that a grating was not placed at the entrance to the sewer to prevent children from being carried into it. *Nutting v. St. Paul*, 73 Minn. 371, 76 N. W. 61.

See also *infra*, VI. e.

e. Open drains.

A municipal corporation is liable for negligence if, having the care of an open sewer, it allows refuse and impure matter to accumulate in the stream and upon its banks, obstructing the flowage and emitting poisonous odors, to the injury of health and property. *Owens v. Lancaster*, 193 Pa. 436, 44 Atl. 559.

A municipal corporation is liable to the head of a family for such damages as he and his family have sustained by reason of the improper use of a sewer having its outlet in an open ditch upon a street fronting his premises, thereby rendering such premises unhealthy and uncomfortable to live in, of which use and the nuisance thereby created the city had knowledge. *Champaign v. Forrester*, 29 Ill. App. 117.

The use of an open sewer by a city in the vicinity of lands on which the owner and his family reside, whereby the comfortable enjoyment and free use of the premises are interfered with, constitutes a nuisance which will be abated at the suit of such owner. *Adams v. Modesto*, 131 Cal. 501, 63 Pac. 1083.

Where a city by its charter is given control over its streets, drains, etc., it cannot avoid responsibility for the unsafe condition of a sidewalk by reason of proximity to a deep, open drain, on the ground that it did not construct the same, where the city had notice, either actual or constructive, of the defective condition. *Klein v. Dallas*, 71 Tex. 280, 8 S. W. 90.

A municipal corporation maintaining a canal for drainage purposes, constructed under an act requiring any private canal taken as part of the drainage system to be kept open and in such order as to protect the proprietors of adjacent lands, is required to keep such banks or embankments along such canal as will securely keep the waters within the channels thereof, and to keep the canal open and in order for the protection of proprietors of adjacent lands, in such a manner as to provide against the changes of weather which are usual and ordinary at different seasons of the year. *Savannah v. Cleary*, 67 Ga. 133.

A municipal corporation is liable for the depreciation in value of land resulting from the construction by it of a permanent open ditch in a public street and private way on two sides of such land for the purpose of draining a pond in an unnatural direction, where the ditch is located so close to the lot line as to cause the soil from such premises to cave and fall into the ditch, obstructs access thereto, and affects the healthfulness of the premises by reason of the filthy water and sewage discharged and allowed to stand in the ditch, thereby creating a nuisance; and it is not relieved from liability because the work was done by an in-

dependent contractor, who constructed the ditch in accordance with the plan adopted by the city. *Seymour v. Cummins*, 119 Ind. 148, 5 L. R. A. 126, 21 N. E. 549.

A claim for damages from interference with the use of premises by an open city sewer is not a demand which must be presented to the board of trustees under a statute requiring that all demands against a city or town shall be presented and audited, since the purpose for which such presentment is required—that they may be audited—is not applicable to demands arising from torts. *Adams v. Modesto*, 131 Cal. 501, 63 Pac. 1083.

A municipal corporation, which leaves a sewer open while in process of construction, an unreasonable length of time, on account of which a property owner cannot rent his house for what it is really worth, is liable to him for the difference between the real rental value and the rent he receives for such period. *Arn v. Kansas*, 4 McCrary, 558, 14 Fed. 236.

A municipal corporation negligently constructing a drainage ditch along a highway, thereby causing damage to the property of another by the improper diversion of drainage water, is liable for the injury so caused. *McAskill v. Hancock Twp.* (Mich.) 55 L. R. A. 738, 88 N. W. 78.

Making highway unsafe.

The duty of the municipality to keep its highways safe requires it to exercise care in locating open drains in them.

An open drain in a highway may be a defect which will render the town liable for injuries caused thereby. *Hinckley v. Barnstable*, 109 Mass. 126.

Where a city is created by a special charter, which provides that the city shall have exclusive control of its streets, and shall have power to put drains and sewers therein, it is liable to a person injured by falling into an uncovered drainage ditch contiguous to a sidewalk, where it appears that the drain, as maintained, was a dangerous obstruction to those passing along the street. *Galveston v. Poshinsky*, 62 Tex. 118, 50 Am. Rep. 517.

Where a person was injured by falling into an open drain negligently maintained by a city contiguous to a sidewalk, if there were broken bottles or pieces of glass in the drain, without which the injury, notwithstanding the fall, would not have resulted, the fall, having been caused by the defective condition of the sidewalk, is the proximate cause of the injury. *Ibid.*

It is gross negligence on the part of a municipal corporation to leave a ditch in a street bordering on a narrow sidewalk filled with water to the depth of nearly 5 feet, situated in the midst of a dense population, without any guards of any kind to prevent children or other persons falling into it, and which has been there so long that the municipal officers must have been perfectly familiar with its location and existence; and it will be liable for the drowning of a child therein. *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378.

A city which constructs and maintains across one of its streets an open ditch 1 foot deep and 1 foot wide, for surface water, and near which there are no guards or lights, is liable for personal injuries sustained by one while driving across such ditch in the night. *Salem v. Webster*, 192 Ill. 869, 61 N. E. 328.

Where a mule was injured while being driven across a ditch on the side of a street which had been out of repair for two months the municipality is liable, although having had no actual

notice of the defect. *Market v. St. Louis*, 56 Mo. 189.

But the maintenance of a gutter or ditch about 1 foot or 18 inches deep, constructed along a road for the purpose of carrying off surface water, and plainly visible, does not render the road unsafe, or entitle a bicyclist to recover for injuries sustained from riding along the edge of the gutter which gave way throwing him from his machine. *Sutphen v. North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128.

And the question of the notice of a municipal corporation of a defect in a sidewalk because of proximity to a deep, uncovered drain is for the jury. *Klein v. Dallas*, 71 Tex. 280, 8 S. W. 90.

An action for damages, and not an injunction, is the proper remedy for maintaining a large open sewer in a street running through a section of unimproved property. *Cooper v. Cedar Rapids*, 112 Iowa, 367, 83 N. W. 1050.

f. Defenses.

1. Consent or contributory negligence.

Under the doctrine that the municipality is not bound to provide drainage, and that, when it does so, individuals can profit by the improvement only to the extent to which it is carried by the municipal authorities, they take the risk of attempting to use the improvement.

A municipal corporation is not liable for damages resulting to an owner's premises from back water of a sewer through the connecting pipe by which such premises are drained into the sewer, whereby the basement is frequently overflowed due to the insufficiency in the capacity of the sewer, where all danger from back water can be avoided by the stopping up and disuse of the connecting pipe, although that would deprive the premises of the benefits of the sewer, for the construction of which the owner has been assessed his proportionate part of the cost. *Roll v. Indianapolis*, 62 Ind. 547.

So, a city is not liable to a private individual for damages due to the flooding of his cellar with water set back from a sewer through a private drain maintained for his private advantage and convenience. *Dermont v. Detroit*, 4 Mich. 435.

Where plaintiff was injured by reason of an overflow resulting from a city drain pipe being so stopped up that it failed to carry off the surplus water, the plaintiff is precluded from recovering by reason of contributory negligence, where it appears that he knew of the obstruction beforehand, but failed to remove it or notify the city, which had no actual knowledge of it. *Parker v. Laredo*, 9 Tex. Civ. App. 221, 28 S. W. 1048.

A landowner may not recover for the flooding of his premises caused by the turning of a stream above into a water course running through his close, by the city, in the course of its repair of streets and drains, where it appears that he had previously altered the natural course of the stream through his close by making it much narrower than in its natural state, and the evidence was not clear that the damage was not occasioned, in part at least, by his own acts. *Bellamy v. Hamilton*, 4 U. C. C. P. 526.

A city is not liable for the flooding of the basement of premises through its sewer on the ground that it was not constructed large enough, where the trouble only arises in times of high water, and would be remedied by removing the closet overflowed from the basement to an upper floor. *Graves v. Olean*, 64 App. Div. 598, 72 N. Y. Supp. 799.

A municipal corporation, having constructed

a sewer of insufficient capacity for public use, is not thereby liable to an abutting property owner for injury to his property from back water of the sewer through the connecting pipe draining such premises into the sewer, where the owner voluntarily tapped the sewer and connected his private drain therewith according to the terms of the city regulations, and the size of the sewer, and its capacity to do its work or not, were apparent before he made such connection, and a disuse of his private drain would avoid all the injury complained of, although it would deprive his property of the benefits of the sewer, except those enjoyed by the general public. *Roll v. Indianapolis*, 52 Ind. 547.

A municipal corporation is not liable in tort for setting back water into the cellar of the house of one who connected his private drain with a sewer which had been constructed with an outlet so narrow that it would not carry the sewage and the water of a brook which had been turned into it. This is put upon the ground that the right of the landowner was to connect only with the existing system, and he could not complain that it was not sufficient to drain his property. He could not complain that the sewer would not drain the land below a certain grade above its own level if its inability to do so was due to the plan on which it was constructed. But in that case the action was not for momentary damage caused by the landowner doing what he was led to suppose, or had a right to suppose, he might do in safety, but was brought for a continuing nuisance on the footing of a right of property which was infringed. His right, however, was simply to connect a pipe having a mouth at such height as would be safe under the existing system. If he connected one having a mouth lower than that, he maintained it at his own risk after experience had shown its dangers. *Buckley v. New Bedford*, 155 Mass. 64, 29 N. E. 201.

A municipal corporation is not liable for damages from the backing of sewage into a cellar because of the clogging up of a private sewer connecting therewith by reason of the negligence of the city authorities in voluntarily and gratuitously reconnecting such private sewer with the main sewer after the breaking of such connection by the lowering of the main sewer. *Streff v. Milwaukee*, 89 Wis. 218, 61 N. W. 770.

So, an agreement by one who connects with a sewer built by a city, that no claim for damages which may be occasioned to his estate or any property thereon in any manner by the construction, use, or existence of such sewer or connection shall be made against the city, is equivalent to the release required by R. I. Pub. Laws, chap. 313, § 5, to be executed when such connection is made. *King v. Granger*, 21 R. I. 93, 41 Atl. 1012, Following *Baxter v. Tripp*, 12 R. I. 310.

But the release required to be executed to the city under R. I. Pub. Laws, chap. 313, § 5, by the owner of an estate when he connects with the city sewer, by which the city is released from any damages that may result from such connection, must be construed with reference to the conditions existing at the time the release is made, as well as the condition that could have been reasonably anticipated; and where a sewer is of sufficient capacity when the connection is made, and the city subsequently changes the grade of other streets so that surface water and sewage are turned into the sewer, which had theretofore flowed in a different direction, the city is liable where the sewer overflows the estate of the landowner who connected with the sewer, notwithstanding the release. *King v. Granger*, 21 R. I. 93, 41 Atl. 1012.

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Where a city constructs a sewer under a state statute which provides that the owner of land on a street through which a sewer is laid is liable to assessment, and, being so assessed, is entitled to connect his estate with the sewer, "upon executing to said city a release of all damages which may at any time happen to such estate in anyway resulting from such connection;" and the owner makes an agreement not to make any claim against the city for damages occasioned by the construction, use, or existence of the sewer or his connection with it,—such agreement is valid as a release, and he cannot recover against the city for injuries to his estate from the reflux of filth from the sewer owing to its insufficient size. *Baxter v. Tripp*, 12 R. I. 310.

But where some active duty is placed on the municipality, either by its charter, or by a contract, express or implied, with the landowner, the latter does not take the risk, but the municipality must construct a sewer which will be reasonably adequate for the use intended.

A property owner, in connecting his drain with a public sewer, is not bound to guard against negligence of the municipal corporation in its want of care in failing to preserve the sewer in repair. *Barton v. Syracuse*, 37 Barb. 292.

That a property owner has voluntarily connected his premises with a public sewer does not deprive him of the right to recover for damages sustained because of its defective condition. *Daggett v. Cohoes*, 27 N. Y. S. R. 630, 7 N. Y. Supp. 882.

A municipal corporation may not claim immunity from a liability to respond in damages for injuries resulting from its negligent maintenance of a defective sewer, by virtue of an ordinance permitting sewer connections only on condition that the city shall be held harmless from loss or damage in any way resulting from such connection. *Murphy v. Indianapolis* (Ind.) 63 N. E. 469.

In an action for damages caused by the backing up into plaintiff's drain of a sewer which was allowed by the city to get out of repair, the defense relied upon was that the drain was unlawfully connected, no payment having been made before connecting the same, as required by Boston Rev. Ord. 1885, chap. 27, § 15; but, it appearing that the then owner of the land had conveyed certain land to the city on condition that he should be required to pay nothing for sewer assessments, and that the city still holds the land so conveyed; also, that the plaintiff, who afterwards purchased the property in question, before doing so, was informed by the city that there were no assessments standing against it,—it was held that, as the city still held the land conveyed to it until he had notice to the contrary, plaintiff had a right to assume that he was entitled to protection as one lawfully connected with the sewer. *Hendrie v. Boston*, 179 Mass. 59, 60 N. E. 386.

That a person's house drain is connected with a sewer maintained by the village in such a manner as to constitute a nuisance does not debar him from maintaining an action to recover damages. *Bolton v. New Rochelle*, 84 Hun. 281, 32 N. Y. Supp. 442.

A property owner injured by the flow of water from the public sewer through his drain into his cellar may recover damages, although he has failed to place a gate in his drain as required by ordinance, where his neglect to do so did not contribute to the injury. *Nutt v. Manchester*, 38 N. H. 226.

After a landowner has established his right to be free from the casting of sewage by a municipality upon his property by a judgment, he cannot be estopped from enforcing his right by

permitting the city to advertise and let a contract for the construction of work to do so, and to expend money in carrying out the contract, where it does not appear that he remains quiet so long as to be guilty of laches. *Vick v. Rochester*, 46 Hun, 607.

If the private drain is wrongfully connected, its owner takes the risk.

No common-law liability attaches to a municipality for overcharging a sewer by turning more drainage into it than it can accommodate so that the water backs up through a private connection, where the connection was made without right. *Darling v. Bangor*, 68 Me. 108.

A municipal corporation is not liable for injury occasioned to private property by the overflow of water from a sewer, which was caused in part by the unauthorized connection of the premises with the sewer. *Breuck v. Holyoke*, 167 Mass. 258, 45 N. E. 732.

And equity will not restrain a municipal corporation from taking out a connection illegally made with a municipal sewer. *Assay v. Baldwin*, 7 W. N. C. 160.

A municipal corporation is not liable for damages resulting from sewage backing from the public sewer into the cellar of one whose property has been connected in violation of city ordinances, requiring the consent of the city authorities to be first obtained, payment of a fee for the privilege of connecting, and the work to be under supervision of the city engineer. *Dasher v. Harrisburg*, 5 Dauphin Co. Rep. 46.

And it has been held that if the owner of property abutting on a sewer makes such a connection as to bring the general flow of sewage onto his lot, it is his own fault, the remedy being to make it higher. *Betterly v. Scranton*, 5 Lack. Legal News, 179.

Contributory negligence.

Where the owner of premises injured by water set back from a sewer could have prevented such injury by properly placing the check valve in making his connection, he cannot recover from the municipality. *Wilson v. Waterbury*, 73 Conn. 416, 47 Atl. 687.

A municipal corporation acting under legal authority to grade streets is not liable for damages to adjacent property from the overflowing thereof by the obstruction of the mouth of a sewer, caused by the work of raising the grade of a street, where the proof shows that all the damage sustained by plaintiff was the result of his building his house before a permanent water grade had been determined upon by the city, and before the passage of the act giving damages for the change thereof. *Fuller v. Atlanta*, 66 Ga. 80.

The facts that a city promised to repair defects in a sewer causing the overflow of abutting property, and that the owner relied on such promise, will not relieve him from the effect of contributory negligence by continuing, during the time of such reliance, one of the concurrent causes of his injury, arising from defects in the construction of the building or arrangement of his premises. *Valparaiso v. Ramsey*, 11 Ind. App. 215, 38 N. E. 875.

Consenting to the changing of the grade of a sewer upon promise to hold the landowner harmless from the consequences will not deprive him of maintaining an action for obstruction of the sewer through negligence in its maintenance and use, where water is backed into his cellar, although the change of grade increased the liability of obstruction. *Emery v. Lowell*, 109 Mass. 197.

2. Flood.

The rule that a city sewer must be of sufficient

capacity to carry off all the water that is likely to flow into it does not apply in case of an extraordinary and excessive rainfall. *Chicago v. Rustin*, 99 Ill. App. 47; *Garfield v. Toronto*, 22 Ont. App. Rep. 128; *Hession v. Wilmington* (Del.) 27 Atl. 830, 1 Marv. (Del.) 122, 40 Atl. 749; *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779; *Capital Printing Co. v. Raleigh*, 126 N. C. 516, 36 S. E. 33.

A municipal corporation, for the efficiency of its sewers, is bound to make provision for such floods as may be reasonably expected, judging from such as have previously occurred, although at wide and irregular intervals of time; and is not liable for damages which could not have been provided for or guarded against by the exercise of ordinary diligence, such as unprecedented rains. *Arndt v. Cullman*, 132 Ala. 540, 31 So. 478.

A municipal corporation, in constructing drains or sewers for the flow of surface water from or upon its streets, is bound to anticipate ordinary rainfalls; and it is a question of fact for the jury to determine whether or not an injury to an owner's land from flooding was caused by such an extraordinary rainfall as to relieve the municipal corporation from liability. *Peoria v. Elsler*, 62 Ill. App. 26.

A city must provide water ways sufficient to carry off water which might reasonably be expected to accumulate judging from the floods that have previously occurred; and the fact that a rainfall is infrequent, if not greater than that which has fallen upon subsequent occasions, is no defense to a suit of an owner whose lands abut a street, to recover damages for overflowing his property. *Powers v. Council Bluffs*, 50 Iowa, 197.

But a municipal corporation is not bound to provide for all possible rainstorms, although it has collected water from a considerable district of country, and is not liable for damages arising from insufficiency of gutters and sewers, in case of extraordinary storm. *Allen v. Chipewewa Falls*, 52 Wis. 430, 38 Am. Rep. 748, 9 N. W. 284.

Negligence on the part of a municipality cannot be predicated on a mere failure to construct gutters or sewers of a sufficient capacity to carry off surface water in case of an extraordinary storm, such that a person of ordinary prudence would not ordinarily anticipate and provide against. *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27.

A city is not bound to anticipate or provide against extraordinary and unusual rainfalls, in the construction of its curbs and gutters. *Haney v. Kansas*, 94 Mo. 334, 7 S. W. 417.

Plaintiff's store stood in a place which, before any improvements had been made in the locality, was at some seasons of the year a pond from accumulations of surface water. The city raised the grade of its streets at that point. Plaintiff filled to grade. The city constructed sewers and gutters, the only feasible mode of disposing of the water, which were sufficient to carry it off at ordinary times when because of an unusual rain of great violence plaintiff's cellar, which was below the grade of the street, was flooded by water from the street flowing over the sidewalk, which was below the street, through windows with areas partly of masonry and partly of wood which were below the sidewalk. The city was not liable for damages because of the injury done by the water. *Alden v. Minneapolis*, 24 Minn. 254.

The ordinary and reasonable care which it is the duty of a municipal corporation to exercise in the maintenance of the dams and banks of a canal for drainage purposes, constructed under an act requiring that any private

canal taken as a part of the system must be kept open and in such order as to protect the proprietors of adjacent lands, requires the taking into consideration of and providing for their efficiency, not only under ordinary circumstances, but at certain seasons of the year when heavy rains and freshets ordinarily occur. *Savannah v. Spears*, 66 Ga. 304.

A municipal corporation is not responsible for damages from the flooding of premises by the backing thereon of water which bursts from the manhole of a sewer during an extraordinary rainfall, in the absence of proof of negligence on its part in the construction of the sewer, or in failing to keep it in proper repair. *Baltimore v. Schnitker*, 84 Md. 34, 34 Atl. 1132.

A municipal corporation is not chargeable with negligence if it constructs a sewer in a workmanlike manner, and takes due care to keep it in proper order, and damage results from its breaking only as the result of a rainfall so extraordinary as to be without the range of probability. *Vanderslice v. Philadelphia*, 103 Pa. 102.

A municipal corporation is not liable for damages to private property by back water from a sewer due to an extraordinary storm which the city could not anticipate, and therefore was not bound to provide against, although the obstruction was negligently allowed to accumulate and remain in the sewer, if the rainfall was so great that the sewer, if clear, would have been of insufficient capacity to prevent the overflow. *Hession v. Wilmington* (Del.) 27 Atl. 830, 1 Marv. (Del.) 122, 40 Atl. 749.

A city which has contracted to enlarge and keep in repair a ditch extending across private lands, so that it will carry off the city drainage without overflowing or saturating the surrounding land, need not make the ditch adequate for extraordinary and unexpected floods; nor is it required to maintain the premises in any better condition than they would have been in had the old ditch remained as it was, and the extra city flowage been excluded. *Coldwater v. Tucker*, 38 Mich. 474, 24 Am. Rep. 601.

A city, in providing sewers for surface water which is accustomed to flow in a ravine, is not required to anticipate extraordinary and unusual storms, which would not be expected to occur in view of the past history of the country. *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767.

A municipal corporation maintaining a canal for drainage purposes, constructed under an act requiring any private canal taken as part of the drainage system to be kept open and in such order as to protect the proprietors of adjacent lands, which is at fault in obstructing the canal and keeping the banks thereof in such condition as necessarily to cause adjacent lands to be flooded and crops thereon injured, is liable for the damages resulting therefrom, and is not excused by extraordinary rains, if such original fault as to the condition of the canal was the proximate and immediate cause of the injury. *Savannah v. Cleary*, 67 Ga. 153.

It will however not be liable for damage to crops on adjacent lands from the overflowing thereof which was the result of an extraordinary storm and rainfall, against which human foresight, by the exercise of proper precaution and care, could not provide, when it is not caused by the negligence or default of the municipal authorities, or by reason of the bad repair and condition of its canals, or by reason of any obstruction put therein by them. *Ibid.*

It is the duty of a city, in the construction of the water ways, to take into consideration, not only the usual quantity of water, but also the liability to freshets occasionally occurring; nevertheless, if it should so provide, if an ex-

traordinary storm should occur, whereby the country should be overflowed, which by the exercise of ordinary prudence could not be provided for or guarded against, the city would not be responsible for the damage which it caused. *German Theological School v. Dubuque*, 64 Iowa, 736, 17 N. W. 153.

Where the bursting of a defective sewer was caused by an unusual rainfall, and would have occurred had not the sewer been defective, the city is not liable for injuries to adjacent property, but if the defects therein and the unusual rainfall were concurring causes, the city is liable. *Brash v. St. Louis*, 161 Mo. 433, 61 S. W. 808.

In an action against a municipal corporation for injury to private property by overflow, caused by the failure of street drains to carry off the water during unusual storms, evidence in regard to the dimensions and fall of the drains and their manner of connection with other drains is admissible to determine whether they are of sufficient capacity, when unobstructed, to carry off the waters caused by unusual storms; as the city would not be liable, even if such drains were not in proper repair, if the fall and unobstructed capacity thereof would not be sufficient to prevent overflow at such times. *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

But a city is not relieved from liability for an injury to property caused by its failure to remove an obstruction in a sewer, by the fact that it occurred during the progress of a severe, but not extraordinary, storm. *Judd v. Hartford*, 72 Conn. 350, 44 Atl. 510.

A city is liable for the destruction of crops by the discharge of surface water and sewage upon the plaintiff's land by means of a large sewer constituting the common outlet of a district, although at the time there was a heavy fall of rain, where the sewer commenced to discharge its contents on the land before the fall of rain had become exceptional. *Magee v. Brooklyn*, 18 App. Div. 22, 45 N. Y. Supp. 473.

A municipal corporation maintaining a canal for drainage purposes, constructed under an act requiring any private canal taken as part of the drainage system to be kept open and in such order as to protect the proprietors of adjacent lands, is liable for damages resulting to adjacent lands from the overflowing of the canal because of the insufficiency thereof to retain the high waters occasioned by heavy rains or freshets at a season of the year when they ordinarily occurred. *Savannah v. Spears*, 66 Ga. 304.

Borough improvement commissioners are liable for negligently constructing a sewer whereby, during an extraordinary flood, water backed into and flooded the plaintiff's premises. *Ruck v. Williams*, 3 Hurlst. & N. 308, 27 L. J. Exch. N. S. 357.

Where a municipality has constructed and maintained a sewer adequate for all ordinary purposes, and properly cared for the same, it is not liable for injuries caused by a storm of a severity so unusual that it would not have been anticipated in the exercise of ordinary prudence and good judgment. *Sundheimer v. New York*, 77 App. Div. 53, 79 N. Y. Supp. 278.

An extraordinary flood, against which ordinary care does not require a city to guard, is not merely an unusual flood, but one which an ordinarily prudent man, in the exercise of reasonable judgment, would not expect to occur; and it is for the jury to determine whether a flood is of that character. *Shaughnessy v. Pittsburg*, 20 Pa. Super. Ct. 609.

In the case of *Dixon v. Metropolitan Bd. of Works*, L. R. 7 Q. B. Div. 418, 50 L. J. Q. B. N. S. 772, 45 L. T. N. S. 312, 30 Week. Rep. 83,

46 J. P. 4. where it was held that, by reason of the public character of the defendant, it was not liable for the injuries inflicted by its sewage system, the court said that, had it not been for such exemption from liability, the principle of *Fletcher v. Rylands*, L. R. 1 Exch. 265, 35 L. J. Exch. N. S. 134, 12 Jur. N. S. 603, 14 L. T. N. S. 523, 14 Week. Rep. 199, 4 Hurlst. & C. 263, would have controlled, and the defendant would have been liable for injuries to a wharf and barge moored thereto, caused by the defendant opening the gates of the sewer during an unusual but not unprecedented storm at a point where the sewer emptied into the water course on which the wharf was located.

3. Municipality not responsible.

In accordance with a doctrine which prevails in the New England states, the limits of which are not very clearly defined, it has been held that, where general laws place the duty of constructing drains and sewers on municipal officers, such officers, in the performance of such duty, act as public officers, and not as agents of the municipality; and the municipality cannot be held liable for injuries resulting from their negligence. *Bulger v. Eden*, 82 Me. 352, 9 L. R. A. 205, 19 Atl. 829.

The construction of sewers is not within the scope of the corporate authority of a town. The municipal officers are the only tribunal authorized to construct sewers, and for the torts of this tribunal the town is not responsible. *Brunswick Gaslight Co. v. Brunswick*, 92 Me. 493, 43 Atl. 104.

A municipal corporation is not liable for an injury or inconvenience occasioned to private property by the location or construction of sewers according to the orders of the board of aldermen, which has exclusive control of the subject, and which acts as an independent board of public officers appointed by law to exercise absolute and exclusive control. The court said the board of aldermen is required to act, not as the agent of the city, or in any manner under the direction of the city, but as public officers. If, in the exercise of its judgment, it appears to it best that a sewer shall be built wholly above the level of tide water, the private drains which are required to enter it must, of course, be placed at a corresponding elevation, and it would follow, as a necessary consequence, that the cellars and yards adjacent must be raised to the like extent, or that drainage can only be allowed from the upper part of houses. *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680.

Where the selectmen of a town act with due care in deepening and straightening the channel of a stream for the purpose of preventing its flooding low lands to the injury of public health, the town is not liable for an injury to property caused by the insufficiency of the new channel to carry off the water during an unusual, though not unprecedented, flood. *Diamond Match Co. v. New Haven*, 55 Conn. 510, 13 Atl. 409.

But it is held elsewhere that a ditch is authorized to be constructed by a city, and the city is liable for the damages resulting to an owner of land over which it passes, where it is actually constructed by the servants of the city under the instructions of the city engineer, although a resolution passed by the common council authorized an appropriation for the construction of the ditch providing the adjacent landowners would raise an additional sum of money, the amount appropriated not to be paid until such adjacent owners had raised the required amount, and although the ditch is constructed before the city authorities have collected all

the moneys raised by the adjacent landowners. *Dallas v. Beeman*, 23 Tex. Civ. App. 315, 55 S. W. 762.

So, a municipal corporation is liable for the maintenance of a sewer in such a manner as to constitute a nuisance, although the entire charge and control of the sewers is vested in commissioners, where they are not independent officers acting for themselves, but constitute one of the instruments of the municipality and government. *Boiton v. New Rochelle*, 84 Hun. 281, 32 N. Y. Supp. 442.

Where an act incorporating a town provides that, where a landowner desires to connect his private drain with the main of the municipality, he may do so at his own cost under the surveillance of an officer appointed by a corporation, the private owner by complying with such privilege is not constituted an employee of the municipality or under its control, so as to render the latter liable for damages caused by his acts. *Dallas v. St. Louis*, 32 Can. S. C. 120.

4. Notice.

A municipal corporation is not liable for failure to remove an obstruction of which it has no notice, in the absence of negligence on its part in making proper inspection. *Parker v. Laredo*, 9 Tex. Civ. App. 224, 28 S. W. 1048; *McCarthy v. Syracuse*, 46 N. Y. 194.

But the city may be chargeable with notice in case the defect is permitted to exist a sufficient length of time. *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743.

The law will charge a municipal corporation with notice of want of repair of a sewer, so as to render it liable for injuries to land caused thereby, where it allowed it so to remain out of repair for two years prior to the date of the injury. *Ibid.*

And want of notice does not relieve it from responsibility for injuries resulting from failure to construct sewers with ordinary care and skill. *Ibid.*

A city is not liable for damages sustained by a property owner whose premises are flooded because of an obstruction in the public sewer, unless it has actual notice of the defect, or unless it has continued for a sufficient time to raise a presumption of actual notice. *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464.

A municipal corporation is liable if the alleged defect in a sewer where the break causing damage occurs, was patent for so long a time prior to the injury that it ought to have been discovered and repaired, although the plaintiff does not show actual notice. *Vanderslice v. Philadelphia*, 103 Pa. 102.

A municipal corporation is not liable for damages from a defective sewer where the defect is remedied when found to be the cause of the injury, and the injury was, at least in part, occasioned by the improper construction of plaintiff's vault. *Gabrylewitz v. Philadelphia*, 9 Phila. 271.

The provision of a city charter that no action shall be sustained in any case in which it might be liable for damages caused from streets, culverts, or sewers being out of repair, from gross negligence of the city, unless the same have remained so for ten days after special notice given to the mayor or city engineer, does not apply to a case where the damage resulted from causing water to flood the property of the plaintiff by reason of the erection of embankments by the city, raising the grade of the street without providing sufficient water ways and by causing the flow from a sewer to be forced upon the land by the flood. *Dallas v. Young* (Tex. Civ. App.) 28 S. W. 1036.

In an action against a city for negligently closing up the manhole of a sewer so as to allow surface water to overflow upon the property of the plaintiff to his damage, the city is not in a condition to invoke the right of notice of the condition of the sewer and the injury, where it appears that the manhole was stopped up by the servants of the city, whose attention was called to it. *Dallas v. Cooper* (Tex. Civ. App.) 34 S. W. 321.

Whether the city would be charged with constructive notice of the defect in a drain pipe by reason of the length of time it may have existed, is a question of fact for the jury, dependent on the circumstances of the case, such as the remote or exposed locality of the defect, and the like. *Parker v. Laredo*, 9 Tex. Civ. App. 221, 28 S. W. 1048.

VII. Parties.

a. Who may sue.

A citizen who suffers special injury from the discharge of sewage upon his premises by a city may maintain a suit in equity to abate the nuisance, and can recover such damages as it is shown he has sustained up to the time the decree is rendered. *Carmichael v. Texarkana*, 94 Fed. 561.

One on whose land large quantities of noxious matter are deposited from a sewer emptying into a creek, in addition to a stench affecting the community in general, arising from the use of the creek for sewer purposes, is specially injured thereby, so as to be entitled to maintain an action for the abatement of the nuisance. *Lind v. San Luis Obispo*, 109 Cal. 340, 42 Pac. 437.

A corporation having the exclusive possession, care, and charge of a raceway leading from a dam to the mills of its stockholders and others, and whose duty it is to keep the same in repair at the expense of the corporation, although it does not own the same, can maintain an action against the city to recover the expense of removing dirt, gravel, and refuse therefrom, deposited therein from a sewer which was constructed by such city as to make the raceway its outlet. *Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433.

Damages for the depreciation in value of land caused by the wrongful and negligent construction by a municipal corporation of a ditch accrue to the owner at the time of the injury; and his right to recover is not affected by a sale of the premises after the commencement of the action under a mortgage foreclosure. *Seymour v. Cummins*, 119 Ind. 148, 5 L. R. A. 126, 21 N. E. 549.

A sale and conveyance of real estate do not carry with them the right of action for a prior injury thereto from back water caused by the construction, by a municipal corporation, of an insufficient sewer. *Logansport v. Wright*, 25 Ind. 512.

An alienee of property damaged by the overflowing thereof by water from sewers or ditches constructed by a municipal corporation in such a manner as would naturally turn thereon a large portion of the water diverted from the street cannot recover therefor if the former owner of the premises authorized its construction. *Troy v. Coleman*, 58 Ala. 570; *Union Springs v. Jones*, 58 Ala. 654.

In an action against a municipal corporation for injuries to an owner's land from flooding occasioned by the negligent and improper manner in which a sewer was constructed, such owner does not need to show an actual paper title in himself in order to entitle him to a recovery, where he was in the actual possession of 61 L. R. A.

the lot at the time of the injury complained of, and had been for many years prior thereto. *Peoria v. Crawl*, 28 Ill. App. 154.

A cause of action accruing to a person in his lifetime, against a municipal corporation, for damages to his property from the construction of a ditch, survives, and is properly continued in the name of his administrator. *Seymour v. Cummins*, 119 Ind. 148, 5 L. R. A. 126, 21 N. E. 549.

Several owners of land abutting on a street may sue jointly for an injunction against a municipal corporation for wrongfully constructing a drain in the street from which they will all suffer injury by overflow, although in different degree. *Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300.

If damages arise from municipal neglect to repair, after notice of the defect, a broken sewer, which impairs, or destroys the security of a mortgagee of the injured premises, he may have his action. *Jersey City v. Kiernan*, 50 N. J. L. 246, 13 Atl. 170.

The mortgagee of the property of a street railway is entitled to maintain an action to enjoin the construction of a sewer by a city in such manner as unnecessarily to damage the railway and obstruct its operation. *Clapp v. Spokane*, 53 Fed. 515.

b. Defendants.

The mayor and common council of a city are properly joined as defendants in a suit to enjoin the maintenance of a condition of the sewers which amounts to a nuisance where it is their duty to abate nuisances, though they were not responsible for the construction of the sewer system. *Waycross v. Houk*, 113 Ga. 963, 39 S. E. 577.

While injury to land from the overflow thereof by reason of the neglect of a city to repair broken sewers and the negligence of its officers in repairing them results from one cause, yet the two acts producing the cause are not joint so as to make the city and its officers joint tortfeasors, liable to be jointly sued. *Butler v. Ashworth*, 110 Cal. 614, 43 Pac. 4, 386.

Owners of real property, who petition the city, as directed by statute, for the construction of a sewer, and agree to use it, are not liable jointly with the city for damages to third parties, when the city constructs and operates the sewer so unskillfully and negligently that its contents are poured into a brook of pure water, which afterwards flows by the premises of other parties, to their damage. *Carmichael v. Texarkana*, 116 Fed. 845, affirming 94 Fed. 561.

VIII. Limitation.

The statute of limitations does not begin to run in favor of a municipal corporation which permits a sewer to become stopped up until injury is done to a person complaining of the resulting nuisance. *Louisville v. O'Malley*, 21 Ky. L. Rep. 873, 53 S. W. 287.

The right of action against a city for injury to property from overflow of an improperly planned sewer accrues at the time of overflow, and limitation runs only from that date. *Louisville v. Norris*, 23 Ky. L. Rep. 1195, 64 S. W. 958.

Not until water is backed through sewers and precipitated upon his property does a right of action accrue in favor of the owner against the city for the damage, and the running of the statute does not, therefore, start until that time. *Kansas City v. King* (Kan.) 68 Pac. 1093.

A cause of action for injuries sustained from

a public nuisance created by the filling up of a stream or harbor basin with sewage and sand, preventing the free access of vessels to a private dock, and emitting a noxious odor, caused by the construction by a municipal corporation of a system of sewers having an outlet into such stream and basin near the dock, accrues from the date when actual damage results, and not when the sewers were built. *Peck v. Michigan City*, 149 Ind. 670, 49 N. E. 800.

The statute providing that actions to recover for injuries sustained by the failure of a municipal corporation to keep in repair public roads, streets, bridges, and highways must be brought within three months after the damages have been sustained, does not apply to an action against the town for negligence in the construction and maintenance of drains whereby they were choked causing sewage matter to overflow plaintiff's premises. *Sullivan v. Barrie*, 45 U. C. Q. B. 12.

Whether conditions which caused the overflow of property were produced by a city within fifteen years next before the institution of an action for damages is immaterial; it is only material to find whether such conditions were produced by the city, and whether they existed at the time of, and were the cause of, the overflow, and whether the overflow occurred within the five years next before the bringing of the action. *Finley v. Williamsburgh*, 24 Ky. L. Rep. 1336, 71 S. W. 502.

The keeping up of a sewer so constructed as to gather surface water from adjoining lands, charged with the filth of sinks, and throwing it upon the lands of plaintiff, producing noxious scents, sickness, hurt, and inconvenience, renders it a continuing nuisance, for which the city remains liable until it is abated. *Smith v. Atlanta*, 75 Ga. 110.

The continuance of a nuisance, caused by the negligent making of changes in a sewer maintained by a city so as to overflow plaintiff's lot, by the keeping up of the sewer in such a manner as to flow, after every rain, sewage on the lot near a house, making the same disagreeable for residents, hurtful to inmates, and unhealthful, is a renewal of the wrong, and is actionable until abated. *Reid v. Atlanta*, 73 Ga. 523.

But a right of action for damages, both present and future, caused by the grading of streets and the construction of sewers by a city so as to discharge a large body of water upon adjacent lands, is barred by the expiration of the time limited for the bringing thereof, from the completion of the work, in the absence of anything showing that a nuisance was created thereby, for the continuance of which the city would remain liable until abated. *Atkinson v. Atlanta*, 81 Ga. 625, 7 S. E. 692.

IX. Damages.

The measure of damages for injuries to land by the discharge of sewage thereon from the terminal of a sewer, where it does not appear that the owner and his family have suffered any considerable annoyance, and the work at the time of the trial had been so changed that it was no longer a nuisance, is the damages actually sustained during its continuance, the amount of which should be proved with reasonable certainty, and should not include any punitive damages, where the sewer was constructed in good faith, of good material, and in a skillful manner; and should not be based upon the loss of profits that might have been realized on sales of land that might otherwise have been made. *Jacksonville v. Lambert*, 62 Ill. 319.

In an action against a municipal corporation 61 L. R. A.

to recover damages to an owner's dwelling house and premises from the overflow of water thereon caused by an insufficient and carelessly constructed sewer, the assessment of damages is excessive where the same were made up from the loss sustained by injury to his realty, garden crops and personal property, such as household goods, etc., and, in addition thereto, the decrease in the rental value of the premises during the period caused by the flooding. *Indianapolis v. Huffer*, 30 Ind. 235.

If a city, upon constructing a new sewer, walls up an old one which had been in use so that water and sewage are set back upon premises connected with it, the owner is entitled to recover for the injury to his estate, including loss of rents and reasonable compensation for his trouble and expense in respect to his property; but no recovery can be had for the expense of connecting the premises with the new sewer. *O'Brien v. Worcester*, 172 Mass. 348, 52 N. E. 385.

Permitting a public city sewer to be or remain in such a defective condition as to become a nuisance, with resulting injury to realty, entitles the owner of such realty to damages for all such injuries which have occurred within four years before the action. *Massengale v. Atlanta*, 113 Ga. 906, 39 S. E. 578.

The measure of damages for an injury to a lot caused by the overflow of sewage thereon on account of the neglect of the municipal authorities to provide a proper escape therefor is the diminution in the rental value of the premises by reason thereof. *Louisville v. O'Malley*, 21 Ky. L. Rep. 873, 53 S. W. 287.

The measure of damages the owner of a lot is entitled to recover from a municipal corporation by reason of the negligent construction of a drain, causing portions of such lot to fall in and be washed away, is the diminished value of the lot caused thereby; in estimating which the jury may take into consideration the expense reasonably incurred in the protection of the property, but not so as to charge the city with that which would restore the property to its former condition in addition to the diminished value caused by the original wrong. The annoyance and trouble caused the owner in reference to the wrong are not an element of damage in such a case. *Maysville v. Stanton*, 12 Ky. L. Rep. 586, 14 S. W. 675.

The measure of damages to property from the overflow thereof by the construction of sewers and ditches is the diminished rental value of the premises for the year during which the nuisance was continued, where the plaintiff elects to claim for that period, waiving the question of permanent injury. *Eufaula v. Simmons*, 80 Ala. 515, 6 So. 47.

The measure of damages for injuries to lands caused by reason of the defective and unskillful construction of a sewer, so that in times of unusual freshet, storm and sewage water are discharged through the owner's private tributary sewer upon his lands, is the actual damages sustained at the time of the commencement of the action, and for continued or recurrent injury from the same cause he must seek relief by successive action. *Nashville v. Comar*, 88 Tenn. 415, 7 L. R. A. 465, 12 S. W. 1027.

One whose property has been flooded and injured by reason of a defective sewer may show the decrease in value of the property owing to the impaired condition. *Daggett v. Cohoes*, 27 N. Y. S. R. 630, 7 N. Y. Supp. 882.

The measure of damages for injury to property by the backing up and flowing in of water thereon in consequence of the construction of a sewer in the street is the difference in the value of such property before and after the injury. *Cummings v. Toledo*, 12 Ohio C. C. 650.

The measure of damages to adjoining property for the pollution of a stream by discharging sewage into it is not the difference in the value of the land before the pollution and during its continuance, where the nuisance, being temporary, is liable to be abated. *Foncannon v. Kirksville*, 88 Mo. App. 279.

Where it appears that the lands of a riparian owner have been rendered barren and unfit for human habitation on account of the discharge of the sewer outlet of a city into the stream, evidence of the annual value and net income of the lands before the discharge of sewage into the stream is admissible as a basis for arriving at the rental value (the property never having been rented), in computing temporary damages. *Umscheid v. San Antonio* (Tex. Civ. App.) 69 S. W. 496.

Where damages are recoverable for a permanent injury to land by the deposit of sewage in a stream flowing through it, special damages for loss of grass, loss of water, the expense of digging a pool, and the building of fences are not recoverable, as they do not come within the measure of damages where the nuisance is permanent. *Paris v. Allred*, 17 Tex. Civ. App. 125, 43 S. W. 62.

Damages to land are properly allowed on the theory that they are permanent, where a city sewer is constructed so as to empty into a stream of water flowing through the land, rendering it unwholesome, and the sewer was constructed with the intention that it should be permanent, and has been so treated ever since its construction. *Ibid*.

A property owner, injured by the negligence of a municipal corporation in constructing or maintaining a sewer, may recover for all damages directly caused thereby; so that the corporation is liable for rents lost during the reasonable time occupied by the contractor in pumping out the water and filling the pit with earth after such a sewer has broken. *Vander-slice v. Philadelphia*, 103 Pa. 102.

A city which maintains a sewer which is inadequate to carry off the surface water in heavy rain storms is liable where neighboring property is thereby flooded so that the water enters the cellar and slacks a quantity of lime, which set fire to the building. *Martin v. Brooklyn*, 32 App. Div. 411, 52 N. Y. Supp. 1086.

An allottee of property damaged by the overflowing thereof by water from sewers and ditches constructed prior to its purchase can recover only for the injury to the property after he became the owner. *Union Springs v. Jones*, 58 Ala. 654.

Plaintiff in a suit to recover for a nuisance caused by the defendant constructing and maintaining a sewer which empties into a street near plaintiff's dwelling house is not limited to the damage sustained by reason of depreciation in the rental value of the property, but is entitled to recovery for the inconvenience and discomfort suffered, and the deprivation of the comfortable enjoyment of the property by himself and family. *Randolf v. Bloomfield*, 77 Iowa, 50, 41 N. W. 562.

The measure of damages for injury to a lot owner by the settling of the lot and the cracking and breaking of the walls of his building in consequence thereof, necessitating their rebuilding, resulting from the bad condition or want of repair of a sewer, either by reason of negligent construction or failure to examine and inspect it, is the difference between the value of the building in the condition in which it was before it was so injured and its value immediately after the injury happened, and not the cost of repairs. *Toledo v. Grasser*, 12 Ohio C. C. 520.

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Damages recovered for injuries caused to a house by the defective construction of a street drain, causing water to be diverted into the cellar, being an injury to the freehold, must be treated by an executor as principal, and not income. *Witzel's Estate*, 26 Pa. Co. Ct. 58.

Injury to health.

Damages for injury to health and business caused by the leaking of sewage into a cellar because of the defective construction of a sewer may be recovered. *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519.

Loss of time from sickness caused by the wrongful emptying of a sewer near a private residence may be considered in estimating the damages to be awarded for the injury. *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172.

The liability of a municipality to damages for permitting a drainage ditch to become obstructed and filled with filth and offal so that the water flows onto adjoining land and causes sickness in the family of its owner is limited to the injury to the property, and does not include the injury by sickness or death, nor by loss of time, increase of family expenses, nor by doctor's bills and medicines resulting from the sickness. *Williams v. Greenville*, 130 N. C. 93, 57 L. R. A. 207, 40 S. E. 977.

In an action by an individual against a municipal corporation for injuries sustained by being deprived of the comfortable use and enjoyment of his home by the noxious odors arising from a sewer, where the same is discharged into an open ravine near his premises and allowed to stand in pools, there is no legally established rule as to the quantity of damages to be awarded, but it is the peculiar province of the jury, under appropriate instructions, to decide such cases; and the law does not recognize in the court the power to substitute its own judgment for that of the jury. *Litchfield v. White-nack*, 78 Ill. App. 364.

One who is damaged by the negligent construction of a sewer so that it discharges upon his property is entitled to recover the difference between the rental value of the property prior to and after the construction of the sewer; and if, by reason of its construction, sickness is caused in the family, and expense is incurred, this shall be taken into account in estimating the damages. *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172.

In an action against a city for wrongfully depositing sewage in a stream flowing through the lands of the plaintiff, where the plaintiff is held entitled to recover as for a permanent injury to his land, he may also recover expenses paid by him for medicine, physician's bills, and he may recover for loss of his time from sickness caused by the wrongful deposit of the sewage. *Paris v. Allred*, 17 Tex. Civ. App. 125, 43 S. W. 62.

A city which drains sewage into a sewer not intended or suitable for such purpose, whereby it is discharged into the cellar of a property owner, is liable for the sickness and death of a child caused thereby; and an action may be maintained therefor under a statute, authorizing the administrator of a decedent to maintain an action to recover damages for the decedent's death caused by the wrongful act, neglect, or default of a natural person or corporation which would have been liable to an action in favor of the decedent if death had not ensued. *Hughes v. Auburn*, 21 App. Div. 311, 47 N. Y. Supp. 235.

Injury to business.

The damages for interruption of a business by

flood water from a sewer cannot be limited to the mere rental value of the property during the time the business is idle. *Terre Haute v. Hudson*, 112 Ind. 542, 13 N. E. 686.

Where, previous to the construction by the city of a sewer, plaintiff's premises, used for a lumber yard, were safe from overflow, and, by the terms of its contract with the plaintiff, the city agreed so to construct such sewer as to prevent all overflows to plaintiff's lands caused by such sewer, the damage to the lumber caused by an overflow, and the expense of labor and machinery in pumping out water, thereby diminishing the damage to the lumber, are proper elements of damage. *Nashville v. Sutherland*, 94 Tenn. 356, 29 S. W. 228.

The measure of damages in an action against a municipal corporation for goods injured or destroyed by the backing of water in a drain is the diminution of the market value of the goods injured, and the market value of goods destroyed at the time of their destruction. *Macon v. Small*, 108 Ga. 309, 34 S. E. 152.

One whose cellar is flooded with water in consequence of the negligence of the city may recover such damages as he has sustained which are the natural and probable consequences of the flooding, including the injury to goods and loss of the use of the cellar; but no damages can be recovered for injury to goods afterwards, which could have been avoided by taking proper measures or precautions. *Anderson v. Wilmington*, 8 Houst. (Del.) 516, 19 Atl. 509.

The measure of damages for injury to the house and furniture of an owner from back water from a sewer is the actual damages the movable goods suffered from the water, and such a sum of money in addition as shall equal the aggregate diminution of the rental value of the house to the date of bringing the action, less taxes, repairs, insurance, and rebate of interest. *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779.

The owner of goods damaged by the backing of water in a drain due to the negligent repair thereof by municipal authorities who had cut the drain may recover, in addition to the damage to the goods, any expense incurred in the preservation of the property from further injury by the water. *Macon v. Small*, 108 Ga. 309, 34 S. E. 152. H. P. F.

Ann T. DRURY, Admr., etc., of Charles Newman Drury, Appt.,
v.

NEW YORK LIFE INSURANCE COMPANY.

(.....Ky.....)

Surrender of the right to extended insurance for the term earned by the premiums paid is not effected by the execution of, and failure to pay, a premium note, a clause in which provides that such failure shall work a forfeiture of the policy, "except as to the right to a surrender value or paid-up policy, which may be provided in the policy," where the policy provides, under

NOTE.—As to right to paid-up policy of insurance generally, see *Northwestern Mut. L. Ins. Co. v. Barbour* (Ky.) 15 L. R. A. 449, and note; *Mutual L. Ins. Co. v. Jarboe* (Ky.) 39 L. R. A. 504; *Union Cent. L. Ins. Co. v. Buxer* (Ohio) 49 L. R. A. 737; *Cravens v. New York L. Ins. Co.* (Mo.) 53 L. R. A. 305; and *Manhattan L. Ins. Co. v. Patterson* (Ky.) 53 L. R. A. 378.
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the head of surrender values, for either a paid-up policy or extended insurance, and states that, in case of a failure to demand a paid-up policy within six months after default, the policy will be extended without request or demand for the time specified in the schedule annexed.

(May 28, 1903.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Union County in plaintiff's favor for a less amount than demanded in an action brought to recover the amount alleged to be due on a life insurance policy. *Reversed*.

The facts are stated in the opinion.

Messrs. Drury & Drury and H. X. Morton, for appellant:

The policy expressly provides that after it has been in force three whole years it cannot be forfeited. So, according to the provisions of the policy itself, nothing the insured could do thereafter would forfeit his policy.

The policy provides that in case of default it will be extended without request or demand therefor, during the term provided in the table, and, by reference to this table, we find that at the end of the third year he would have been entitled to four years and ten months extended insurance. There was, then, no indebtedness by the insured, nothing for him to pay; and, as he died before the end of the extended term, his administratrix is entitled to the entire \$1,000.

The provisions of the premium note for a forfeiture cannot be enforced.

Manhattan L. Ins. Co. v. Myers, 109 Ky. 372, 59 S. W. 30; *Montgomery v. Phoenix Mut. L. Ins. Co.* 14 Bush, 51; *Northwestern Mut. L. Ins. Co. v. Fort*, 82 Ky. 274; *Cravens v. New York L. Ins. Co.* 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519.

Messrs. Humphrey, Burnett, & Humphrey, for appellee:

The rights of the insured under this policy at the end of three years embraced two options on his part; that is, he had the right to demand paid-up insurance, payable at his death. This option, however, he did not avail himself of. It is expressly provided in the policy that, if the insured had paid the interest and the principal of the premium note, he was clearly entitled to the extended insurance.

The contract embraced in the premium note reads: "2. That unless said interest and premiums are duly paid, said policy and its accumulations shall immediately become forfeited and void, except as to the right to a surrender value or paid-up policy, which may be provided in said policy or by statute."

By the terms of the contract insured has waived or abandoned the right to extended insurance by his failure to pay the interest and the face of the note at maturity or within a reasonable time thereafter.

Union Cent. L. Ins. Co. v. Buxer, 62 Ohio St. 385, 49 L. R. A. 737, 57 N. E. 66; *Rife v. Union Cent. L. Ins. Co.* 129 Cal. 455, 62

Pac. 48: *Omaha Nat. Bank v. Mutual Ben. L. Ins. Co.* 81 Fed. 935.

Burnam, Ch. J., delivered the opinion of the court:

On the 7th day of July, 1897, the New York Life Insurance Company issued and delivered to Charles N. Drury a policy for \$1,000 upon the twenty-years payment life plan, payable to his executors, administrators, or assigns, or such other beneficiary as might be designated by the insured, in consideration of \$29.70 paid in advance, and the payment of a like sum on the 7th day of July in every year during the continuance of the policy until twenty full years' premiums should have been paid. As an inducement to take the policy, the company offered certain special advantages in the way of loans and surrender values, which were set out in a table on the second page of the policy, and which were made a part of the contract of insurance, and which are as follows:

Table of Loans and Surrender Values in Paid-up Insurance or Extended Insurance, Under the Conditions Specified on the Next Page.

At the End of	Loans.	Surrender Values.	
		Paid-up Ins.	Extended Ins. for \$1,000 for the Term of
3d Year ..	\$40 00	\$150 00	4 yrs. 10 mon.
4th Year ..	55 00	200 00	8 yrs. 1 mon.
5th Year ..	72 00	250 00	11 yrs. 4 mon.
6th Year ..	88 00	300 00	14 yrs. 3 mon.

On the third page of the policy, under the head of "Benefits and Provisions," the policy contained these stipulations:

"This policy cannot be forfeited after it shall have been in force three full years as hereinafter provided:

"First. If any subsequent premium is not duly paid, this policy will be indorsed for the amount of paid-up insurance payable at the death of the insured, specified in the table on the preceding page, less the value of any indebtedness on this policy, provided demand is made therefor with the surrender of this policy within six months after such nonpayment, or,

"Second. If any subsequent premium is not duly paid, and if this policy is not surrendered as provided in the preceding clause, the insurance under this policy will, after the repayment of any indebtedness, be extended without request or demand therefor, for the amount of \$1,000, during the term provided in the table on the preceding page, payable only if the insured dies within said term. At the end of said term, if the insured is then living, this policy shall cease and determine."

The annual premium of \$29.70 was paid when the policy was issued, and on the 7th day of July, 1898, and 1899. On the 7th day of July, 1900, the insured, Drury, failed to pay in cash the premium of \$29.70 in ad-

vance, and by agreement with the company executed the following note:

Premium Lien Note.

\$29.70 July 7, 1900.

Twelve months after date I promise to pay to the order of the New York Life Insurance Co., at the office of said company in the city of New York, the sum of \$29.70, with interest in advance at the rate of five per cent per annum (for value received) being for premium due July 7th on policy No. 801,525, issued by said company on the life of Charles N. Drury.

It is understood and agreed:

First. That this note may be renewed if interest thereon and subsequent premiums on said policy are duly paid.

Second. That unless said interest and premiums are duly paid, said policy and its accumulations shall immediately be forfeited, except as to the right to a surrender value or paid up policy, which may be provided in said policy or by statute.

Third. That in the settlement of any claim or any benefit under said policy before this obligation shall have been fully paid, the amount thereon shall be deducted from the amount otherwise payable by said company.

[Signed]

Charles N. Drury.

Drury failed to pay either the principal or interest on this note at maturity, and he also failed to pay any part of the premium of \$29.70 for the ensuing twelve months, which fell due on the 7th day of July, 1901, and departed this life, intestate, on the 16th day of August, 1901. And the appellant, Ann T. Drury, shortly thereafter qualified as his administratrix, and forwarded to the company proofs of the death of the insured, and demanded the payment to her under the terms of the policy of \$1,000, with interest from October 4, 1901, and, payment being refused by the company, instituted this suit against appellee on the 11th day of October thereafter.

The company, in its answer, admitted the issuance of the policy and the payment of the premiums for the years 1897, 1898, and 1899; that no application was made by the insured for paid-up insurance; but denies that it was indebted to the appellant in any amount exceeding \$84, and the second paragraph of the answer reads as follows: "Defendant says that by the terms of the contract above quoted the assured waived and surrendered his right to extended insurance by refusing or failing to pay the interest on his premium note above set out, and by refusing or failing to pay the premium due July 7, 1901. Defendant says that by the terms of the premium lien note quoted *supra* it was expressly agreed, in addition to the contract set out in the policy, and in conformity therewith, 'that, unless said interest and premiums are duly paid, said policy and accumulations shall immediately become forfeited and void, except as to the right to a surrender value or paid-up policy;' that the assured, by the terms of the

policy above set out, and by the terms of the premium note aforesaid, is entitled to a paid-up policy only as specified in the policy, less the amount of his indebtedness at the time to the company, leaving a net amount, as of date July 7, 1901, of \$84, for which amount this defendant hereby offers to confess judgment in full of plaintiff's recovery."

A general demurrer was filed by plaintiff to the defendant's answer, and it was overruled, and, plaintiff declining to plead further, it was adjudged by the trial court that the plaintiff recover judgment for \$84, with interest from the 16th of August, 1901, until paid, and so much of her petition as sought to recover more than this sum was dismissed, and plaintiff has appealed.

It is admitted that the conditions of the policy had all been complied with by the assured up to the time he executed the note of July 7, 1900, for the premium then due, carrying the policy up to July 7, 1901; and that by the express terms of the policy, he was on that date entitled to a loan of \$40, or to a paid-up policy of \$150, or to extended insurance for \$1,000 for four years and ten months. It is also admitted that, if the appellant had not executed the premium note relied on, or paid any of the subsequent premiums in accordance with the terms of his contract, and had died at any time within four years and ten months from the 7th of July, 1900, that his administratrix would have been entitled to recover the full amount of the policy. But the defendant insists that the note given on the 7th of July, 1900, contained a new contract between the company and the assured, by which it was agreed that, unless the principal and interest of the premium note was paid at maturity, the policy and its accumulations were immediately forfeited, except as to the right of the assured to a paid-up policy for \$150, less the indebtedness of the assured to the company growing out of the execution of the note. It does not seem to us that this is a fair construction of the second condition attached to the premium note of July, 1900. While it recites that, unless the interest and premiums are duly paid, the policy and its accumulations shall be forfeited, it expressly stipulates that the right to a surrender value or paid-up policy provided in the policy shall remain intact. Under the head of "Surrender Values," in the table of loans and surrender values set out on the second page of the policy, we find paid-up insurance and extended insurance both under the head of "Surrender Values;" and under the head of "Nonforfeiture Provisions," on the third page of the policy, we find it provided that, if any subsequent premium is not duly paid, this policy shall be indorsed for the amount of paid-up insurance, payable at the death of the insured, specified in the table on the preceding page, less the amount of indebtedness on this policy; provided demand is made therefor with surrender of this policy within six months

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after such payment. There is no pretense that the insured ever complied, or attempted to comply, with this provision of the policy. It therefore follows that his right to a policy for paid-up insurance was abandoned. In the second condition under this head it is provided that if any subsequent premium is not duly paid, and if the policy is not surrendered as in the preceding clause, the insurance under this policy will, after the repayment of any indebtedness, be extended without request or demand therefor for the amount of \$1,000 during the term provided in the table on the preceding page, payable only if the insured dies within said term. At the end of said term, if the insured is then living, the policy shall cease and determine. It will be observed that extended insurance for the full amount of the policy is one of the surrender values expressly provided for, and the only one which, under all conditions, is not forfeitable. Paid-up insurance is also a surrender value, but, to enable the insured to take advantage of this provision, the policy requires that the insured should, within six months after failure to pay a premium, surrender his policy and demand paid-up insurance. If the contention of the company is a sound one, the effect of the failure of the insured to pay the interest and premium note at maturity is to exactly reverse these conditions of the policy. In other words, it forfeits automatically the provision for extended insurance, and revives the provision for a paid-up policy, which had been forfeited by the assured's failure to make demand therefor and surrender his policy within six months. The law does not favor forfeitures, and will not assume that the assured intended by the execution of the note of July, 1900, to forfeit the right to extended insurance, which he had already acquired by the payment of three annual premiums on the policy. The only reasonable construction which can be put upon the language of the policy and note is that on the forfeiture of the policy by the nonpayment of interest assured forfeited all right to further participate in accumulations, to receive dividends, to be reinstated after the lapse of the policy, etc.; but did not surrender his right to extended insurance for the term earned by the premiums paid. Nor can we doubt that, if the insured had made a demand for paid-up insurance at the time of his default in the payment of the premium note and interest, the company would have been prompt to claim that he was not entitled to a paid-up policy, as he had failed at the proper time to make demand therefor, but only to such extended insurance as his interest in the policy would purchase after the payment of his indebtedness to the company.

It therefore follows that the judgment must be reversed, and cause remanded, with instructions to sustain plaintiff's demurrer to the defendant's answer, and for other proceedings consistent with this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

James S. PHELPS *et al.*, *Appts.*,
v.
MUTUAL RESERVE FUND LIFE ASSO-
CIATION.

(50 C. C. A. 339, 112 Fed. 453.)

1. A defendant appearing specially to contest the jurisdiction of the court over him for insufficient service of process is bound by a judgment sustaining it until it is reversed by a court of appellate jurisdiction, and he cannot attack it in a collateral proceeding in another court by seeking to enjoin execution of the judgment finally rendered against him.
2. The rendition of a money judgment and award of execution does not exhaust the court's jurisdiction, but, in case the execution is returned unsatisfied, it may entertain an application for a receiver to impound the debtor's assets as a proceeding auxiliary to the primary suit.
3. A decision by a court which, after having acquired jurisdiction of defendant, rendered a money judgment, and awarded execution, that, either under its general jurisdiction or by statutory authority, it may appoint a receiver in aid of the execution without further notice to defendant, is not subject to collateral attack.
4. A receiver, although illegally appointed by a state court in excess of its jurisdiction to aid the enforcement of its own judgment, cannot be enjoined from acting by a United States circuit court, being protected by U. S. Rev. Stat. § 720 (U. S. Comp. Stat. 1901, p. 581), which provides that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.
5. A proceeding for the appointment of a receiver in aid of an execution is merely ancillary to the suit in which the execution was rendered, and is not subject to removal from a state to a Federal court.

(December 3, 1901.)

APPEAL by defendants from a decree of the Circuit Court of the United States for the District of Kentucky enjoining proceedings to enforce a judgment. *Reversed.*

Statement by **Lurton**, Circuit Judge:

This is an appeal from a decree continuing an interlocutory injunction. The case is briefly this: The appellee, the Mutual Reserve Fund Life Association, is a corporation organized under the laws of the state of New York. For many years it solicited

insurance in the state of Kentucky, having complied with the law of that state in respect of the conditions upon which foreign insurance companies are permitted to do business in the state. As preliminary to being licensed, its board of directors passed a resolution consenting that service of process in suits brought against it in Kentucky might be made upon the insurance commissioner of the state, and that such service should be a valid service upon the association. October 10, 1899, the Kentucky insurance commissioner revoked all authority theretofore granted by his department, and all licenses granted to its agents to do business within the state. In this situation of things, suit was brought against the association, in the Jefferson circuit court, one of the courts of the state of Kentucky having both common-law and equity jurisdiction, by James S. Phelps, one of the appellants. Phelps had for many years been a member of the association, and held a policy of life insurance therein. He claimed that the company had, without his consent, violated the terms and conditions of its contract with him, and, in effect, had annulled and canceled its agreement with him, by the imposition of new and illegal arbitrary conditions. He therefore sued to recover back the dues, premiums, and assessments paid by him theretofore, aggregating \$1,994.20. Process issued against the said association, which was returned served upon the insurance commissioner of the state of Kentucky and upon one Ben Frese, who was described in the return as "the managing agent and chief officer and agent of the Mutual Reserve Fund Life Association found in this county." The association appeared specially, and solely for the purpose of challenging the sufficiency of this service of the writ of summons, and moved to quash the return. Upon this motion evidence was heard, involving the character of the agency of B. Frese, as well as the sufficiency of the service upon the state insurance commissioner after revocation of the company's license to do business within the state. Upon the evidence and exhibits, the circuit judge made a finding of fact and law which was, in substance: First, that the resolution of the board of directors of the association, consenting that service upon the Kentucky insurance commissioner of process issuing in any suit pending or which might be brought in the courts of the state should be a valid service, had never been revoked or canceled, and that the service of process in this suit upon the said commissioner was a good and valid service; second, that Ben Frese, at the time of service upon him "was the local treasurer of the defendant association in Jefferson county, and as such was an agent of the company upon whom summons might be served." The motion to quash was accordingly overruled. The defendant declined to plead further, and judgment by default was rendered for the sum

NOTE.—The above decision is an important one to the effect that the provision of U. S. Rev. Stat. § 720 (U. S. Comp. Stat. 1901, p. 581), against injunctions from a Federal court to restrain proceedings in a state court, extends even to proceedings in state courts which have no jurisdiction. For exclusiveness of jurisdiction by appointment of receiver, see *note to Re Schuyler's Steam Tow Boat Co.* (N. Y.) 20 L. R. A. 891.
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of \$1,994, with interest on the various items from date of each payment, respectively. This judgment for the principal sum and interest aggregated \$2,360. Execution issued which was returned "No property found." Thereupon the plaintiff in the said judgment by leave of court filed in the said Jefferson circuit court, and in the same case, a pleading styled an "Amended and Supplemental Petition." In this he set out the fact of his said judgment, and that execution had been duly returned "No property found," and that his said judgment was wholly unpaid. It was then, in substance, averred: That the said association, at the time its license to do business in the state had been withdrawn, had a great number of policy holders in the state, which policies were a large source of income to the association, and that it had continued to do business within the state by collecting dues, premiums, and assessments upon its said existing contracts, and that at stated times dues, premiums, and assessments became due from said Kentucky policy holders, which the company regularly demanded and received as a condition of keeping in force its said contracts. It was also averred that prior to December, 1899, such policy holders had paid all dues, premiums, and assessments to local collectors and treasurers, who were appointed at different places within the state for the purpose of receiving such dues, premiums, and assessments accruing to the association, but that since December, 1899, the authority of all such collectors and treasurers had been revoked, and the company's debtors and policy holders notified and required to forward all such dues, premiums, and assessments directly to the home office of the association, in New York. This method of doing business, the petition averred, was adopted for the purpose of evading the service of process within the state, while so still carrying on business in the state, and for the fraudulent purpose of removing its assets out of the state to evade the process of the law and the payment of local creditors, and particularly with the intent of preventing this plaintiff in the collection and realization of the amount due upon his said judgment. The prayer of the petition was in these words: "Wherefore, the plaintiff prays for a decree in aid of and in the enforcement of the judgment heretofore rendered in this court, and to this end plaintiff prays that a general attachment issue against the property of the defendant, the Mutual Reserve Fund Life Association; that the defendant and all persons now or heretofore connected with said defendant be required to appear before the commissioner of this court, and disclose any money, choses in action, equitable or legal interest, and all other property to which the defendant is entitled to or to which it has an interest; or, if it seems best to the court, the plaintiff prays that a receiver be appointed to take charge of the business, assets, and all other property of every kind and description which the defendant has in Kentucky or may hereafter obtain in this state; that all

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revenues and incomes accruing to the defendant from policy holders and other debtors be ordered paid to said receiver; and that so much as may be necessary of any money or property belonging to the defendant as may by any order or process come within the jurisdiction of this court be employed to the settlement and satisfaction of the judgment which the plaintiff holds against the defendant, as set forth and mentioned herein. Plaintiff prays for his costs in this action, and for all other relief, general, equitable, and special." The final judgment in favor of said James S. Phelps was rendered May 19, 1900. This amended or supplemental petition was filed August 4, 1900, and on the same day the said Jefferson circuit court made an order, entitled as in the original suit, directing that the petition be filed and the action transferred to the equity docket. By the same order the court appointed the appellant, the Fidelity Trust & Safety Vault Company, receiver for the Mutual Reserve Fund Life Association in Kentucky, and directed it to "collect and receive all moneys, debts, things in action, and credits now owing to or hereafter to accrue to the said Mutual Reserve Fund Life Association in Kentucky;" that the said receivers "shall take into possession all the revenue and income which has accrued or may accrue to the defendant from its business in this state and policy holders." It was further ordered that "all persons insured in said association and all other debtors of said association in Kentucky are now specifically ordered and directed to pay to the receiver herein appointed all dues, premiums, assessments, and whatever else of value may now be or hereafter become owing or due to the said defendant association." The receiver was authorized to employ counsel and to bring and defend all suits necessary to recover the assets of the association, and all persons were enjoined from interfering with him in the custody, management, and control of the assets and rights "hereby impounded and placed in the hands of said receiver," who was directed to hold the same for the satisfaction of the judgment of said petitioner, Phelps, and of the costs and expenses of the receivership. It was directed that "when such judgment shall be paid, and such costs and expenses liquidated, the receivership provided for herein shall terminate." The receiver was further directed to make report from time to time of all his acts and proceedings. The receiver qualified on the same day by giving the bond required by the court. On August 22d, following, the said Mutual Reserve Fund Life Association, appearing for the sole purpose of filing a petition for the removal of said action, did file a petition praying the removal of said proceeding, which was described "as an equitable action apparently based or sought to be maintained upon the statutory authority of § 439 of the Code of Practice in Civil Cases, based upon a return" of *nulla bona*, etc. It was averred that the amount in controversy exceeded \$2,000, being \$2,360, with interest from May

18, 1900; that the petitioner was a corporation of the state of New York; and that the plaintiff in said proceeding was a citizen and inhabitant of the state of Kentucky. Bond, conditioned as required by law, was tendered. The application to remove was denied. Thereupon the said Mutual Reserve Fund Life Association, for brevity hereafter called the "Association," filed the present bill in the circuit court below; the said James S. Phelps, plaintiff in said judgment, and the Fidelity Trust & Safety Vault Company, a corporation of the state of Kentucky, being sole defendants. The averments of this bill were substantially the facts already stated, and need not be repeated. A duly-certified transcript of all the proceedings in the Jefferson circuit court was made an exhibit to said bill. It was further averred that said receiver so appointed had caused to be issued to all of the holders of policies residing in Kentucky notice of his appointment and of the order of the court requiring all dues, premiums, and assessments to be paid to him, and warning them that payments thereafter to the association would be ineffectual in respect to dues then or thereafter accruing. The judgment in favor of Phelps was asserted as null and void, for want of due notice and service of valid process. It was further averred that no notice of any kind or character had been given of the filing of the "amended and supplemental petition," under which a receiver had been appointed. This, it was averred, was a proceeding without due process of law, and in violation of the provisions of the 14th Amendment. The object of the bill is fully shown by its prayer, which was as follows: "Your orator prays the aid of this honorable court, and that it may please your honors to grant unto your orator a writ of injunction commanding the said defendants, and each of them, and all persons claiming to act under their authority, or the authority, direction, or control of either of them, to absolutely desist and refrain from taking possession of or in any wise interfering with any of the assets or estate of your orator in the state of Kentucky, and from collecting or receiving any moneys, things in action, credits, income, or revenues now owing to or hereafter to accrue to your orator, and especially the dues, premiums, and assessments payable to your orator by its members by virtue of the terms of their certificates of membership, and from taking or instituting any action or other proceedings against said members, or any of them, to collect or realize such dues, premiums, or assessments, or to prevent them, or any of them, from paying over to your orator, according to the stipulations and provisions of their certificates of membership, all dues, premiums, and assessments payable according to the tenor thereof, until otherwise ordered by your honors, and that upon final hearing the injunction herein prayed be made perpetual." After notice and argument by counsel, the court below granted an interlocutory injunction in these words: "The defendants, James S. Phelps and the Fidelity Trust & Safety Vault Company, and all its officers and agents, are severally hereby enjoined and restrained from collecting or attempting to collect, and from reducing or attempting to reduce to possession, and from in any wise interfering with or claiming, any of the revenue or income of the complainant derived from any of the dues, assessments, mortuary calls, or premiums which have accrued or which may accrue or be made upon any of the certificates of membership or policies of life insurance issued by complainant to any person or persons whatsoever; but the defendant James S. Phelps is left at full liberty to proceed otherwise to enforce against any other property or assets of the complainant any judgment he may have against the complainant by all lawful writs or processes as he may be advised." A motion to discharge this injunction was subsequently made and overruled, and from this order continuing this injunction this appeal has been prayed.

Argued before *Lurton, Day, and Severens*, Circuit Judges.

Mcsmrs. Zack Phelps and Benjamin F. Washer, for appellants:

The mere fact that in October preceeding the date of service the insurance department of the state had revoked the association's license to longer canvass for new applications, did not cause the company to cease doing business in Kentucky.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Swann v. Mutual Reserve Fund Life Assn.* 100 Fed. 922.

A foreign insurance company is in court when served with summons, as the appellee here was served, by process executed on the commissioner.

Home Ben. Soc. v. Muehl, 109 Ky. 479, 59 S. W. 520; *Commercial Bank v. Buckingham*, 5 How. 317, 12 L. ed. 169; *Lawler v. Walker*, 14 How. 149, 14 L. ed. 364; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

The judgment having been rendered, an execution of *fi. fa.* issued, was placed in the hands of the sheriff, and returned by him "No property found." Plaintiff could then file, in the same action in which the defendant had been summoned and the judgment secured, a supplemental petition or affidavit, and thus obtain an attachment, receivership, or any process by which the defendant's property might be seized and held to answer the judgment debt.

Caldwell v. Deposit Bank, 18 Ky. L. Rep. 156, 35 S. W. 625; *Lewis v. Deposit Bank*, 109 Ky. 197, 58 S. W. 589.

The rendition of the final judgment did not operate in law to take the case off the docket; on the contrary, it remained upon the docket, and the court's jurisdiction and power over it and the parties to it remained for all purposes tending towards its enforcement and satisfaction.

Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; *Leathe v. Thomas*, 38 C. C. A. 75, 31 L. R. A.

97 Fed. 136; *Shields v. Coleman*, 157 U. S. 178, 39 L. ed. 663, 15 Sup. Ct. Rep. 570; *Thomp. Corp.* § 6880; *Commercial & Sav. Bank v. Corbett*, 5 Sawy. 172, Fed. Cas. No. 3,057; *Treter v. Williams*, 3 B. Mon. 562, 39 Am. Dec. 485.

The proceedings subsequent to the rendition of the judgment were not removable to the United States court.

Dere v. Strother, 10 Fed. 406; *Cook v. Whitney*, 3 Woods, 715, Fed. Cas. No. 3,166; *Clafin v. McDermott*, 20 Blatchf. 522, 12 Fed. 375; *Cortes Co. v. Thannhauser*, 20 Blatchf. 59, 9 Fed. 226; *Desty*, Fed. Proc. 9th ed. p. 448; *Fidelity Trust & S. V. Co. v. Newport News & M. Valley Co.* 70 Fed. 403.

The state court was the proper tribunal to determine the character and identity of the fund sought to be subjected to the payment of plaintiff's judgment.

Domestic & Foreign Missionary Soc. v. Hinman, 2 McCrary, 543, 13 Fed. 161; *Beckett v. Harford County Sheriff*, 21 Fed. 32; *Simpson v. Ward*, 80 Fed. 561.

Any proceeding of a state court taken with or without the sanction of precedent; all processes of a state court issued under actual or colorable authority; every officer of a state court, appointed and acting in cases within or without the jurisdiction of the court,—are protected, not only by § 720 of the Revised Statutes, but by the rules of comity as well.

Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Covell v. Heyman*, 111 U. S. 176, 179, 28 L. ed. 390, 391, 4 Sup. Ct. Rep. 355; *Senior v. Pierce*, 31 Fed. 628; *Leathe v. Thomas*, 38 C. C. A. 75, 97 Fed. 136; *Mills v. Provident Life & T. Co.* 40 C. C. A. 394, 100 Fed. 344; *Southern Bank & T. Co. v. Folsom*, 21 C. C. A. 568, 43 U. S. App. 713, 75 Fed. 929; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 260; *American Asso. v. Hurst*, 7 C. C. A. 598, 16 U. S. App. 325, 59 Fed. 5; *Re Hall & S. Co.* 73 Fed. 530; *Hutchinson v. Green*, 2 McCrary, 471, 6 Fed. 838; *Rensselaer & S. R. Co. v. Bennington & R. R. Co.* 18 Fed. 617; *Yick Wo v. Crowley*, 26 Fed. 207; *Rhodes & J. Mfg. Co. v. New Hampshire*, 70 Fed. 721; *Dillon v. Kansas City Suburban Belt R. Co.* 43 Fed. 111; *Missouri, K. & T. R. Co. v. Scott*, 13 Fed. 793; *Tarble's Case*, 13 Wall. 401, 20 L. ed. 598; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 964; *Tefft v. Sternberg*, 5 L. R. A. 221, 40 Fed. 6.

Writ of error, not injunction, was the proper procedure.

Senior v. Pierce, 31 Fed. 628; *Rensselaer & S. R. Co. v. Bennington & R. R. Co.* 18 Fed. 617; *Chesapeake & O. R. Co. v. White*, 111 U. S. 137, 28 L. ed. 378, 4 Sup. Ct. Rep. 353; *Iowa C. R. Co. v. Iowa*, 160 U. S. 392, 40 L. ed. 468, 16 Sup. Ct. Rep. 344.

Messrs. Pirtle & Trabue, with *Messrs. George Burnham, Jr., and Sewell T. Tyng*, for appellee:

Service of summons upon the insurance commissioner was invalid, the company not 61 L. R. A.

then doing business in Kentucky, the commissioner having canceled its license months previously.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; *Goldney v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Mutual Reserve Fund Life Asso. v. Boyer*, 62 Kan. 31, 50 L. R. A. 538, 61 Pac. 387; *People v. Commercial Alliance L. Ins. Co.* 7 App. Div. 297, 40 N. Y. Supp. 269; *Swann v. Mutual Reserve Fund Life Asso.* 100 Fed. 922; *Home Ben. Soc. v. Muehl*, 109 Ky. 479, 59 S. W. 520.

The question of service having become one of contract, and being a question of due process, the state court cannot deprive appellee of the benefit of the question and the Federal court of jurisdiction by assuming to construe the contract against it.

Houston & T. C. R. Co. v. Texas, 177 U. S. 77, 44 L. ed. 680, 20 Sup. Ct. Rep. 545; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73.

The proceedings for appointment of a receiver were void for want of process.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Hall v. Grogan*, 78 Ky. 11; *Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477; *Redwine v. Underwood*, 101 Ky. 191, 40 S. W. 462.

There is no execution of a personal judgment in an action at law in Kentucky except execution of fieri facias (Ky. Stat. § 1650); nor is there any equitable proceeding for the enforcement of such judgment by reaching intangible property except by the separate equitable action authorized by Civil Code, § 439.

Davidson v. Simmons, 11 Bush, 333.

Sixty days after judgment having elapsed, the court's control over it ceased as by expiration of a term of court. Act December 30, 1892, § 5. The court's control ends with the term.

Louisville Rock & Lime Co. v. Kerr, 79 Ky. 12; *Elder v. Richmond Gold & S. Min. Co.* 7 C. C. A. 354, 19 U. S. App. 118, 53 Fed. 536; *Muller v. Ehlers*, 91 U. S. 250, 23 L. ed. 320.

Proceedings under a judgment in a state court may be enjoined by a Federal court for fraud in the procurement of the judgment.

Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; *Young v. Sigler*, 48 Fed. 182.

Where the state court is proceeding irreparably to injure property in controversy after removal proceedings, the Federal court may enjoin proceedings in the state court.

French v. Hay, 22 Wall. 250, 22 L. ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. ed. 497; *Sharon v. Terry*, 1 L. R. A. 572, 13 Sawy. 387, 36 Fed. 365.

The court's jurisdiction is always open to question, even when the constitutional requirement of "full faith and credit" is in-

voked for it; and this is equally true in the state and Federal courts.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *American Asso. v. Hurst*, 7 C. C. A. 598, 16 U. S. App. 325, 59 Fed. 5; *Connor v. Tennessee C. R. Co.* 54 L. R. A. 687, 48 C. C. A. 730, 109 Fed. 935.

If a defendant's acts done pursuant to an edict of a state judge without jurisdiction be injurious to complainant, he may invoke Federal jurisdiction for injunction if he manifest proper citizenship and jurisdictional amount, or other grounds of Federal jurisdiction declared by statute.

Johnson v. Waters, 111 U. S. 640, 667, 28 L. ed. 547, 556, 4 Sup. Ct. Rep. 619; *Arrow-smith v. Gleason*, 129 U. S. 86, 101, 32 L. ed. 630, 635, 9 Sup. Ct. Rep. 237; *Terre Haute & I. R. Co. v. Peoria & P. U. R. Co.* 82 Fed. 946.

The determination of questions of threatened conflict must rest with either the state or Federal court; it cannot rest with both, and conflict be avoidable except by forbearance of one or the other. The Federal courts have the determination of the question.

United States v. Peters, 5 Cranch, 115, 3 L. ed. 53; *United States v. Booth*, 21 How. 506, 16 L. ed. 169; *Freeman v. Howe*, 24 How. 460, 16 L. ed. 752; *Baker v. Ault*, 78 Fed. 394; *Re Long Island North Shore Pass. & Freight Transp. Co.* 5 Fed. 628; *Elder v. Richmond Gold & S. Min. Co.* 7 C. C. A. 354, 19 U. S. App. 118, 58 Fed. 536; *Naugue v. Clapp*, 101 U. S. 551, 25 L. ed. 1026; *Robb v. Vos*, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4; *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 908, 19 Sup. Ct. Rep. 506; *Howard v. De Cordova*, 177 U. S. 609, 44 L. ed. 908, 20 Sup. Ct. Rep. 817.

That appellee's property would be taken by the appointment of the receiver is incontestable, and if the court be without jurisdiction it must necessarily proceed without due process.

Guthrie's 14th Amendment, pp. 104, 105; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541.

The offer of appeal does not afford due process, because the price of appeal to a citizen of another state is the requirement that he enter his appearance in the Kentucky court.

Grace v. Taylor, 1 Bibb, 430; *Graves v. Hughes*, 4 Bibb, 84; *Wharton v. Clay*, 4 Bibb, 167; *Maude v. Rodes*, 4 Dana, 145; *Bradford v. Gillespie*, 8 Dana, 68; *Lawlins v. Lackey*, 6 T. B. Mon. 70; *Bentley v. Gregory*, 7 T. B. Mon. 369; *Brown v. Humphreys*, 1 J. J. Marsh. 394; *Gill v. Johnson*, 1 Met. (Ky.) 652; *Allon v. Brown*, 4 Met. (Ky.) 343; *Salter v. Dunn*, 1 Bush, 316.

Whenever a judgment is invoked in justifi-

cation by a defendant, the jurisdiction of the court rendering it may be challenged.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Robb v. Vos*, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4; *Cooper v. Newell*, 173 U. S. 556, 43 L. ed. 811, 19 Sup. Ct. Rep. 506; *Thormann v. Frame*, 176 U. S. 356, 44 L. ed. 503, 20 Sup. Ct. Rep. 446; *Howard v. De Cordova*, 177 U. S. 609, 44 L. ed. 908, 20 Sup. Ct. Rep. 817; *Elder v. Richmond Gold & S. Min. Co.* 7 C. C. A. 354, 19 U. S. App. 118, 58 Fed. 536.

On this point it is immaterial whether or not the absence of jurisdiction from the court rendering the judgment be of the subject-matter or of the parties.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

Until summons is issued or warning order made there is no proceeding in court, none having been commenced.

Butts v. Turner, 5 Bush, 435; *Cecil v. Sowards*, 10 Bush, 96; *Savings Bank v. McAllister*, 83 Ky. 149; *Hoffman v. Brungs*, 83 Ky. 404.

On petition for rehearing.

Mr. William D. Guthrie, also for appellee:

The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground.

Harkness v. Hyde, 98 U. S. 478, 25 L. ed. 237; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 209, 37 L. ed. 705, 13 Sup. Ct. Rep. 859; *Goldney v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *York v. Texas*, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9; *Chesapeake, O. & S. W. R. Co. v. Heath*, 87 Ky. 659, 9 S. W. 832; *Newport News & M. Valley R. Co. v. Thomas*, 96 Ky. 613, 29 S. W. 437; *Sun Mut. Ins. Co. v. Crist*, 19 Ky. L. Rep. 306, 39 S. W. 837.

Lurton, Circuit Judge, delivered the opinion of the court:

1. The judgment in favor of appellant James S. Phelps, and against the appellee, the Mutual Reserve Fund Life Association, has been assailed because it is said that the Jefferson county circuit court did not obtain jurisdiction by the service of process upon Ben Frese as a local agent, or by the service upon the Kentucky commissioner of insurance. But the association appeared in the Jefferson court for the very purpose of putting in issue the sufficiency of that service. The determination of the issue thus made up involved questions of law and fact. The judgment of the state court contains these recitations: "This action having heretofore been submitted upon a motion to quash the service of process, upon which motion the

court made the following findings of law and facts, which are incorporated in and made a part of this judgment, to wit: First. Upon proof induced by affidavits, the court was and is of the opinion that Ben Frese at the time of service of summons upon him in this action was the local treasurer of the defendant association in Jefferson county, Kentucky, and as such was an agent of the company upon whom summons might be served, and the defendant association thereby brought before the court. By the summons herein upon the said Ben Frese, the defendant association was brought before this court in this action, and the jurisdiction of this court to grant the relief prayed for in the petition became vested. Second. It appearing, from proof induced by affidavits, that the defendant association did, by resolution of its board of directors adopted prior to the service of summons in this action, consent that service of process upon commissioner of insurance of this state, in any action brought or pending in this state, should and shall be a valid service upon said defendant association, and it further appearing to the court that the authority and power to receive service of process thus vested in the commissioner of insurance of Kentucky has never been revoked, canceled, or annulled, this court held and now holds that the summons served upon the commissioner of insurance of Kentucky in this action was a valid and sufficient service, and operated to bring the defendant association before the court, and subject said defendant association to the jurisdiction and decrees of this court in this action. This action having now been regularly set at rules and called by the court, and the necessary time for answer having elapsed without any action being taken by the defendant, the cause was regularly submitted for judgment. The court being advised by the uncontroverted allegations of the petition that the prayer of said petition should be granted, it is therefore ordered and adjudged that the plaintiff recover of the defendant the sum of nineteen hundred and ninety-four dollars (\$1,994), with interest on the various amounts going to make up said sum from the dates of the payments of such various amounts to the defendant association, as shown by the itemized statement and account filed with the petition, amounting in all to twenty-three hundred and sixty dollars (\$2,360), with interest from this date, May 19, 1900, and that plaintiff further recover of defendant his costs in this action expended, for all of which debt, interest, and costs the plaintiff may have immediate execution."

Having appeared for the purpose of challenging the jurisdiction of the court, the decision of the court upon that issue is conclusive, until annulled or reversed by some court having jurisdiction to revise and correct error. However erroneous the conclusions of the Jefferson circuit court may have been,—and we intimate nothing in that respect,—its judgment is certainly not void, and in a proceeding of this kind we must
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accept it as a valid and legal judgment; for neither the circuit court nor this court has any character of appellate or revisory jurisdiction over that court. The question is not one of waiver of personal jurisdiction by an appearance solely for the purpose of contesting that jurisdiction, but of the effect and force, in a collateral attack, of a judgment upon an issue involving the jurisdiction of the court over the person of a defendant, to which issue the present appellant was a party. The court below was therefore right in assuming the validity of the judgment, which was the foundation for the subsequent proceedings which led to the injunction here involved.

2. We are unable to agree with the opinion of the court below that the jurisdiction of the state circuit court was exhausted by the rendition of its judgment. The power to render that judgment included the power to issue all proper process to enforce its payment. The jurisdiction of the court over the controversy and over the parties, acquired in the primary case by service of process, continued until its judgment should be satisfied. This is a well-settled rule in respect to the jurisdiction of courts of record. *Wayman v. Southard*, 10 Wheat. 1, 22, 6 L. ed. 253, 258; *Riggs v. Johnson County*, 6 Wall. 166, 187, 197, 18 L. ed. 768, 773, 776; *Covell v. Heyman*, 111 U. S. 176, 183, 28 L. ed. 390, 393, 4 Sup. Ct. Rep. 355; *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 483, 33 L. ed. 400, 402, 10 Sup. Ct. Rep. 155. *Riggs v. Johnson County*, 6 Wall. 166, 187, 197, 18 L. ed. 768, 773, 776, is much in point. In that case a judgment had been rendered against Johnson county upon bonds. An execution was returned unsatisfied. The plaintiff then applied for a writ of mandamus to compel the levy of a tax under a law in force when the bonds were issued. The officials against whom the writ was directed replied that prior to the application for the writ of mandamus they had been enjoined by a state court from making any levy. This raised a question as to which of the two courts should be obeyed, and the decision was made to turn upon priority of jurisdiction over the controversy. In respect to the power of the circuit court to issue a writ of mandamus after judgment, and in aid of its enforcement, the court said: "Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal that, if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree. Express determination of this court is that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record. Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power

would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."

In answer to the argument that the state court had first obtained possession of the controversy by issuing its injunction before application made for the writ of mandamus, the court said: "Unless it be held that the application of the plaintiff for the writ is a new suit, it is quite clear the proposition is wholly untenable. Theory of the plaintiff is that the writ of mandamus, in a case like the present, is a writ in aid of jurisdiction which has previously attached, and that in such cases it is a process ancillary to the judgment, and is the proper substitute for the ordinary process of execution to enforce the payment of the same, as provided in the contract. Grant that such is the nature and character of the writ as applied in such a case, and it is clear that the proposition of the defendants must utterly fail, as in that view there can be no conflict of jurisdiction, because it has already appeared that a state court cannot enjoin the process or proceedings of a circuit court. Complete jurisdiction of the case, which resulted in the judgment, is conceded; and if it be true that the writ of mandamus is a remedy ancillary to the judgment, and is the proper process to enforce the payment of the same, then there is an end of the argument, as it cannot be contended that a state court can enjoin any such process of a Federal court."

In conclusion, the court held that the circuit court had not lost jurisdiction by the rendition of the primary judgment, and that the writ of mandamus was a writ ancillary to the judgment, and not a new suit, but proper process to enforce satisfaction of its primary judgment.

In the instance before us, the state court had acquired jurisdiction over the association by service of process upon its duly constituted agents. An execution had been returned "No property found." The court by a sworn petition was then advised that this nonresident judgment debtor had no property subject to execution, but that it was in the receipt at stated times of dues and premiums upon existing contracts of insurance, and that it had revoked the authority of all of its agents and collectors within the state, and was requiring all such accruing dues to be remitted directly to its home office by the policy holders themselves, and that this method of conducting its business in the state had been resorted to for the purpose of removing its assets beyond the jurisdiction of the state. In this situation, the court was asked to impound and sequester these choses in action, through means of a receiver, that they might be applied to the payment of this judgment. Manifestly, the action of the court in impounding property of the judgment debtor which could not be reached by execution was action auxiliary to the primary suit. The proceeding was not in any sense a new suit or a separate action. That which the court was asked to do, and that which the court did do, was to take a step in aid of the satisfaction of its judgment;

and this it did as a proceeding ancillary to the judgment, and by virtue of its previously acquired jurisdiction over the subject-matter of the controversy and of the parties. Instead of ordering an alias *fi. fa.*, or an attachment, it appointed a receiver, and directed him to take possession of the choses in action which apparently constituted the only property of the debtor within the jurisdiction. This appointment was made without other than constructive notice. How, otherwise, could it be, if the averments of the supplemental petition were true? Was the court powerless because the judgment debtor was a foreign corporation, unrepresented by agents, and having no property subject to execution?

As we are advised by an opinion subsequently filed by the very learned judge of the state court, that court regarded a summons upon this supplemental proceeding as wholly unnecessary, because no new cause of action was presented therein, and because the judgment debtor was charged with constructive notice of all steps taken in the case after the original service in the primary action. Aside from any question of the sufficiency of constructive notice where, in the same case, a receiver is applied for, after judgment and a return of *nulla bona*, as a substitute for an alias execution, or an attachment, or other proper writ of process, we are not prepared to say that, if such a supplemental matter be regarded as a new suit or action, the constitutional requirement of due process is infringed if a receiver be appointed before notice. Doubtless the general rule is that, even after judgment, applications for appointment of a receiver should not be entertained without notice. Beach, Eq. Pr. § 730, and cases cited. "But," says the author, "the rule requiring notice is not inflexible so as to prevent the court from proceeding in cases where it is impracticable to give legal notice, as in the case of absconding or nonresident defendants, or in cases of great emergency demanding the immediate interference of the court."

The ground upon which the court below proceeded was that there was no such vitality remaining in the primary suit as to justify any kind of supplementary proceeding. To quote the figurative, yet forcible, language of Judge Evans, "the whole so-called supplemental proceeding was an attempt to graft a live branch upon a dead stock." For this reason, said the judge, "the filing of the supplemental petition and the action of the court appointing a receiver thereupon will be treated as mere nullities." The metaphor, as we have already seen, is not apt. The jurisdiction of the state court had not been exhausted by the rendition of its judgment: for, under well-settled rules of general jurisprudence, it continued for the purpose of enforcing satisfaction of that judgment.

We have not been cited to any decisions of the highest court of Kentucky, nor to any statutory provision, which conflicts with the view which Judge Toney, of the Jefferson

circuit court, took as to the ancillary powers of his court. Counsel for appellees have cited two decisions as supporting the view of the court below. They are *Brown v. Vancleave*, 86 Ky. 381, 6 S. W. 25, and *Meadows v. Goff*, 90 Ky. 540, 14 S. W. 535.

Brown v. Vancleave was a proceeding by attachment against a nonresident copartnership, of which it was averred Brown was a member. The property attached was shares of stock belonging to Brown. Brown appeared and denied that he was a member of the firm which had made the notes in suit. This issue was found in Brown's favor; but the court held him liable for a part of the debt in suit, because incurred at a time when he was a member of the firm sued. Judgment went against Brown accordingly. It was further ordered that, unless he paid into court within ten days an amount sufficient to pay this judgment and costs, the attached shares should be sold. Brown complied, and paid in the sum necessary to satisfy the judgment against him. On the day he did this, the plaintiff filed an amended pleading, in which he sought to subject Brown's attached shares to the satisfaction of that part of the debt in suit for which Brown had been held not liable, upon the ground that Brown had permitted the firm of which he was not a member to pledge the attached shares for the payment of the firm's debts. The object was to tack this new cause of action onto the old suit, already decided, and thus hold on to the attached property. The Kentucky court of appeals held that this could not be done, as the rights of the parties had been litigated to a final judgment. The court, among other things, said: "After a final judgment had been rendered, and after it had been discharged according to the term prescribed by the court, the appellee filed an amended petition, in which he set up a new and distinct cause of action against the appellant. The cause of action thus set up was not designed to aid in effectuating the judgment already rendered, for that judgment had been satisfied; but it was designed to subject the appellant's property to the payment of the remaining portion of the two notes, for the payment of which he, according to the judgment of the court, was not bound. It is thus seen that the amendment proposed a new and distinct cause of action, and for that reason alone the amendment should have been rejected."

Meadows v. Goff is to the same effect. After a judgment in an action of ejectment, a stranger asked leave to appear and be made a party defendant, upon the ground that the land belonged to her, and not her husband, who had been sole defendant. The court held she came too late.

We see nothing in either of these cases which militates against the procedure of the state court in the proceedings instituted there in aid of the satisfaction of its judgment. The label affixed to the petition praying an attachment or the appointment of a receiver is of no conclusive significance. The relief sought should determine its nature. 61 L. R. A.

It was not thereby sought to amend the original petition, nor to tack onto the original cause of action a new and distinct suit, as in *Brown v. Vancleave*, 86 Ky. 381, 6 S. W. 25. The relief was plainly in aid of the judgment already rendered, differing in kind only from an alias execution, a writ of attachment, or a writ of mandamus. A receiver was sought as a means of impounding property of the judgment debtor and applying it to the satisfaction of the judgment rendered. The appointment of a receiver was neither more nor less than the seizure of the judgment debtor's property for the satisfaction of the judgment of the court by an equitable attachment.

Aside from the general equity powers of the Jefferson circuit court, under which a receiver might be appointed under circumstances authorizing such action by a court proceeding according to the usual course of a court of equity, there was a statute which expressly granted power to appoint a receiver "on motion of any party to an action" who brings himself within the terms of that law.

Ky. Rev. Codes (Carroll, 1900), § 298, reads as follows:

"On the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, and that the property or fund is in danger of being lost, removed, or materially injured, the court, or the judge thereof, during vacation, may appoint a receiver to take charge of the property or fund during the pendency of the action, and may order and coerce the delivery of it to him. The order of a court, or of the judge thereof, appointing or refusing to appoint a receiver, shall be deemed a final order for the purpose of an appeal to the court of appeals: provided, that such order shall not be superseded."

Sections 439 and 441 of the same Codes read as follows:

"After an execution of fieri facias, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and, in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants."

"In such action the plaintiff may have an attachment against the property of the defendant in the execution, similar to the general attachments provided for in chapter 3, of title 8, without either the affidavit or bond therein required."

Having, as we conclude, already acquired jurisdiction over the defendant, by process

duly served in the original suit, the ruling of the learned judge of the state court was, in effect, that the law of Kentucky did not require that a new subpoena should issue before he could, in aid of the enforcement of the judgment rendered, act upon an application for a receiver, and that, the defendant being already before the court under primary process, no further notice was necessary as a condition to the seizure of its property to compel satisfaction of its judgment. It may be that in this ruling that court erred; but we are not content to so decide in the absence of some statute more explicitly requiring such new summons or other notice, or some decision of the supreme court of Kentucky in conflict with the decision as to the law of Kentucky made in the very case now under examination.

Whether the decision of Judge Toney was rested upon the general powers of a court of record having general law and equity jurisdiction, or was based upon the interpretation of §§ 298 or 439, it was the decision of a court whose jurisdiction had not been exhausted by the rendition of its judgment, but continued until it should be satisfied for the purpose of the issuance of all proper writs or process in aid of its enforcement. Having jurisdiction through the service of the primary summons, everything subsequently done within the general sphere of its power to compel the satisfaction of its judgment should be held as conclusive, when collaterally assailed in the courts of another jurisdiction, unless it is impeached for fraud. If the court erred in its construction of the statute or in the exercise of its powers by appointing a receiver without notice, the remedy was by seasonable proceedings in error. *Cornett v. Williams*, 20 Wall. 226, 250, 22 L. ed. 254, 259; *Laing v. Rigney*, 160 U. S. 531, 542, 40 L. ed. 525, 528, 16 Sup. Ct. Rep. 366.

In *Elder v. Richmond Gold & S. Min. Co.* 7 C. C. A. 354, 19 U. S. App. 118, 58 Fed. 536, the court of appeals for the eighth circuit, speaking by Circuit Judge Caldwell, said: "The court had jurisdiction of the parties and the subject-matter, and it had the power, and it was its duty, to hear and decide every question of fact and law that arose in the progress of the case, until it was finally disposed of. It was its duty to inquire and decide whether the requirements of the practice act, in the particular mentioned, had been observed. The presumption is that it did inquire, and that it decided the question rightly; and this presumption is of conclusive force as against a collateral attack upon the judgment. But, if this or any other question of law or fact which arose in the progress of the case was erroneously decided, the jurisdiction of the court and the validity of its judgment would not be affected thereby. An erroneous decision does not divest a court of its jurisdiction over the case. *Elliott v. Peirson*, 1 Pet. 328, 340, 7 L. ed. 164, 170. If it commits errors, they can only be corrected by appropriate appellate procedure in a court which by law can review the decision. *Bronson v. Schul-* 61 L. R. A.

ten, 104 U. S. 410, 26 L. ed. 797. But neither this court nor the circuit court is invested with appellate or supervisory jurisdiction over the state courts, nor can either reverse, vacate, or modify their judgments, in cases in which they had jurisdiction of the parties and the subject-matter. *Randall v. Howard*, 2 Black, 585, 17 L. ed. 269; *Nougue v. Clapp*, 101 U. S. 551, 25 L. ed. 1026; *Central Trust Co. v. St. Louis, A. & T. R. Co.* 40 Fed. 426. The judgment of June 10, 1882, even if it was erroneous, was not void, and has the same force and effect as if no error had been committed in its rendition."

3. But if we are in error in respect to the law of Kentucky, and that under the law of that state a new writ of summons should have issued as a prerequisite to jurisdiction under the proceedings supplementary to the primary judgment, we are then confronted with the grave question as to whether, under Rev. Stat. § 720 (U. S. Comp. Stat. 1901, p. 581), the court below did not err in issuing the injunction against the receiver of the state court. That section reads as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The position of the court below, and of the counsel for appellee here, is that, if the state court exceeded its jurisdiction by assuming to appoint a receiver in aid of the enforcement of its own judgment without a new summons or notice, the proceeding under which its jurisdiction in that respect was invoked is to be regarded as not being a "proceeding" within the meaning of § 720, and that a receiver appointed under such circumstances is not in any sense an officer of the state court, and that an injunction against such an interloper is "in no way enjoining a proceeding in a state court." To so narrow a construction of the term "proceedings in any court of a state" we cannot assent, and no authority has been produced which sanctions any such definition. The supplemental petition filed in the primary suit was an appeal to the supposed power of the court to order any other or further writs or process necessary to compel payment of its judgment. The petition constituted a "proceeding" in court, whether we regard it as a new action or as a mere collateral and supplemental pleading. In point of fact the "proceeding" was regarded neither by the state court nor by the party filing it as a new action, but as a collateral and supplemental appeal to the continuing jurisdiction of the court until its judgment should be satisfied: and, if the action of the state court is subject to criticism, it is because, when its jurisdiction was thus invoked, it erred in assuming that it might act upon the constructive notice of the primary suit, and without a new writ of summons or other form of notice.

But does it follow, because the state court exceeded its jurisdiction by thus appointing

a receiver in aid of the enforcement of its own judgment without notice, that a court of the United States, upon the application of the judgment debtor and in defiance of the injunction, which forbids any interference with the receiver in the discharge of his duties, may enjoin that receiver from obeying the order of the court, whose officer he colorably was, or dispossess him from the custody of the property which he had been directed to hold? There is no pretense of any prior suit involving the same controversy in the United States court, nor of any prior possession, constructive or actual, of the *res* which the receiver was ordered to reduce to possession. The injunction of the state court, forbidding interference with its receiver, is met with a counter injunction forbidding the receiver to proceed with the duties of his appointment, and forbidding his interference with the property of the Mutual Reserve Life Fund Association, which the state court had specifically directed him to take possession and custody of. Which court shall the receiver obey? Unless one court or the other shall yield its pretensions, nothing remains but an appeal to force. Fortunately, the state court, while justifying its action in an opinion of vigor, but commendable courtesy, has directed its receiver to apply to the circuit court to discharge its injunction, and to appeal to this court from any order continuing it in operation.

If there are principles of comity or of statutory construction by which so deplorable a conflict between coequal courts of concurrent jurisdiction may be avoided, and the operations of our independent systems of judicature rendered harmonious, it is our highest duty to discover and apply them. "It forms a recognized portion of the duty of this court," said Justice Campbell, in *Taylor v. Carryl*, 20 How. 583, 595, 15 L. ed. 1028, 1032, in speaking for the court, "to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the Union, so that they may co-operate as harmonious members of a judicial system, coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations." Continuing he said: "The decisions of this court that disclose such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the court with authority, and have returned to it, bringing the vigor and strength that is always imparted to magistrates of whatever class by the approbation and confidence of those submitted to their government."

It is a rule of almost universal application that, between courts of the same sovereignty and concurrent jurisdiction, the court which first acquires jurisdiction of the controversy or of the *res* should be suffered by every other court to decide every question within the sphere of the pending cause, and to continue in the possession of the subject-matter of the controversy until every

question before it shall be decided and the *res* discharged from its control. This rule has its foundation, perhaps, in comity; but the fruits of its recognition have been so beneficent, when applied to courts of concurrent jurisdiction created by different sovereignties, as to justify the conclusion that it is not only a rule of comity, but one of necessity. The cases are numerous which recognize its binding force and illustrate its wide application. No useful purpose will be subserved in making quotations from them. We content ourselves with the citation of a few which are most in point. *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Tarble's Case*, 13 Wall. 397, 20 L. ed. 597; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 452, 42 L. ed. 807, 813, 18 Sup. Ct. Rep. 403; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. ed. 768; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *American Asso. v. Hurst*, 7 C. C. A. 598, 16 U. S. App. 325, 59 Fed. 1; *Southern Bank & T. Co. v. Folsom*, 21 C. C. A. 508, 43 U. S. App. 713, 75 Fed. 929; *Mills v. Provident Life & T. Co.* 40 C. C. A. 394, 100 Fed. 344; *Aultman & T. Co. v. Brumfield*, 102 Fed. 7; *Senior v. Pierce*, 31 Fed. 628; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

The courts of the state and of the United States are, as to each other, foreign courts. Nevertheless the power sometimes exercised by courts of equity to restrain parties within their jurisdiction from proceeding in a foreign court does not apply to them, and it has long been recognized that state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. *Story, Eq. Jur.* §§ 899, 900; *Central Nat. Bank v. Stevens*, 169 U. S. 436, 462, 463, 42 L. ed. 808, 818, 18 Sup. Ct. Rep. 403. Section 720 originated in 1793, and is a legislative command affirmatively enforcing this rule of comity by expressly prohibiting the enjoining of proceedings in state courts, except when authorized in bankrupt cases. Some cases other than bankruptcy suits have been held not to be within the literalism of the statute. Thus it has been held that the statute does not prevent a court of the United States from protecting its own prior jurisdiction over the property in controversy (*Iron Mountain R. Co. v. Memphis*, 37 C. C. A. 410, 96 Fed. 113), nor from enforcing its own judgments in causes removed from the state court (*French v. Hay*, 22 Wall. 250, 22 L. ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. ed. 497). So it has been held that, when the requisite Federal jurisdiction exists, a bill in equity will lie to deprive parties of the benefits of a decree or judgment obtained by fraud in a state court. *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *Arrowsmith*

v. *Gleason*, 129 U. S. 86, 101, 32 L. ed. 630, 635, 9 Sup. Ct. Rep. 237; *Johnson v. Waters*, 111 U. S. 640, 667, 28 L. ed. 547, 556, 4 Sup. Ct. Rep. 619. In *Marshall v. Holmes*, 141 U. S. 589, 599, 35 L. ed. 870, 874, 12 Sup. Ct. Rep. 62, a bill to annul, on the ground of fraud, judgments rendered by a state court was upheld; the court, among other things, saying: "While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud."

It is plain that in all these cases the Federal court was violating no rule of comity, for in every one of the supposed exceptions to the statute the court was either protecting its own prior possession of the res, or of the controversy, or enforcing its own judgment. This is true of a suit for the nullification of a judgment upon the ground of fraud. The relief sought in such a case would be the subject of an independent suit in equity, and, if the requisite diversity of citizenship existed, such a suit could be maintained in a circuit court of the United States, and any injunction against the enforcement of the judgment nullified for fraud would be mere process for the enforcement of its own judgment, and operative only through its jurisdiction over the parties thereto. In passing, however, it may be observed that in none of the cases of this class reported was any injunction actually granted in the Federal court. In *Marshall v. Holmes* an injunction was allowed in the state court before removal. This remained in force, for the cause stands after removal just as it did before. *Bondurant v. Watson*, 103 U. S. 281, 287, 26 L. ed. 447, 449. None of these instances of so-called exceptions made by judicial construction of the statute apply to the case in hand.

The effort to remove the proceedings under which the receiver was appointed was rightly denied; for, in any view we take of the matter, it must be regarded as a proceeding ancillary to the primary suit, and not as an independent suit. *Barrow v. Hutton*, 99 U. S. 80, 85, 25 L. ed. 407, 408; *Marshall v. Holmes*, 141 U. S. 589, 597, 35 L. ed. 870, 873, 12 Sup. Ct. Rep. 62. Unless the court below can enjoin the proceeding in the state court, and prevent the receiver thus appointed from executing the orders and directions of that court, it is plain that no equitable jurisdiction exists. But it is said that neither the statute nor any rule of comity requires the United States courts to refuse a remedy by injunction against any proceeding under which property is about to be taken without due process

of law. The receiver was armed with the authority of the Jefferson circuit court. He was colorably, at least, its officer, and his action was its action, his possession its possession, though constructive, and not actual. It is not enough for one to say: "This process under which my property is about to be taken is issued without authority, or the officer who assumes to exercise dominion over my property was appointed by a court which exceeded its jurisdiction in appointing and instructing him."

The effect of the appointment of the appellant as receiver, under the terms of the order, already cited, was to place him constructively in possession of the property of the appellee association within the state of Kentucky. To obtain actual possession he had, when enjoined, notified the association debtors to pay their debts to him, and had thus done all that was possible, without instituting suit, to reduce these choses in action to his actual possession. Is it possible that under such circumstances the receiver may be ousted from its constructive possession, and the hand of the state court stayed, while the United States court determines the question as to whether, under the law of Kentucky, the state court had the jurisdiction to make the order and take the step complained of? No case has been cited which gives support to this contention. It is not relevant to say that a void judgment is a nullity, and that whenever it is set up as a justification its voidness may be shown. Nor is it relevant to say that the jurisdiction of the court is always a subject of inquiry when a foreign judgment is sued upon.

The question we have to deal with involves no such question, but concerns the power of a United States circuit court, in view of § 720, to enjoin a proceeding in a state court of concurrent jurisdiction for the purpose of determining whether or not it had exceeded its jurisdiction in respect to the matter complained of. A receiver is peculiarly the hand of the court which appoints him. His possession, whether actual or constructive is but the possession of the court, and, when he is dispossessed or enjoined, the court is dispossessed or enjoined. Can it need anything more than the plain unmistakable language of the statute to perceive that such a case is both within its letter and spirit? It is enough to take a given case out of the statute that the complainant, asking an injunction against action under an order, a writ, or process from a state court, challenges the power of the court to make the order or issue the writ complained of?

It will not do to say that the owner of property taken constructively or actually, or about to be so taken, by invalid order or process of a court of another jurisdiction, is otherwise without remedy. Such an owner may apply for relief to the court under whose authority his property has been seized. *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *American Asso. v. Hurst*, 7 C. C. A. 598, 16 U. S. App. 325, 59 Fed. 1; *Gumbel v. Pitkin*, 124

U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Lammon v. Feusier*, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286. If the officer taking the property exceeds the authority of his writ, he may be sued in any court having jurisdiction in an action of trespass. *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257. A third remedy consists in the right to sue for the recovery of the property after the hand of the court seizing it has been raised. If the taking was under a proceeding void for want of due process of law, the title of one acquiring it under such an invalid proceeding would be unavailing. *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506.

To prevent such unnecessary conflicts of jurisdiction as that presented on this record, the statute (now Rev. Stat. § 720 [U. S. Comp. Stat. 1901, p. 581]) was enacted. The burden is upon one who asserts an interpretation of that provision which would tend to weaken its force and defeat its beneficent purposes. The spirit of the rule of comity between courts prevents interference, not upon any question of ultimate right or wrong, but upon the question as to which jurisdiction had first attached. This rule is clearly and definitely established. *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Southern Bank & T. Co. v. Folsom*, 21 C. C. A. 568, 43 U. S. App. 713, 75 Fed. 929. There may be instances in which the question as to which of two conflicting authorities should prevail may turn upon priority of actual seizure and custody of the property in suit; but the cases in which a distinction between actual and constructive seizure and custody has been observed have been cases in which the jurisdiction of the United States courts has been exclusive, and not concurrent with the state courts. Thus, in *Taylor v. Carryl*, 20 How. 583, 601, 15 L. ed. 1028, 1034, the facts were that a vessel had been actually seized under an attachment issuing from a state court, and was under order of sale made by the state court, when process issued under a libel filed in the district court of the United States for mariners' wages and supplies. It was held that the libel did not divest the officials of the state court of their authority over the vessel, and that of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff conveyed the legal title and the sale by the marshal was inoperative. The decision was expressly put upon the single ground that, while the property levied upon was in the actual possession of one jurisdiction, it should not be taken by an officer acting under another. In *Moran v. Sturges*, 154 U. S. 256, 276, 38 L. ed. 981, 987, 14 Sup. Ct. Rep. 1019 *et seq.*, the facts were much the same, with this distinction. The state court had not made any actual seizure of the vessels, though it had appointed a receiver, who

had not qualified when the vessels were seized by the marshal under libels filed subsequent to the proceedings for appointment of a receiver in the state court. The holding was: First, that the state court had no authority to enforce maritime liens; second, that, being without power to enforce such liens, it was incapable of displacing them; third, that for this reason actual possession by a state court of the *res* subject to such liens will not be disturbed, but as a state court can only deal with the property subject thereto, when its jurisdiction has determined the admiralty courts may proceed; fourth, in respect of the title of the receiver, the court held that, as he had not qualified when the marshal seized the vessels, his title, by relation upon qualification thereafter, should not be carried back, so as to antedate the marshal's seizure. In respect to this the court said: "The contention is not only that the title to these vessels vested in the receiver as of July 31st, and that in such a case as this constructive is the equivalent of actual possession, but that, although the receiver did not qualify until after the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31st, and the jurisdiction of the district court was thereby ousted. But, if jurisdiction had attached, it would not be defeated, even by the withdrawal of the property for the purposes of the state court; and moreover, the doctrine of relation has no application. As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so, because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent, and the subject-matter in litigation in the one is not within the cognizance of the other, while actual, or even constructive, possession may, for the time being and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet, where there is neither actual nor constructive possession, there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and, under these state statutes, is adopted to defeat fraudulent, unwarranted, and unjust disposition of the debtor's property, and to accomplish just and equitable ends. *Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 340, 377, 12 N. E. 763. At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession."

The case furnishes no reason for drawing any distinction between actual and constructive possession of the choses in action of the

Mutual Reserve Fund Life Association. The subject-matter of the litigation was one in respect to which the jurisdiction of the two courts was concurrent. The receiver of the state court had actually qualified, and had served notice of his appointment and authority upon the debtors of the Mutual Association. The receiver was therefore in constructive possession of the assets before the interference of the United States court was solicited. The case in this respect falls within the very distinction recognized by the chief justice when he said: "As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute."

The rule thus stated is supported in the case of *Peck v. Jenness*, 7 How. 624, 12 L. ed. 841; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257.

That the property of a stranger to the proceeding has been taken will not justify a writ of replevin, or any other dispossessory or injunctive proceeding, in the court of another jurisdiction, is well settled. *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; and *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355. In *American Asso. v. Hurst*, 7 C. C. A. 598, 16 U. S. App. 325, 59 Fed. 1, the facts were that the property of a stranger to a writ from a state court was levied on and was about to be sold to satisfy a judgment against another. An injunction was sought from a circuit court of the United States to restrain such taking. The writ was denied below, and the refusal affirmed by this court. Judge Taft, speaking for this court said: "The principle is that, in order to preserve the dignity and protect the effectiveness of the process of courts of concurrent jurisdiction, and to avoid unseemly conflicts between them and between their respective executive officers, no remedy of an injunctive or dispossessory character will be afforded by one court against the acts of the executive officers of the other court, when done under color of an order or process issuing from such other court, because it would have the inconvenient and anomalous effect to stay the proceedings in one court to allow another court to investigate the validity of acts done under such proceedings."

No case has been called to our attention which sanctions the contention of counsel that the mere fact that the jurisdiction of the state court is challenged will justify the enjoining of one court by another. The state and Federal courts are independent of each other, except in a limited class of cases, when a writ of error will lie from the highest

court of a state to the Supreme Court of the United States. They are courts of equal dignity and of concurrent jurisdiction in respect to the subject-matter of this controversy. Neither court has the power to control or coerce the other. If the circuit court of the United States has the power and jurisdiction, when diversity of citizenship exists, to enjoin and dispossess a receiver, acting under authority of the Jefferson circuit court, upon a bill averring a defect of jurisdiction, the other must have an equal right upon a case arising presenting similar jurisdictional questions. The power must be reciprocal, if it exists. We entirely approve the view expressed by District Judge Love in *Senior v. Pierce*, 31 Fed. 625, 631, in saying that: "Inasmuch as the very purpose of noninterference is to prevent a conflict between the two jurisdictions, I can see no difference in the application of the principle whether the question to be decided by the two courts is one of jurisdiction, or of mere property right, the jurisdiction being conceded. The state court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the state court. If the Federal court may decide the question of the regularity of the seizure and jurisdiction adversely to the state court, and proceed to take the property from its custody by force, why may not the state court reciprocally, in any parallel case, decide the same questions when property is in our custody, and proceed by a writ of replevin to dispossess the marshal? But, assuredly, if the Federal court were in possession by legal process, it would not permit the state court to decide the question of jurisdiction and wrest the property from our control. The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the court first obtaining jurisdiction, and take his appeal, if not satisfied, to the final justice of the supreme court of the state, or of the United States, as the case may require. It will not do for the suitor to assume that he cannot obtain justice in one jurisdiction or the other. But at all events it is infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdictions."

Inasmuch as no relief whatever can be obtained unless the proceedings in the state court can be enjoined, *the cause will be remanded, with direction to dismiss the bill for want of equity and to dissolve the injunction.*

Rehearing denied.

Affirmed by Supreme Court of United States May 18, 1903.

CONNECTICUT SUPREME COURT OF ERRORS.

Patrick McKEON
v.

NEW YORK, NEW HAVEN, & HARTFORD
RAILROAD COMPANY.

(75 Conn. 343.)

1. The temporary occupation of a highway with rails, by a railroad company, for its convenience while elevating its roadbed to abolish a grade crossing over a highway, entitles the abutting owner in whom resides the fee, and whose access to and from his property is thereby destroyed, to compensation.
2. The state cannot, under its police power, authorize a railroad company to utilize a public highway as its roadbed while it is elevating its tracks to abolish a grade crossing without making compensation for destruction of the access of the abutting owner in whom resides the fee.
3. The charter duty of a railroad company to pay the damages inflicted on individuals by the exercise of its powers is not removed because it is compelled by the state to make changes in its roadbed for the public good.
4. In determining the damages to be awarded an abutting owner because of the temporary occupation of a street with railroad tracks, the fact may be considered that, by reason of the elevation of the tracks above the grade of the street, puddles of water from rain and melting snow were formed on the sidewalk to the inconvenience of such owner.
5. Injury to other abutting owners by the deposit in the street by a railroad company, whose right of way abuts thereon, of machinery and building materials while it is engaged in elevating its tracks, in the exercise of due care and only for a reasonable time, does not entitle such owners to compensation.
6. Substantial damages may be awarded an abutting owner whose property is cut off from access to the street by the use of it as a roadbed by a railroad company, pending the elevation of its tracks, which may include actual loss of rent, depreciation of rental value, permanent injury to buildings from the jar of passing trains, injury to the sidewalk, and the cost of keeping horses employed in his business, of which no use can be made while the tracks are in the street.

(December 5, 1902.)

RESERVATION by the Court of Common Pleas for Fairfield County for the opinion of the Supreme Court of Errors of an action brought to recover damages for obstruction of a highway. *Judgment for substantial damages advised.*

The facts are stated in the opinion.

NOTE.—As to right of abutting owner to recover damages for construction of steam railroad in the highway, whereby his access to the street is cut off, see also *Eger v. New York C. & H. R. R. Co.* (N. Y.) 14 L. R. A. 381, and note.
61 L. R. A.

Messrs. Canfield & Judson, for plaintiff.

So much of the order, at least, as commanded the four-tracking of the road through Bridgeport was not the exercise of a power which, in the nature of the acts required, would constitute defendant an agent of the state, so as to relieve it from liability.

State ex rel. New Haven & D. R. Co. v. Railroad Comrs. 56 Conn. 313, 15 Atl. 756; *New York & N. E. R. Co.'s Appeal*, 62 Conn. 539, 26 Atl. 122; *Bradley v. New York & N. H. R. Co.* 21 Conn. 295.

It was not the duty, primarily, of the state to abolish grade crossings where safety required the alteration. It was the concern of the state to command the defendant to discharge the duty which had been imposed upon it as a condition to the enjoyment of the special privileges conferred upon it.

New York & N. E. R. Co. v. Waterbury, 60 Conn. 8, 22 Atl. 439; *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527, 26 Atl. 122; *Burritt v. New Haven*, 42 Conn. 174; *Bradley v. New York & N. H. R. Co.* 21 Conn. 295; *Nicholson v. New York & N. H. R. Co.* 22 Conn. 74, 56 Am. Dec. 390.

The decisions will not support the claim that in a work not necessarily incident to the removal of the grade crossings the acts performed, even though required by law, are in the execution of a governmental agency.

Westbrook's Appeal, 57 Conn. 101, 17 Atl. 368; *Bradley v. New York & N. H. R. Co.* 21 Conn. 295; *Doolittle v. Branford*, 59 Conn. 405, 22 Atl. 336; *Woodruff v. Catlin*, 54 Conn. 297, 6 Atl. 849; *Woodruff v. New York & N. E. R. Co.* 59 Conn. 63, 20 Atl. 17; *Newton v. New York, N. H. & H. R. Co.* 72 Conn. 427, 44 Atl. 813; *New Haven Steam Saw Mill Co. v. New Haven*, 72 Conn. 285, 44 Atl. 229, 609.

The public, by establishing the highway, only acquired a right of way over it with the incident right of repairing it in a reasonable manner.

Nicholson v. New York & N. H. R. Co. 22 Conn. 84, 56 Am. Dec. 390; *Imlay v. Union Branch R. Co.* 26 Conn. 249, 68 Am. Dec. 392; *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 159, 36 Atl. 1107.

Elevated street railroads are held to invade the private rights of abutting owners, even in jurisdictions in which the fee of the highways is in the municipality.

Story v. New York Elev. R. Co. 90 N. Y. 143, 43 Am. Rep. 146; *Williams v. Brooklyn Elev. R. Co.* 126 N. Y. 100, 26 N. E. 1048; *Leicis v. New York & H. R. Co.* 162 N. Y. 227, 56 N. E. 540; *Fitch v. New York, P. & B. R. Co.* 59 Conn. 414, 10 L. R. A. 188, 20 Atl. 345; *Reining v. New York, L. & W. R. Co.* 128 N. Y. 157, 14 L. R. A. 133, 28 N. E. 640.

To take away a man's front is to invade a definite right of property.

Cullen v. New York, N. H. & H. R. Co. 66 Conn. 226, 33 Atl. 910; *Newton v. New York, N. H. & H. R. Co.* 72 Conn. 427, 44

Atl. 813; *Atwood v. Partree*, 56 Conn. 82, 14 Atl. 85; *Fitch v. New York, P. & B. R. Co.* 59 Conn. 414, 10 L. R. A. 188, 20 Atl. 345; *Trinity College v. Hartford*, 32 Conn. 452; *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 150, 36 Atl. 1107; *Lewis v. New York & H. R. Co.* 162 N. Y. 227, 56 N. E. 540.

The legislature intended to impose liability whenever the construction or development of the railroad caused direct injuries to private rights.

Bradley v. New York, N. H. & H. R. Co. 21 Conn. 295; *Longworth v. Meriden & W. R. Co.* 61 Conn. 451, 23 Atl. 857; *Cullen v. New York, N. H. & H. R. Co.* 66 Conn. 226, 33 Atl. 910; *Nicholson v. New York & N. H. R. Co.* 22 Conn. 87, 56 Am. Dec. 390.

Closing of the street, if necessary to the work, as claimed by the defendant, is a part of the construction.

Cullen v. New York, N. H. & H. R. Co. 66 Conn. 226, 33 Atl. 910.

Special damages might be regarded as a part of the "expense" of the alteration of a crossing for apportionment.

Woodruff v. New York & N. E. R. Co. 59 Conn. 93, 20 Atl. 17; *State ex rel. New York & N. E. R. Co. v. Asylum Street Bridge Commission*, 63 Conn. 100, 26 Atl. 580; *New Haven Steam Saw Mill Co. v. New Haven*, 72 Conn. 276, 44 Atl. 229, 609.

It is only necessary for the plaintiff to state the facts upon which he relies in narrative form, with an appropriate claim for relief. This he has done.

Craft Refrigerating Mach. Co. v. Quinpiac Brewing Co. 63 Conn. 551, 25 L. R. A. 856, 29 Atl. 76; *Botsford v. Wallace*, 72 Conn. 200, 44 Atl. 10.

If the acts were legalized so far as interference with plaintiff's rights was concerned, but were not a technical "taking" and did not require an assessment as a pre-requisite to occupation, then an action for trespass would lie for the injury from the authorized acts, in so far as these acts were in excess of those to which a highway is dedicated.

Woodruff v. Catlin, 54 Conn. 297, 6 Atl. 849; *Woodruff v. New York & N. E. R. Co.* 59 Conn. 63, 20 Atl. 17; *New York, N. H. & H. R. Co. v. Long*, 69 Conn. 435, 37 Atl. 1070; *Nicholson v. New York & N. H. R. Co.* 22 Conn. 84, 56 Am. Dec. 390; *Burritt v. New Haven*, 42 Conn. 174.

Trespass, or trespass on the case, has been uniformly regarded as the appropriate form of action in this class of cases.

Bradley v. New York & N. H. R. Co. 21 Conn. 295; *Burritt v. New Haven*, 42 Conn. 174; *Longworth v. Meriden & W. R. Co.* 61 Conn. 454, 23 Atl. 827; *Lewis v. New York & H. R. Co.* 162 N. Y. 227, 56 N. E. 540.

The plaintiff had title to, and constructive possession of, the easement, with absence of actual exclusive possession by the defendant, prior to the acts complained of.

Waterbury Clock Co. v. Irion, 71 Conn. 259, 41 Atl. 827; *Fitch v. New York, P. & B. R. Co.* 59 Conn. 414, 10 L. R. A. 188, 20 Atl. 345; *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 158, 36 Atl. 1107, 61 L. R. A.

If an assessment for the damages is not applied for by the defendant an action may be brought by the person injured for the recovery of damages.

Holley v. Torrington, 63 Conn. 430, 28 Atl. 613; *Cullen v. New York, N. H. & H. R. Co.* 66 Conn. 211, 33 Atl. 910.

Messrs. Stoddard, Marsh, & Boardman, for defendant:

The damages alleged to have been suffered by the plaintiff were in consequence of the exercise of the police power of the state, for which no action lies unless so provided by statute.

The action of the legislature and the railroad commissioners is an exercise of police power.

Mooney v. Clark, 69 Conn. 254, 37 Atl. 506, 1080; *Westbrook's Appeal*, 57 Conn. 104, 17 Atl. 368; *Woodruff v. New York & N. E. R. Co.* 59 Conn. 84, 20 Atl. 17; *New Haven Steam Saw Mill Co. v. New Haven*, 72 Conn. 276, 44 Atl. 229, 609.

There was no "taking" of any property of the plaintiff. The burning of clothing and furniture of individuals to prevent contagion, is an every-day occurrence, and yet the owner is not compensated.

Seavey v. Preble, 64 Me. 120; *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *State v. Main*, 69 Conn. 123, 36 L. R. A. 623, 37 Atl. 80.

Frequently it is the case that the exercise of the police power involves a depreciation in the value of property merely by prohibition of certain methods of using it.

Cooley, Const. Lim. p. 741, and notes; *Com. v. Alger*, 7 Cush. 53; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Campbell v. Race*, 7 Cush. 408, 54 Am. Dec. 728.

The railroad commissioners had a public work in hand of great magnitude. They unquestionably had the right, by virtue of their general powers, and irrespective of the special acts, to close temporarily, without compensation, any and all streets or portions of streets which would enable them to carry on their great task with convenience, economy of time, and safety.

Defendant was the agent of the state, engaged in a lawful execution of a police regulation in a case where no provision is made for compensation for loss or damage incidentally occasioned by the execution of the work.

Newton v. New York, N. H. & H. R. Co. 72 Conn. 420, 44 Atl. 813; *New Haven Steam Saw Mill Co. v. New Haven*, 72 Conn. 276, 44 Atl. 229, 609; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 567, 38 L. ed. 272, 14 Sup. Ct. Rep. 437; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 640-642, 25 L. ed. 336-338; *Fries v. New York & H. R. Co.* 169 N. Y. 270, 62 N. E. 358; *Wilson v. New York C. & H. R. Co.* 2 N. Y. Supp. 65.

No recovery can be had for damages resulting from obedience to, and the lawful execution of, a police regulation and order of the state of Connecticut, except so far as the state has by statute given to persons thereby damaged the right to compensation.

New Haven Steam Saw Mill Co. v. New Haven, 72 Conn. 284, 44 Atl. 229, 609; *Newton v. New York, N. H. & H. R. Co.* 72 Conn. 420, 44 Atl. 813.

The use and occupation of the street by the defendant as set forth in the finding was but a legitimate exercise of the right which the public retains over all highways in the state.

2 *Bates*, Fed. Eq. Proc. 624; *Cullen v. New York, N. H. & H. R. Co.* 66 Conn. 223, 33 Atl. 910; *Hollister v. Union Co.* 9 Conn. 435, 25 Am. Dec. 36.

To constitute a "taking" there must be an intention on the part of the ex-proprietor permanently to occupy the land. Mere temporary user is not sufficient.

10 Am. & Eng. Enc. Law, p. 1102; *New York, N. H. & H. R. Co. v. Long*, 69 Conn. 435, 37 Atl. 1070; *Woodruff v. New York & N. E. R. Co.* 59 Conn. 93, 20 Atl. 17.

But the plaintiff's property was not in fact injured by any act of the defendant.

Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 151, 36 Atl. 1107; *New York, N. H. & H. R. Co. v. Long*, 69 Conn. 435, 37 Atl. 1070; *Com. v. Alger*, 7 Cush. 53; *Healey v. New Haven*, 47 Conn. 314; *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36; *British Cast Plate-Glass Mfrs. v. Meredith*, 4 T. R. 794; *Green v. Siefert*, 47 Cal. 536; *Lansing v. Smith*, 8 Cow. 146; *Alexander v. Milwaukee*, 16 Wis. 247; *Sutton v. Clarke*, 6 Taunt. 29; *Boulton v. Crouther*, 2 Barn & C. 703; *Gilman v. Philadelphia*, 3 Wall. 729, 18 L. ed. 100; *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385; *Northwestern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Osgood v. Chicago*, 154 Ill. 196, 41 N. E. 40.

Plaintiff's damages are not special.

Atwood v. Partrce, 56 Conn. 80, 14 Atl. 85; *Clark v. Saybrook*, 21 Conn. 323; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Willard v. Cambridge*, 3 Allen, 574; *Gilman v. Philadelphia*, 3 Wall. 729, 18 L. ed. 101; *Angell & D. Highways*, § 216; *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 742; *West v. Bancroft*, 32 Vt. 367; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; 10 Am. & Eng. Enc. Law, p. 884; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 859.

The defendant had the right temporarily to occupy the street for the purpose of constructing this viaduct, as an adjoining and abutting owner, so long as the obstruction was reasonably necessary, and not unreasonably prolonged.

Fitch v. New York, P. & B. R. Co. 59 Conn. 414, 10 L. R. A. 188, 20 Atl. 345; *Shepherd v. Baltimore & O. R. Co.* 130 U. S. 426, 32 L. ed. 970, 9 Sup. Ct. Rep. 598; *Raymond v. Keseberg*, 84 Wis. 302, 19 L. R. A. 643, 54 N. W. 612; *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222; *State ex rel. Beatty v. Omaha*, 14 Neb. 265, 45 Am. Rep. 108, 15 N. W. 210; *St. John v. New York*, 6 Duer, 315; *O'Linda v. Lothrop*, 21 Pick. 292, 32 Am. Dec. 261; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573; *North Manheim Twp.* 61 L. R. A.

v. Arnold, 110 Pa. 380, 13 Atl. 444; *Lansing v. Smith*, 8 Cow. 146.

No constitutional provision, either of the state of Connecticut or the United States, has been violated.

Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; *Cooley*, Const. Lim. pp. 432-436; 5th ed. pp. 192-196; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Powell v. Pennsylvania*, 127 U. S. 683, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

Baldwin, J., delivered the opinion of the court:

The defendant seeks to justify the acts complained of on the ground that they were reasonably incidental to the work of elevating its railroad tracks in the city of Bridgeport so as to remove certain dangerous grade crossings, in obedience to the command of the state. That it was bound to obey this command, as found in the resolution of the general assembly approved January 22, 1895, and that the general plan adopted for that purpose, and embodied in the agreement between the city of Bridgeport and the defendant, could not be successfully attacked for illegality by one whose land might be taken to carry it out, are no longer open to question. *Mooney v. Clark*, 69 Conn. 241, 37 Atl. 506, 1080; *New York, N. H. & H. R. Co. v. Wheeler*, 72 Conn. 481, 45 Atl. 14; *Wheeler v. New York, N. H. & H. R. Co.* 178 U. S. 321, 44 L. ed. 1085, 20 Sup. Ct. Rep. 949. The board of railroad commissioners, in 1896, on a hearing had after public notice to all persons interested, approved the agreement (which is recited in *Mooney v. Clark*), and ordered its execution. It was also confirmed by the general assembly in 1901. 13 Special Laws, p. 730. One of its provisions was that during the progress of the work the defendant should "have the free use of such streets or portions of streets and the right to temporarily close such streets as may be necessary for the convenient prosecution of the work;" and the order so made by the railroad commissioners in 1896 specifically stated that "we deem it necessary and proper, for the due execution of the purposes of said resolution, and do order that streets in said city be temporarily used, occupied and closed, as stipulated in said agreement." The resolution of 1895, to which reference was thus made, directed the railroad commissioners to make "all orders" which they might deem necessary as to "the temporary use, occupation, or closing of any street in said city, and including the number of tracks to be constructed by said company." In 1899, without giving any further notice, the board of railroad commissioners made another order that the defendant should temporarily use, occupy, and

close, between certain points, a street in Bridgeport known as "Railroad avenue," which ran parallel and adjacent to its railroad, and "lay and use two temporary tracks" on that portion of the street during the progress of the work. The plaintiff owned a lot of land fronting on this part of Railroad avenue on which had been erected a building containing a grocery store and several tenements, and a barn which he used as a livery stable. The defendant laid two railroad tracks on that half of the street of which the plaintiff owned the fee, and, to promote public safety, built a tight fence near the outer edge of the paved sidewalk in front of his store; the sidewalk, which was about 6 feet wide, becoming thus the only part of the avenue left open for public use. All direct communication between his lot and the main roadway of the street was thus cut off. On the tracks so laid the defendant ran all its trains for more than a year, which was no longer than was necessary for the completion of the work. Meanwhile it was occupying its location for the construction of its new roadbed and laying its permanent tracks. It could have reserved room enough upon its location for laying these temporary tracks and could have run all its trains over tracks so laid while the work was in progress; but time and money were saved, and the danger both to its workmen and the public lessened, by putting them in the street, and the committee has found that it was necessary for the company to do all that it did. Whatever authority the general assembly could give for the temporary occupation of Railroad avenue for railroad purposes has been given. That authority is ample to protect the defendant against any charge of the commission of a public wrong. No statute, however, can avail to justify the taking of private property for public use without just compensation. Const. art. 1, § 11. The location of an ordinary steam railroad upon a highway is a taking of property. It imposes an additional burden upon the soil, for which the owner of the fee is entitled to demand compensation. *Imlay v. Union Branch R. Co.* 26 Conn. 249, 260, 68 Am. Dec. 392; *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 146, 150, 36 Atl. 1107. The defendant put this burden on soil owned by the plaintiff. That it put it there merely as a temporary expedient in aid of a lawful work, and removed it as soon as the work was completed, is only important in determining the amount of compensation to which he is entitled. A lawful work cannot justify an unlawful expedient, and any expedient is unlawful as respects one whose property is thereby taken without his consent, unless he is first paid for what he is to lose. Nor is a wrongful taking of property, whether it be real or personal, any the less a taking because it is not permanently appropriated to the wrongdoer's use. It is contended by the defendant that all its acts were done at the command of the state, that this command was an exercise of the police power, and that for damage due to an exercise of that power no compensation

can be recovered, unless by force of some express statutory provision. The phrase "police power" has been sometimes used by writers upon legal subjects as if it denoted some peculiar and transcendent form of legislative authority. The word "police" does not naturally carry out any such meaning. Its use in this connection came into our law early in the nineteenth century. Russell, *Pol. Power of State*, 231. In the Constitution of this state (art. 10, § 2), it is provided that each town shall annually elect such officers of local police as the laws may prescribe. This clearly refers to officers of local administration and government. So, as applied to the state, police laws are laws of general administration and government. Its power to enact such laws extends over all subjects within its territorial limits. *Prigg v. Pennsylvania*, 16 Pet. 539, 625, 10 L. ed. 1060, 1092. The police powers of a state, in the apt words of Chief Justice Taney, "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." *The License Cases*, 5 How. 504, 583, 12 L. ed. 256. If they are exercised by legislation which violates any right guaranteed by the national or state Constitution, they are so far forth invalid. *Leisy v. Hardin*, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *State v. Conlon*, 65 Conn. 478, 31 L. R. A. 55, 33 Atl. 519. The legislation on which the defendant relies in the case at bar makes no direct provision for compensation for property taken. The Constitution does, and that is enough.

The defendant, however, is an artificial person, gifted with a franchise to construct and operate a railroad. Its charter gave it power to enter upon and use all such real estate as might be required for constructing its road, with all necessary turnouts, through Bridgeport, but it made it liable to pay all damages that might thus arise to any person. 4 Special Laws, 1020, 1021; Pub. Acts 1871, p. 714. This liability was not removed because it was compelled to make the changes which involved the damage to the plaintiff's property which is the subject of this action. *Burritt v. New Haven*, 42 Conn. 174; *Cullen v. New York, N. H. & H. R. Co.* 66 Conn. 211, 33 Atl. 910. If none of his property had been taken, and his right of access to the highway not directly obstructed, it may be that his injuries would have been too remote to support a judgment in his favor. *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36; *Newton v. New York, N. H. & H. R. Co.* 72 Conn. 420, 429, 44 Atl. 813. But that, in order to remove a danger to public safety, it was compelled to eliminate these grade crossings by taking what belonged to the plaintiff, did not relieve it from paying him its value. It could not enrich itself at his expense, without his leave, by barring out the entrance to his livery stable, so that it might use the ground for temporary turnouts, on which to transact its own business as a common carrier. It was not in position of an ordinary

agent of the state, selected to construct a public work, in which such agent has no personal interest. Its railroad served both public and private uses. It received a private benefit from its franchise, and it was bound to bear whatever burdens the charter which gave it had attached to its exercise, when such exercise required and resulted in the appropriation to its own use of rights and property vested in another. The plaintiff's real estate was so appropriated as truly as if the temporary tracks had been laid behind his store, instead of in front of it, or as if his lot had fronted on a street not adjacent to the railroad, and the temporary tracks had been laid on that. The tracks were raised above the established grade of the street, in consequence of which puddles of water, coming from rain or melting snow, were sometimes formed upon the sidewalk, and remained for days, making its use inconvenient. This was an element of damage directly attributable to the wrongful use of the roadway, and to be considered in determining the extent of the injury done to the plaintiff's property.

The defendant placed upon the part of Railroad avenue which is in question, between its location and the temporary tracks, large quantities of material, articles of machinery, and other apparatus, to facilitate its work upon its location; but this is found by the committee to have been done with due care, and only for a reasonable time. Such a use of a highway by an adjoining proprietor, while temporarily engaged in improving his land, is one of those which were to be contemplated when the highway was established. The railroad company occupied the position of such an owner, by vir-

tue of its location, whether it owned the fee or simply a right of way. *Fitch v. New York, P. & B. R. Co.* 59 Conn. 414, 10 L. R. A. 188, 20 Atl. 345.

The committee, at the request of both parties, embraced in its report a decision, not only as to the facts, but as to the law applicable to them, and assessed only nominal damages. The facts found, in the view of the law which we have taken, required the assessment of substantial damages. The report states that by reason of the tracks in the street, and their use for train service, and from the cutting of the plaintiff off from access to the street, he suffered consequential loss and damage, as alleged in his complaint, to the amount of \$1,365. This sum covers compensation for actual loss of rent for one year and five months; depreciation of the rental value of the property during the same period; depreciation in the value of the use of a tenement occupied by himself as a family residence; permanent injury to the building from the jar occasioned by passing trains; injury to the sidewalk; the cost of keeping three horses, of which he could make no use, through one winter. No question has been made before us as to the right of the plaintiff to recover for any of these items of loss in case he were entitled to substantial damages.

The Court of Common Pleas is therefore advised to render judgment in his favor for \$1,365, with interest from the date when the report was filed. The costs in this court will be taxed in his favor.

Affirmed by Supreme Court of United States April 27, 1903.

FLORIDA SUPREME COURT.

Ex parte C. M. Cox.

(.....Fla.....)

- *1. **The Constitution of this state, in organizing the judiciary thereof, has assigned to each court created thereby certain jurisdiction therein designated, and has provided that the legislature may give to certain of these courts additional jurisdiction. Where no such provision is made in the Constitution, the legislature cannot confer upon one of these courts jurisdiction not given to it by the Constitution.**
2. **A writ of error does not lie from the supreme court of this state to review a judgment rendered by an individual justice thereof in a habeas corpus proceeding.**

(December 18, 1902.)

*Headnotes by MAXWELL, J.

NOTE.—On the question of superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal, see *note to State ex rel. Fourth Nat. Bank v. Johnson* (Wis.) 51 L. R. A. 33. 61 L. R. A.

ERROR to review the rulings of a single justice of the Supreme Court denying a writ of habeas corpus to procure petitioner's discharge from custody to which he had been committed by one who was alleged to have no jurisdiction over him. *Dismissed.*

The facts are stated in the opinion.

Mr. C. M. Cox, in propria persona:

Where the town claims an organization and existence under it quo warranto will be against an individual for usurping the office of mayor; and in that proceeding the question of a corporate existence of the town can be tried and passed upon.

State ex rel. Patterson v. McReynolds, 61 Mo. 203; *State ex rel. O'Sullivan v. Coffee*, 59 Mo. 59; 2 Dill. Mun. Corp. 4th ed. p. 1086, note 2; *People v. Carpenter*, 24 N. Y. 86; *People ex rel. Wood v. Draper*, 15 N. Y. 532; *State v. Independent School Dist.* 29 Iowa, 264.

There is no possible ground for sustaining the incorporation, and there is, therefore, no such office as that assumed by the respondent.

People ex rel. Shumway v. Bennett, 29

Mich. 451, 18 Am. Rep. 107; 2 Dill. Mun. Corp. 4th ed. § 895; *People v. Rensselaer & S. R. Co.* 15 Wend. 113, 30 Am. Dec. 33; High, Extr. Legal Rem. 2d ed. § 696; *State ex rel. Probstfeld v. Sharp.* 27 Minn. 38, 6 N. W. 408.

An information against the corporation admits the existence of the corporation.

People ex rel. Weber v. Spring Valley, 129 Ill. 169, 21 N. E. 844; *People v. Rensselaer & S. R. Co.* 15 Wend. 113, 30 Am. Dec. 33.

In quo warranto proceedings the *onus probandi* is on the respondent to prove his title as pleaded, or as much of it as is traversed.

People ex rel. Pontiac v. Central U. Teleph. Co. 192 Ill. 307, 61 N. E. 428.

It is not necessary to make the municipal corporation a party defendant where the proceeding is instituted against the incumbents on the ground that a pretended municipal corporation has never been legally created.

Ewing v. State, 81 Tex. 172, 16 S. W. 872; 2 Spelling, Inj. & Extr. Rem. § 1838; *Territory v. Armstrong*, 6 Dak. 226, 50 N. W. 832; *People ex rel. Lord v. Bruennemer*, 168 Ill. 482, 48 N. E. 43.

The existence of the corporation could not be directly inquired into in any way other than by proceeding to oust individuals claiming to hold municipal offices.

17 Enc. Pl. & Pr. pp. 435, 436.

A person cannot be a *de facto* officer after a judgment of ouster has been rendered against him or there has been any other judicial decision against his right to hold office.

8 Am. & Eng. Enc. Law, 2d ed. p. 799; 1 Dill. Mun. Corp. 4th ed. 276.

Mr. S. K. Gillis for respondent.

Maxwell, J., delivered the opinion of the court:

A writ of error from this court was sued out by petitioner to review a judgment in a habeas corpus proceeding rendered by a justice of this court, before whom the writ of habeas corpus was returnable. The question arises whether this court has appellate jurisdiction in such a case.

The right of appeal is not as of course, and, if it exists, it is because provision is made therefor in our organic or statute law. *Re Curley*, 34 Iowa, 184.

In § 5 of article 5 of our Constitution, jurisdiction is conferred upon this court as follows: "The supreme court shall have appellate jurisdiction in all cases at law and in equity originating in circuit courts, and of appeals from the circuit courts in cases arising before judges of the county courts in matters pertaining to their probate jurisdiction, and in the management of the estates of infants, and in cases of conviction of felony in the criminal courts, and in all criminal cases originating in the circuit courts. The court shall have the power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of its jurisdiction." Then follows a provision that each justice may issue

writs of habeas corpus, under which provision the original writ herein was issued.

It is apparent that this section, except as to criminal cases, provides for appeals only from the circuit court, and gives such jurisdiction in two classes of cases: The first is that in which the jurisdiction of the circuit court is original, and it then applies to "all cases in law and equity originating in circuit courts." The second is that in which the jurisdiction of the circuit court is appellate, where it applies only to certain designated cases. The case at bar has not been before the circuit court, and there is therefore no express constitutional provision for writ of error therein.

The statutory provision for writs of error in habeas corpus proceedings is found in chapter 4920 of the Acts of 1901, amending § 1780 of the Revised Statutes; and we will assume, for the purposes of this case, that the language of the act is broad enough to embrace such writ to review the judgment of a justice of this court. The jurisdiction of this court will then depend upon the validity of this act.

The Constitution, in § 1 of article 5, provides that "the judicial power of the state shall be vested in a supreme court, circuit courts, criminal courts, county courts, county judges, and justices of the peace." It then proceeds to organize and prescribe the jurisdiction of each of these courts. After providing as above set forth for the jurisdiction of this court, in § 11 of the same article it gives the circuit courts original jurisdiction of certain designated cases, "and of such other matters as the legislature may provide," and appellate jurisdiction of certain cases, "and of such other matters as the legislature may provide." Subsequent sections fix the jurisdiction of each of the other courts created by this article; in some instances making it definite, and in others leaving it to be fixed by law within certain prescribed bounds. Provision is made for the appointment of a referee in certain cases, and that "the cause shall be subject to an appeal in the manner prescribed by law."

In so organizing the judiciary of the state, it is evident that the framers of our Constitution have undertaken to prescribe the powers of each of the courts so created; and when they felt it necessary that provision be made for further jurisdiction, in order that the courts, by the flexibility of their powers, might meet the unforeseen or growing demands engendered by new conditions, they made express provision therefor, designating therein the courts upon which such grant of power should be conferred. Where no such power is delegated to the legislature, it cannot vest in one of these courts jurisdiction of a matter withheld from it by the Constitution.

This view is adopted in Texas, when it is said that, "in framing the provisions of article 5, 'it was the object of the framers of the Constitution to mark out a complete judicial system, defining generally the province of each of the courts by reference to

the objects confided to the action of each, and the relation of each to the others. Such a system cannot be changed by action of the legislative department, except when the power to make the change is conferred by the Constitution itself.' *Ex parte Toules*, 48 Tex. 413; *Ex parte Ginnocchio*, 30 Tex. App. 584, 18 S. W. 82; *Gibson v. Templeton*, 62 Tex. 555." *Leach v. State*, 36 Tex. Crim. Rep. 248, 36 S. W. 471; *Titus v. Latimer*, 5 Tex. 433; *Ex parte Whitlow*, 59 Tex. 273; and in California,—*Caulfield v. Hudson*, 3 Cal. 389; *Parsons v. Tuolumne County Water Co.* 5 Cal. 43, 63 Am. Dec. 76. See also *Auditor of State v. Atchison, T. & S. F. R. Co.* 6 Kan. 500, 7 Am. Rep. 575, and the leading cases of *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, Followed in *Florida v. Georgia*, 17 How. 478, text 505-509, 15 L. ed. 181, 199, 200; *State ex rel. King v. Hall*, 47 Neb. 579, 66 N. W. 642; *Lake v. Lake*, 17 Nev. 230, text 238, 30 Pac. 878; *Cass v. Davis*, 1 Colo. 43; *Godbe v. Salt Lake*, 1 Utah, 68; *Territory v. Ortiz*, 1 N. M. 5; *Kent v. Mahaffy*, 2 Ohio St. 498. Other cases holding that the legislature is not authorized to confer jurisdiction upon constitutional courts, though in those cases the language of the Constitution was more restrictive than in ours, are *Ex parte Jones*, 2 Ark. 93; *State, Flanagan, Prosecutor, v. Plainfield*, 44 N. J. L. 118; *State use of Fletcher v. Gannaway*, 16 Lea, 124; *State v. Bank of East Tennessee*, 5 Sneed, 573; *Vail v. Dinning*, 44 Mo. 210.

A decision by this court very much in point is that of *Singer Mfg. Co. v. Spratt*, 20 Fla. 122, in which it is held that, as the Constitution had expressly conferred upon the circuit courts original jurisdiction in certain cases, not embracing the writ of prohibition, it had no jurisdiction of this matter. The court says: "Here we have the jurisdiction of the circuit courts and of the supreme court sharply defined. The power to issue the writ of prohibition is, in clear words, given to the supreme court, as an original proceeding. The Constitution, enumerating what original writs may be issued, omits to name the writ of prohibition as within the power of the circuit courts and judges, but expressly gives the power to issue this writ to the supreme court. The ancient maxim, *Inclusio unius est exclusio alterius*, is applicable. As a writ 'necessary to the complete exercise of their jurisdiction,' the circuit courts may issue a prohibition or any other appropriate writ to protect its jurisdiction in any cause properly before it; but this is ancillary to a jurisdiction already acquired, and not an original process by which to obtain jurisdiction. Nor is it within the power of the legislature to enlarge the jurisdiction so strictly defined." The italics are ours. The court then quotes approvingly, and applies, *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60.

The application of this doctrine to the present case is made more pointed by the fact that the appellate jurisdiction of this court is prescribed in the same section of the Constitution which authorizes one of its jus-

tices to act in habeas corpus proceedings. With both subjects under consideration at the same time, no provision is made in the one making it applicable to the other. Whether the same rule would apply equally as to appeals from the exercise of judicial powers created under subsequent amendments, we need not consider.

And it is further to be observed that, unlike the Constitution of some states, and that first in force in this state, our present Constitution does not provide that the supreme court shall have general superintendence and control of all other courts. It has merely prescribed that it shall have certain stated appellate jurisdiction, and certain stated original jurisdiction, with no provision, as in the case of circuit courts, that the legislature can enlarge this.

It only remains to comment upon and distinguish certain decisions of this court which may, perhaps, be regarded as indicating a different view from that here expressed.

In *Ex parte Henderson*, 6 Fla. 279, it was held that the legislature had power to provide for appeals from justice courts to the circuit courts, though only original jurisdiction had been expressly conferred by the Constitution upon the latter courts. The court held that, as the trial upon appeal was *de novo*, it was an exercise of original, and not of appellate, jurisdiction; the one ingredient of appellate power being that the case had had its origin in the inferior court. Furthermore, the Constitution then in force provided, in § 10 of article 5, that, "in cases tried before a justice of the peace, the right of appeal shall be secured under such rules and regulations as may be prescribed by law." No court was named as the depository of the appellate jurisdiction contemplated by this provision, and the legislature charged with the duty of making provision therefor very properly reposed it in the circuit courts, where it had been for twenty years before the Constitution was in force.

In *Thebaut v. Canova*, 11 Fla. 143; *Sveepson v. Call*, 13 Fla. 337; *State ex rel. Florida Pub. Co. v. Hocker*, 35 Fla. 19, 16 So. 614, and *Chapman v. Reddick*, 41 Fla. 120, 25 So. 673,—the power of the legislature to provide for the transfer of a cause from one circuit to another, for the judge of one circuit to hear a cause pending in another, and for process from one circuit to be executed in another, is recognized and upheld. This, however, is in the nature of a regulation or provision for the more effectual exercise of the jurisdiction already vested in these courts by the Constitution, and is sustained as being not in conflict with the Constitution in this regard, but in furtherance of its provisions and purpose.

In the last-mentioned case this language is used: "While constitutional jurisdiction cannot be restricted or taken away, it can be enlarged by the legislature in all cases where such enlargement does not result in a diminution of the constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the Constitu-

tion. *State ex rel. Florida Pub. Co. v. Hooker*, 35 Fla. 19, 16 So. 614; *Harris v. Vanderveer*, 21 N. J. Eq. 424." This must be construed with reference to the question involved in that case, which was the right of the legislature to provide, in aid of the jurisdiction vested in the circuit courts, that writs issuing therefrom might be levied upon property situated in other circuits. And the authorities cited therein will not carry the proposition beyond this. The first (35 Fla. 19, 16 So. 614) is that cited by us holding that a circuit judge may dispose of a demurrer pending in another circuit.

The other (21 N. J. Eq. 424) upheld a statute providing for appeal from the prerogative court to the court of errors and appeals. The Constitution creating the latter court constituted it "a court of errors and appeals in the last resort in all causes, as heretofore." It was contended that the words "as heretofore" related to the word "causes," and were restrictive of the jurisdiction of the court. The court repudiated this construction, and treated the provision as making the court one, as theretofore, of last resort in all causes. This they held to authorize the jurisdiction conferred by the act in question.

It is most pertinent to the case at bar to note that they held that if the words "as heretofore" were given the interpretation contended for, limiting the grant of power therein made to the jurisdiction previously vested in the court, it would be a bar to conferring upon it appellate jurisdiction of any new matters thereafter confided to the inferior courts, and that a minority of the court, giving them that construction, held the act in question unconstitutional.

The writ of error in this case will be dismissed.

Shackleford and Cockrell, JJ., concur. **Carter, J.,** did not take part in the decision of this case.

Taylor, Ch. J., dissenting:

I am unable to agree with the conclusion reached and expressed in the opinion prepared by my brother Judge Maxwell as to the interpretation to be put upon § 5 of article 5 of our Constitution, defining the jurisdiction of the supreme court. Its language is: "The supreme court shall have appellate jurisdiction in all cases at law and in equity originating in circuit court." It can hardly be said that the framers of that instrument, in thus prescribing the general jurisdiction of the court of last resort, undertook to make the fact of the actual beginning of cases the test of such jurisdiction, or that it intended to make such jurisdiction depend, not upon the class or character of the case, but solely upon the fact of its having been commenced in some particular court, regardless of the class or character of the case itself. My view is that such was not its intention, but, on the contrary, that its design was to make the appellate jurisdiction of this court depend upon the class or character of the case, and that it made use of

the expression "originating in circuit courts" simply as a definition of the class or character of the cases in general that it should have appellate jurisdiction of, and that such jurisdiction in no sense depends upon the bare fact of the forum in which any given case has its actual beginning. Suppose, *illustratio*, some benighted individual should file a bill in equity in due and ancient form in the court of some still more benighted justice of the peace to foreclose a mortgage on land for \$100, and such J. P., despite demurrers, pleas to the jurisdiction, etc., should enter a decree for foreclosure, likewise in due, ancient, and prolix form; an appeal is taken to the circuit court, and the circuit judge, in absent-minded mood, should affirm such decree; is there any doubt but that this court, upon appeal or certiorari, would have the power to undo the whole misguided proceeding, regardless of the court in which it had its origin, or would it be deprived of the corrective power of appellate review simply because of the fact, though a cause in equity, it was not commenced in the circuit court? Section 11 of the same article of our Constitution, in defining the jurisdiction of circuit courts, uses this language: "The circuit courts shall have exclusive original jurisdiction in all cases in equity, also in all cases at law, not cognizable by inferior courts," etc. This section being *in pari materia* with § 5, above, of the same instrument, the two must necessarily be construed together. In § 11 the class of cases that can rightfully and properly be originated in the circuit courts is clearly, but in general terms, defined; and § 5, in contemplation of the fact that a cause cannot originate in a court having no original jurisdiction to entertain it, uses the word "originating" in the sense of defining a general class of causes that may rightfully and properly originate in circuit courts, and not in the restricted sense of causes that do in fact originate there, whether properly or improperly. The word "originating," used in § 5, should be given a broad and liberal construction, consistent with the patent design of the Constitution to give the court of last resort appellate review of any and all cases that may properly originate in circuit courts, by reason of the fact that the latter courts are given original jurisdiction over them. How can a cause be said to originate in a court unless such court is clothed with original jurisdiction over it? And when we say, in the broad, general language of a constitution, "causes originating in circuit courts," is it not necessarily understood that such causes are contemplated, over which circuit courts have the initiatory right to entertain jurisdiction, and not to such cases only as may happen to be actually commenced therein? My view is that said § 5 gives to this court jurisdiction to review any and every cause over which circuit courts are now vested with original jurisdiction, and also in all causes that may in future be properly put within the original jurisdiction of such circuit courts by legislation; and, if a case be found in which some

other tribunal is given concurrent original jurisdiction with the circuit court, the right of review vests in this court over such case, regardless of the fact as to whether it was actually commenced in such circuit court, if it belongs to a class of cases over which such circuit court might have entertained original jurisdiction. But even if this construction be not correct, we have said in *Chapman v. Reddick*, 41 Fla. 120, text 133, 25 So. 673, that, "while constitutional jurisdiction cannot be restricted or taken away, it can be enlarged by the legislature in all cases where such enlargement does not result in a diminution of the constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the Constitution." We have a constitutional inhibition against the creation of other judicial tribunals than those expressly established by that instrument, but where in its provisions relating to the jurisdiction of this court is the inhibition against the enlargement by legislation of such jurisdiction in any direction that does not encroach upon jurisdiction expressly lodged elsewhere? The only answer is, *Expressio unius est exclusio alterius*. The principle of this maxim should be applied with great caution to the provisions of an organic law that is supposed to deal with its subjects in the broadest and most comprehensive sense, and that never goes into individual details. I have no doubt that Rev. Stat. § 1780, as amended by Laws 1901, chap. 4920, undertakes to give to this court the right to review upon writ of error the judgment of an individual justice thereof in a habeas corpus case. This being true, in order to deny such jurisdiction it is necessary to adjudge this statute to be in violation of the Constitution. What specific provision of that instrument does it transgress? The answer is still, *Expressio unius est exclusio alterius*, and this in the face of the principle so often announced by this and other courts, that, if there is any reasonable doubt as to whether any legislative enactment violates the Constitution, such legislation should be upheld by the courts.

Mabry, J., dissenting:

It being conceded in this case that the legislature has by statute undertaken to provide for a review of a decision rendered by a justice of this court in habeas corpus cases by writ of error to the supreme court, the question considered by the court is whether the legislature has power to enact such a provision. The settled rule in this court is that, if there be a reasonable doubt as to the constitutionality of a statute passed by the legislature, the statute should be sustained.

By the 5th or judiciary article of the Constitution, the judicial power of the state is vested in a supreme court, circuit courts, criminal courts, county courts, county judges, and justices of the peace, with authority in the legislature to establish in incorporated towns and cities courts for the punishment of offenses against municipal ordinances. In the 35th section of the article 61 L. R. A.

it is ordained that no courts other than those therein specified shall be established in this state, with an amendment thereto that the legislature may confer judicial power upon the railroad commission. The jurisdiction and powers of the designated inferior courts are granted or provided for, with appellate review from the lower to superior courts. The circuit courts shall have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before the county judge, of all misdemeanors tried in criminal courts, of judgments or sentences of any mayor's court, and of all cases arising before justices of the peace in counties in which there is no county court, and supervision and appellate jurisdiction of matters arising before county judges pertaining to their probate jurisdiction, or to the estates and interests of minors, and of such other matters as the legislature may provide. The original and exclusive original jurisdictions of the circuit courts are defined, and by the 5th section of the article it is ordained that "the supreme court shall have appellate jurisdiction in all cases at law and in equity originating in circuit courts, and of appeals from the circuit courts in cases arising before judges of the county courts in matters pertaining to their probate jurisdiction and in the management of the estates of infants, and in cases of conviction of felony in the criminal courts, and in all criminal cases originating in the circuit courts. The court shall have the power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of its jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court, or any justice thereof, or before any circuit judge." Appellate power is conferred upon the supreme court in certain enumerated cases, but there are no terms of negation in the grant. Undoubtedly, in the exercise of the various judicial powers by the different courts specified, the supreme court has appellate power, and can only have appellate power, in the cases enumerated in the 5th section. The grant of jurisdiction to the inferior courts, and the express provision for a review of its exercise by other courts than the supreme court, would exclude the jurisdiction of this court, unless otherwise expressly provided. But express power is conferred upon a justice of the supreme court to hear and determine habeas corpus cases, and his powers in this respect are distinct from those exercised by any of the other courts enumerated in the Constitution. It is true that he has in such cases concurrent powers with circuit courts and the supreme court, but it cannot be said that while acting in such matters he is either a circuit court or a supreme court, as organized by the Constitution. The theory of our Constitution in reference to the organization of the differ-

ent courts mentioned for the exercise of usual judicial powers is that appeals can only come to the supreme court from any of the enumerated inferior courts in the cases mentioned, but the powers of a justice of this court in habeas corpus matters are exceptional, and rest upon a special grant in the Constitution. Such a grant in the absence of some prohibition would not exclude the right of the legislature to authorize a review of this decision, and, as the constitutional grant of appellate power over certain cases originating in the inferior courts enumerated contains no words of negation

it seems to me that it should not be so construed as to prevent the legislature from authorizing a review of a decision of a justice of this court in the special exercise of power in habeas corpus cases. This conclusion is in conflict with the opinion of the majority of the court, and, entertaining the view that the statute authorizes a writ of error from this court to review the decision of a justice of this court, I do not agree to the result in this case.

Rehearing denied.

GEORGIA SUPREME COURT.

Winnie SIMMONS, *Plff. in Err.*,

v.

GEORGIA IRON & COAL COMPANY.

(.....Ga.....)

- *1. The proceeding by habeas corpus is not, strictly speaking, either a civil or criminal action, but a summary remedy created for the benefit of a person illegally held in custody by another, and having for its sole object the restoration to liberty of such person. The origin, history, and purpose of the writ of habeas corpus ad subjiciendum discussed.
2. While the writ of habeas corpus is a "writ of right," it does not issue as a matter of course, but only when the application therefor contains allegations which, if true, would authorize the discharge of the person held in custody.
3. The technical rules of pleading are not applicable in a proceeding of this character, and where a writ has been issued, and in response thereto the person detained has been brought into court, it is not the proper practice to demur to the petition for want of sufficient allegations. While a motion to quash the writ may be made on this ground, the better practice when the person detained is before the court, is to inquire into the cause of the restraint, and pass such order as the justice of the case requires.
4. No response will satisfy the writ unless accompanied with the body of the person held in custody, or unless a satisfactory reason for his nonproduction is given; and where, in a given instance, a writ has been issued, and the respondents have appeared at the time appointed in the writ, and a hearing is had, it will be presumed, nothing to the contrary appearing, that the person claimed to be illegally restrained of his liberty was before the court at that time.
5. Although a judge may have no authority to issue a writ directed to a person holding another in custody beyond

certain territorial limits, yet, where he does issue the writ thus directed, and the respondent obeys its mandate by producing into court the person detained, a plea that the court had no jurisdiction to issue the writ should be overruled, and the cause of the detention inquired into.

6. The judge of a city court, the jurisdiction of which extends over the whole of the county in which it is located, has power to grant the writ directed to any person having another in illegal custody within the territorial limits of the county, and to make it returnable to any place within the county, notwithstanding such person may be a non-resident of the county.
7. The fact that the application may show that the person held in custody is detained under a void sentence of the superior court would not prevent the judge of a city court having power to grant the writ from taking jurisdiction of the proceeding.
8. Where four sentences in misdemeanor cases are imposed against the same person on the same day, each one after the first providing that the term of service should begin to run at the expiration of the time fixed by those preceding, the convict is not entitled to be discharged from custody until he has served the aggregate time fixed by the four sentences.
9. Convicts cannot be worked in private chain gangs controlled by private individuals, and a convict confined on such a chain gang should be released from the custody of the individuals controlling it, and remanded to the custody of the authorities lawfully entitled thereto.
10. The fact that the averments of a petition for habeas corpus, which it is claimed show the detention to be illegal, are made "on information and belief," is no ground for quashing the writ or refusing to issue it. More especially is this so where the application is made by a person other than the one alleged to be restrained of his liberty.
11. While there is no precedent for issuing a writ of habeas corpus directed to a corporation as such, yet where a writ is directed to a corporation, "and its officers agents, and employees," and one or more of such persons respond by producing the body of the person detained, the irregularity in the address of the writ will be no ground for refusing to investigate the cause of the detention. The practice, however, of thus issuing the writ, is not to be commended; but

*Headnotes by COBB, J.

NOTE.—As to right to hire out convicts, see also cases in note to *Topeka v. Boutwell* (Kan.) 27 L. R. A. 593.

For commitment of convicts to custody of unofficial institutions, see also *Senate of Happy Home Club v. Alpena County* (Mich.) 23 L. R. A. 144, and *Farmer v. St. Paul* (Minn.) 33 L. R. A. 189.
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It should be directed to the individual having the actual physical custody and control of the person detained, and, if this cannot readily be ascertained, then to someone who is manifestly a party to the detention, and aids and abets it.

(March 13, 1903.)

ERROR to the City Court of Cartersville in and for Bartow County to review a judgment dismissing an application for a writ of habeas corpus to secure the release of Wess Simmons from custody in which he was alleged to be illegally detained. *Reversed.*

The facts are stated in the opinion.

Mr. J. B. Conyers for plaintiff in error.

Messrs. John W. Akin and Paul F. Akin, for defendant in error:

In civil cases a defendant may demur, plead, or answer, and these defenses must be determined in the order named.

Ga. Civ. Code, 5047.

One ground of demurrer is founded upon the want of jurisdiction of the court.

Ga. Civ. Code, 5048.

Motion to quash the writ may be made.

9 Am. & Eng. Enc. Law, p. 202, note b.

The superior court has greater jurisdiction than the city court. It is superior to the city court, and its decrees cannot be reversed by the latter court.

Pitts v. Hall, 60 Ga. 391; *Forston v. Elbert County* (Ga.) 43 S. E. 492; *Perry v. McLendon*, 62 Ga. 605; *Maxwell v. Tumlin*, 79 Ga. 570, 4 S. E. 858.

Jurisdiction cannot be given by consent.

Ga. Civ. Code, 5079.

If the case has no jurisdiction it will be dismissed.

Powell v. Cheshire, 70 Ga. 357, 48 Am. Rep. 572.

Jurisdiction of the subject-matter cannot be waived.

Watson v. Pearce, 110 Ga. 320, 35 S. E. 316.

A proceeding by habeas corpus is a civil proceeding to enforce a civil right.

9 Am. & Eng. Enc. Law, p. 164; 15 Am. & Eng. Enc. Law, p. 157, and notes 4, 5; Church, Habeas Corpus, § 88; *Ex parte Tom Tong*, 108 U. S. 556, 27 L. ed. 826, 2 Sup. Ct. Rep. 871, Affirmed in *Kurtz v. Moffitt*, 115 U. S. 494, 29 L. ed. 459, 6 Sup. Ct. Rep. 148.

There is no allegation in plaintiff's petition that defendant resides in Bartow county.

Etowah Milling Co. v. Crenshaw, 116 Ga. 406, 42 S. E. 709.

Mr. Sam P. Maddox also for defendant in error.

Cobb, J., delivered the opinion of the court:

Winnie Simmons presented to the judge of the city court of Cartersville a petition for habeas corpus, alleging substantially the following: Petitioner's husband, Wess Simmons, is now, and has been for more than twelve months past, confined in a chain gang in Bartow county, which is maintained and operated, "as your petitioner is

informed, believes, and alleges," by the Georgia Iron & Coal Company, a private corporation doing a mining business in that county. On November 8, 1901, four separate misdemeanor sentences were pronounced against petitioner's husband by the superior court of Bartow county; the first two imposing an alternative sentence of twelve months' labor in the chain gang on the public works, and the last two each imposing an alternative of six months' labor in such chain gang. Each sentence after the first provided that it was to commence at the expiration of the terms fixed in the previous sentences. Being unable to pay the fines imposed in the judgments referred to, the convict was, on November 9th, delivered to the corporation above named, which corporation, by its agents, servants, and employees, placed him in a chain gang, where he has been confined at hard labor, except when he was wholly unable to work. Petitioner does not know, of her own knowledge, whether this chain gang is a legal place of confinement, or not, but, upon information and belief, alleges that the county commissioners, acting through the solicitor general, made a contract with the corporation by which it was to pay the commissioners a stated sum per month as hire for the convict for a term of three years from his reception by the corporation under the several sentences of the court referred to. Petitioner also alleges, upon information and belief, that the servants, agents, and employees controlling and operating the chain gang are in the employ of the corporation, and are paid for their services by it, and that her husband is not now confined in a chain gang on the public works, as the law contemplates, but that he is illegally detained and confined in a chain gang unauthorized by the laws of Georgia, under a contract made as aforesaid, which contract petitioner alleges, upon information and belief, is illegal and unauthorized by law. Petitioner also shows, upon information and belief, that the superior court of Bartow county had no legal right to suspend the operation of three of the sentences pronounced against her husband; that, while § 1041 of the Penal Code of 1895 authorizes this to be done in felony cases, there is no authority of law for such action in misdemeanor offenses. Petitioner alleges that the sentences referred to run concurrently, and that after the lapse of twelve months all are satisfied. Petitioner does not attach a copy of the contract with the corporation and the county commissioners, because she does not know whether such contract was in writing or parol. The prayer was that the writ of habeas corpus be issued, directed to the "Georgia Iron & Coal Company, a corporation as aforesaid, and its officers, agents, and employees who have the charge and custody of said Wess Simmons." The writ was issued, and directed to the corporation, "its officers, agents, and employees." It was served upon a named person as superintendent and agent of the corporation. At the time set for a hearing, the respond-

ents appeared and filed what they termed a demurrer to the petition, on the grounds that the judge of the city court had no jurisdiction to hear and determine the petition, or to grant the relief prayed for; that "no cause of action is set forth in the petition," and no jurisdiction of "this defendant" is shown by the petition. The petitioner objected to the consideration of the demurrer, on the ground that, the writ having been issued, it was incumbent upon the respondents to file an answer to the same, and that the petition was not subject to attack by demurrer. The judge overruled this objection, heard argument on the demurrer, and sustained the same. To these rulings the petitioner excepted.

1. Questions growing out of an alleged illegal restraint of a person's liberty are always questions of much delicacy and importance. They impose upon the judiciary the duty of instituting a careful and painstaking investigation into the cause of the detention, and, if it be shown to be illegal, the courts should not be too astute in finding technical objections to the manner in which the legality of the restraint is called in question. On account of the character and importance of the questions made by the record, it is necessary to make some inquiry into the nature and object of the writ of habeas corpus, and the proceedings upon which it is issued. Many are accustomed to regard the writ as almost obsolete and of little practical value, and this results, doubtless, from the fact that it is so seldom called into operation. But the writ is as much a palladium of liberty to-day as it was during the abuses existing in the days of the ancient English sovereigns. It is to the credit of an advanced civilization that the necessity for the issuance of the writ rarely ever arises, but the Constitution of this state declares that the privilege of the writ shall never be suspended, and it stands to-day, as it did in the days of King Charles, to protect and safeguard the liberty of the citizen. The origin of the writ has been left in some obscurity. There is ample evidence, however, that it was in use before the days of Magna Charta. See 2 Spelling, Extr. Relief, §§ 1154, 1157; 15 Am. & Eng. Enc. Law, 2d ed. pp. 128, 129. The common-law writ became so little respected that it no longer afforded real or substantial benefits to English subjects, and it was not until after the passage of Stat. 31 Chas. II., known as the "habeas corpus act," that the writ came to be thoroughly reorganized in its fullest scope. This act, by virtue of our adopting statute, became a part of the law of this state. See Schley's Digest, p. 262; Cobb's Digest, p. 1131. Numerous changes have since been made in the act by statutes passed since its adoption. See Cobb's Dig. 543; Penal Code 1895, §§ 1210 *et seq.* The writ with which we are now dealing was the one known to the common law as the "habeas corpus ad subjiciendum," and was issued in cases of illegal detention. 3 Bl. Com. p. 131. The proceeding by habeas corpus was, strictly speaking,

neither a civil nor criminal action. "It was not a proceeding in a suit, but was a summary application by the person detained. No other party to the proceeding was necessarily before or represented before the judge except the person detaining, and that person only because he had the custody of the applicant, and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. It was, as Lord Coke described it, *festinum remedium*." Church, Habeas Corpus, § 88, p. 140. See also, in this connection, 3 Bl. Com. p. 131; 2 Spelling, Extr. Relief, § 1152. The act of Charles II. certainly did not change the nature of the proceeding, or the practice of the courts in granting the writ. See Church, Habeas Corpus, § 100. On the contrary, it was designed to correct the imperfections of the common-law writ, and make it a speedy remedy for a person to regain his liberty when illegally detained by another. It seems to have been doubted whether, under the common law, the writ could be issued in vacation, and this was doubtless one of the reasons which brought about the passage of the act. See, in this connection, 3 Bl. Com. 131; 4 Bacon, Abr. pp. 568, 593; Church, Habeas Corpus, § 171; 15 Am. & Eng. Enc. Law, 2d ed. p. 129. The great purpose of this act, therefore, was to make the remedy speedy and effective. The proceeding is sometimes characterized as a "cause" or "action," but erroneously so; and it has been called a civil or criminal proceeding, according to whether the person is held in custody on a criminal charge, or by private restraint. While instances may arise where it is important to determine whether it is a civil or criminal proceeding, it can never be accurately characterized as a technical suit or action. See, in this connection, 15 Am. & Eng. Enc. Law, pp. 157, 158; 2 Spelling, Extr. Relief, § 1161. It may be analogized to a proceeding *in rem*, and is instituted for the sole purpose of having the person restrained of his liberty produced before the judge, in order that the cause of his detention may be inquired into, and his status fixed. The person to whom the writ is directed makes response to the writ, not to the petition. 9 Enc. Pl. & Pr. p. 1035. When an answer is made to the writ, the responsibility of the respondent ceases. See, in this connection, *Barth v. Chase*, 12 Wall. 400, 20 L. ed. 393. The court passes upon all questions, both of law and fact, in a summary way. The person restrained is the central figure in the transaction. The proceeding is instituted solely for his benefit. It is not designed to obtain redress against anybody, and no judgment can be entered against anybody. There is no plaintiff and no defendant, and hence there is no suit, in a technical sense. The judgment simply fixes the status of the person for whose benefit the writ was issued; and, while anyone disobeying the judgment may be dealt with as for a contempt, the judgment does not fix the rights of anyone interested, further than to declare that the person detained must be restored to liberty.

The respondent, in his answer to the writ, seeks simply to justify his conduct, and relieve himself from the imputation of having imprisoned without lawful authority a person entitled to his liberty. He comes to no issue with the applicant for the writ. He answers the writ. The applicant may traverse the answer, and thus take issue with the respondent as to the truth or legal effect of the facts which he sets up. If, upon an investigation into the matter, it appears that the detention was without color of authority the person detained will, of course, be discharged; and he may bring a civil action for damages, or prosecute the person by whom he was restrained of his liberty for false imprisonment. But the proceeding itself is not in any sense a suit between the applicant and the respondent. Our habeas corpus law, as above stated, is made up partly of the common law and partly of the statute of Charles, with the changes that have been made from time to time by the general assembly. Such portions of this law as are material in the present investigation will be referred to in the appropriate places. It is certain that there is nothing in the law which takes away any of the substantial benefits of the English statute, or modifies it in any material respect.

2. But while the writ of habeas corpus is a "writ of right," it did not, either under the common law or the statute of Charles, issue as a matter of course, but only on probable cause shown. It was, under the English practice, incumbent upon the party moving for the writ to make a *prima facie* showing, under oath, authorizing the discharge of the person restrained of his liberty. 4 Bacon, Abr. p. 568; 1 Tidd, Pr. p. 346. And this is also the rule in the courts of America. Church, Habeas Corpus, § 92; 25 Am. Digest, Cent. ed. cols. 995, 996, § 55; 2 Spelling, Extr. Relief, §§ 1193, 1318. Penal Code, § 1211, provides how such an application shall be made, and what shall be its contents, and the application must state, among other things, "the cause or pretense of the restraint, and, if under pretext of legal process," a copy of the process, if possible, must be annexed to the petition; and the application must contain "a distinct averment of the alleged illegality in the restraint, or the reason why the writ of habeas corpus is sought." When Judge Montgomery, in *Broomhead v. Chisolm*, 47 Ga. 392, used the language that every judge whose duty it is to grant the writ "must do so when any person shall apply for it," he, of course, did not mean to say that the application need not state sufficient facts to authorize the writ to issue, and the application with which the learned judge was dealing in that case met unquestionably the requirements of the rule just referred to. Mr. Justice Bleckley, in *Perry v. McLendon*, 62 Ga. 604, says that the writ should be issued, "provided the petition contains the requisite matter, is in due form, duly authenticated, duly presented, and does not show on its face that the imprisonment, though

complained of as illegal, is in fact legal." It is therefore the duty of the court in every case, before issuing the writ, to inspect the application, to see if it contains sufficient averments and is properly verified. If it lacks these essential requisites, he should decline to issue the writ. If it does not, it is "his duty to grant it," and for a failure to do so the law imposes a penalty upon him. Penal Code 1895, § 1234. The provisions of the section just cited as to the imposition of a penalty and the character of the penalty are, in substance, what was provided in the act of Charles II. Cobb's Digest, p. 1131, § 10; Schley's Digest, p. 275. But we know of no law which authorizes either the person against whom the writ is prayed, or anyone else, to come into court and object to the issuance of the writ. There is no precedent for an objection of this character. It is a matter to be determined solely by the judge. And even after the writ has issued, and the respondent has appeared in answer to it, the sufficiency of the petition cannot be tested by a demurrer, though it seems that a motion may be made to quash the writ because of insufficient averments in the petition. 9 Enc. Pl. & Pr. 1021; 2 Spelling, Extr. Relief, § 1335. Mr. Church, however, in his work on Habeas Corpus, § 156, p. 241, states that a motion was made to quash the writ on the ground that it had been issued improvidently, before Justice Wilson, of the Queen's bench, in Canada, and the justice stated: "Even if it were clear to me that I have the power, I do not know that I would exercise it, now that the writ has been returned and filed, and the prisoner is here awaiting my judgment." See *Re Ross*, 3 Practice Rep. 301. So, states the author, instead of quashing the writ on motion made for that purpose, he discharged the prisoner on defects in the warrant returned. This practice commends itself very strongly to our minds. When the writ has been answered, and the prisoner produced, why fritter away his rights with technical niceties and rules of pleading? Let it be granted that the writ ought not to be issued until probable cause is shown, when it is issued, even though improvidently, if it accomplishes its purpose and results in the production of the person detained, why remand to the place from whence he came a man deprived of his liberty without any color of legal authority, because, forsooth, the petition is defective in form, or even in substance? The writ of habeas corpus is a writ of right, and its beneficial effects ought not to be dissipated by subtle objections and technical niceties. Of course, if the petition clearly shows on its face that the detention is lawful, there is nothing to investigate. But if it is merely lacking in that fullness which the statute and good pleading require, and shows that a claim is made by the applicant that the detention is illegal, the writ ought not to be quashed after the person detained has been brought into court, but an inquiry into the cause of the detention ought to be instituted. Especially ought this rule to be applied

where the petition is made by a person other than the party restrained of his liberty. Let the party detained be given an opportunity to show that his detention is not lawful. It may be said that in the administration of the law due forms must be observed. This is true, but this writ was framed to meet an emergency and for a special purpose, and was intended to be used in a summary and speedy manner, and its beneficent purposes and wholesome effects must not be lessened by legal refinements. See, in this connection, *Broomhead v. Chisolm*, 47 Ga. 390.

4. As will be noted, the argument just made presupposes that the person alleged to be illegally restrained of his liberty is produced into court in response to the writ. In the present case the record does not disclose affirmatively that the person held in custody was brought into court. But the record does show that the writ was issued, that the party served with the writ appeared, and that a hearing was had. Under the common law no answer would satisfy the writ, "but to return the cause with *paratum habens corpus*," etc. Church, *Habeas Corpus*, § 107; 4 Bacon, Abr. 570; 2 Spelling, Extr. Relief, §§ 1322, 1329. As shown above, the statute of Charles II. did not change the practice and procedure which was of force under the common law, and, so far as respects the matter just referred to, no change has been made by any of the statutes of this state. And hence it is that, as the answer of the respondent must be made to the writ, his return will be insufficient unless he produces therewith the body of the person alleged to be in his custody, if it be in his power to do so. It is therefore the duty of the judge to decline to proceed with the hearing until the body of the person is produced, or a satisfactory reason given why it could not be done. While no formal answer was made to the writ in the present proceeding, there was a hearing on the writ. The respondents appeared and filed what they called a demurrer to the petition; and we think we are bound to presume that the mandate of the writ, that the body be produced, was complied with before the respondents were heard to urge any reasons why the prisoner ought not to be discharged on the showing made by the applicant. Until the prisoner was produced, the court had no authority to hear from the respondents, but should have issued an alias writ or an attachment for contempt, in its discretion. See, in this connection, 2 Spelling on Extr. Relief, § 1338. Having entered into a hearing, it is to be presumed that the proceeding had reached a stage where it was proper to hear from the respondents, nothing to the contrary appearing in the record.

5. But it may be said that the rule that, after the prisoner is produced, the cause of his detention should be inquired into, although the writ may have been improperly or improvidently issued, ought not to be applied to an objection made to the jurisdiction of the court. But this is exactly the character of objection to which it was applied in *Broomhead v. Chisolm*, 47 Ga. 390.

In that case a petition for habeas corpus was presented to the judge of the city court of Atlanta, and he issued the writ. The person to whom it was directed answered by producing the person held in custody by him, and set up that such person was being detained by him beyond the city limits, and that for this reason the judge had no jurisdiction in the premises. In reply to the plea of jurisdiction, the court, through Judge Montgomery, said: "The respondent, before answering it, brought the person held in custody within the city limits, but claimed in his answer that he only brought him in, in response to the writ, and therefore the judge had no jurisdiction. What might have been the decision had the respondent declined to bring the prisoner within the city, we do not say. Having brought him before the judge in obedience to the writ, we are not disposed to scan too critically the mode in which he got there, but hold that, being there, the judge had authority to pass such order as the nature of the case required." The plain meaning of this decision is that, even conceding that the judge had no jurisdiction to issue the writ in the first instance, yet when he did so, and the respondent saw fit to answer and produce the person held in custody, the judge had power, and it was his duty, to inquire into the detention, and discharge the person if sufficient reason for so doing was made to appear. This decision was by a unanimous court, the point was directly made, and it is controlling authority on the question.

6. We think the judge of the city court had jurisdiction to issue the writ. The petition alleges that Simmons, the person alleged to have been illegally detained, was held in custody by the respondent, a corporation, or its officers and employees in Bartow county. The principal office of the respondent corporation is not situated in Bartow county, where the detention occurred. It is to be noticed that the so-called demurrer does not point out why the judge of the city court had no jurisdiction. But waiving these technical objections, the question is, Could the judge of the city court of Cartersville issue a writ of habeas corpus to a nonresident of Bartow county to bring up a person unlawfully restrained of his liberty in Bartow county under a sentence imposed by a judge of the superior court? A city court for Bartow county was created by an act of 1885, with jurisdiction over the whole county; and by § 23 of the act it was provided that "the judge of said city court shall have authority to grant writs of habeas corpus, except when the person detained of his liberty is charged with a capital felony." Acts 1884-85, p. 493. The statutory right of the judge of that court to issue the writ of habeas corpus must be derived solely from this act, as it is to be observed that § 1212 of the Penal Code of 1895 provides that the petition may be presented to the judge "of a city court established on the recommendation of a grand jury," or to

the judge of the superior court, making no mention of judges of courts of the character of the city court of Cartersville. So that if we are to be guided by the jurisdiction of the city court, in fixing the territorial jurisdiction of the judge of that court in habeas corpus proceedings, the judge manifestly had jurisdiction in this proceeding, so far as mere geographical limits are concerned. The place of detention fixes the jurisdiction of the habeas corpus judge, without reference to the residence of the person detaining. Expressions will be found scattered through our Reports to the effect that, when passing upon a petition for habeas corpus, the judge sits as a habeas corpus judge and as a special habeas corpus court, separate and distinct from the other court over which he presides at other times. See, in this connection, *Livingston v. Livingston*, 24 Ga. 379, 383; *Perry v. McLendon*, 62 Ga. 603; *Moore v. Roberson*, 63 Ga. 506; *Southern Exp. Co. v. Lynch*, 65 Ga. 245. In *Moore v. Roberson*, 63 Ga. 506, it was held that jurisdiction to issue writs of habeas corpus was conferred by the Code upon the ordinary, and not upon the court of ordinary, and that, as in such a proceeding the ordinary acts as a "special habeas corpus court," the Constitution of 1877, restricting the jurisdiction of courts of ordinary to "county matters," did not withdraw from the ordinary the statutory power to grant the writ of habeas corpus. But in *Barranger v. Baum*, 103 Ga. 471, 30 S. E. 524, some of the previous decisions are referred to, and it is distinctly ruled that there is no such thing in this state as a habeas corpus court, *eo nomine*, and that, when a judge of a superior court passes upon an application for habeas corpus, he is presiding in a cause pending in his court, and a writ of error will lie to the supreme court, under Civil Code 1895, § 5527. We will not now undertake to reconcile any apparent conflict in the two decisions last cited, even if the conflict is only apparent. We are satisfied that when a statute creates a court with jurisdiction over a given territory, and confers upon the judge of that court power to grant the writ of habeas corpus, the right to issue the writ is coextensive with the territorial jurisdiction of the court in other matters. There is no general law fixing the jurisdiction of a judge of a court of the character of the city court of Cartersville when sitting as a habeas corpus judge. The jurisdiction of a judge of the superior court is fixed by such a law, and extends over the territorial limits of his circuit, and a writ granted by him may be made returnable to any county in his circuit. Penal Code 1895, § 1212. The proceedings should be recorded in the county where the detention occurred. See Penal Code 1895, § 1232. Under the common law the writ was treated as a prerogative writ, and issued to any part of the King's dominions. Being a prerogative writ, it was not subject to the ordinary rule of writs "between part and party." 4 Bacon, Abr. p. 570; 3 Bl. Com. 131; 15 Am. & Eng. Enc. Law, 2d ed. p. 133. By the statute of 1895, § 1212, the writ was made returnable to the county where the detention occurred. See Penal Code 1895, § 1232. Under the common law the writ was treated as a prerogative writ, and issued to any part of the King's dominions. Being a prerogative writ, it was not subject to the ordinary rule of writs "between part and party." 4 Bacon, Abr. p. 570; 3 Bl. Com. 131; 15 Am. & Eng. Enc. Law, 2d ed. p. 133. By the statute of 1895, § 1212, the writ was made returnable to the county where the detention occurred. See Penal Code 1895, § 1232.

ute of Charles II. the writ was issued by the chancellor, lordkeeper, the justices of either bench, and the barons of the exchequer, and ran to any place in the Kingdom, or Wales, or the town of Berwick, and the Islands of Jersey and Guernsey. See Schley's Digest, 276, 277; Cobb's Digest, pp. 1131, 1133. So that, if we are to look to the section of the Penal Code and to the English law for an analogy, it would seem to be clear that, where the territorial jurisdiction of a judge to grant a writ of habeas corpus is not defined by statute, it is necessarily to be implied that the power extended at least to the geographical limits of the court over which he presided, and that the writ may be made returnable to any place within such jurisdiction. "There is no question of the authority of a state court, or judge who is authorized by the laws of the state to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits." Church, Habeas Corpus, § 108. See also 9 Enc. Pl. & Pr. p. 1025, and cases cited; *State v. Glenn*, 54 Md. 572, where it was held that, as the Constitution of that state provided that the privilege of the writ should never be suspended, and that the judges should be the conservators of the peace throughout the state, the legislature could not restrict the power of the circuit judges to grant the writ to their circuits, but it extended throughout the limits of the state. It has been held that the writ may be issued by judges of courts of general common-law jurisdiction, though no authority is given by statute. 15 Am. & Eng. Enc. Law, 2d ed. p. 145.

7. It is argued that the judge had no power to issue the writ, because it appeared that Simmons was held in custody by virtue of a sentence imposed by the superior court, but that the application should have been made to the judge of that court, to avoid an unseemly inference on the part of the city court judge in a matter over which the judge of a court of higher dignity than his court had previously had control. As stated above, the power to grant the writ was conferred upon the judge of the city court, not upon the court; and, although the proceeding was to be treated as one pending in the city court, it was nevertheless passed upon by Judge Foute as a habeas corpus judge, and not as city court judge. We are not aware of any difference in rank among the various judges of the state when acting as habeas corpus judges; and we see no reason, in principle, why one such a judge presiding in a city court might not discharge a person wrongfully held in custody under a void sentence imposed by the superior court. The sole question to be inquired into is, whether the detention is illegal, and, if it is, the prisoner ought to be discharged, without regard to who or what was the direct or indirect cause of the detention. The remarks of Judge Jackson in *Pitts v. Hall*, 60 Ga. 391, were purely *obiter*, even if they could be construed to express a contrary view to that above presented.

8. Did the petition state sufficient facts to authorize the writ to issue? One ground upon which the application bases the right to have the prisoner discharged is that four separate sentences for misdemeanor offenses were pronounced against him on the same day, and that, as he has been in custody a sufficient length of time to discharge the longest one of the four, he must be discharged. It appears that in imposing the sentences the judge provided that each one after the first should begin to run after the expiration of the previous sentences. They were therefore not concurring, but cumulative, and the prisoner would not be entitled to his discharge from legal custody until after he had served the aggregate time fixed by the four sentences. In *Fortson v. Elbert County*, 117 Ga. —, 43 S. E. 492, while it was held that the sentences were concurrent, and that for this reason the prisoner ought to have been discharged after having served the longest time fixed by any one of them, it was recognized that the rule would be otherwise where the sentences were cumulative, as appears in the present instance. While Penal Code 1895, § 1041, relates exclusively to felony cases, we entertain no doubt that the judge has power, under the common law, to impose cumulative sentences in misdemeanor cases. See 19 Enc. Pl. & Pr. p. 484.

9. The right to have the prisoner discharged is based on the further ground that he is held in custody, under a sentence of the superior court, in a private chain gang, under the control and management of private individuals, acting for a private corporation. In *Russell v. Tatum*, 104 Ga. 332, 30 S. E. 812, it was held that "convicts cannot be worked in chain gangs controlled by private individuals," and that where, on the hearing of a habeas corpus proceeding, it appeared that a prisoner was confined in such a chain gang, it was proper for the judge to remand him to the custody of the authorities of the county in which he was sentenced.

10. The fact that the allegations which it is claimed show that the custody of the prisoner is unlawful are charged "on information and belief" does not make the petition fatally defective. It must be borne in mind that the application was by a party other than the prisoner, and by one who, from the nature of the case, was not in a position to state with absolute certainty and definiteness all the facts upon which the prayer for the writ was based. The writ itself is inquisitorial. Its very object is to inquire into the cause of the detention, and to ascertain, when the judge has in his possession all the facts, after a response has been made to the writ, whether the detention is in fact illegal. While § 1212 of the Penal Code provides that there must be "a distinct averment of the alleged illegality in the restraint," and that the "cause or pretense of the restraint must be stated," it will not do, as shown above, to apply to a proceeding of this character the strict rules applicable to pleadings in suits between parties. The 61 L. R. A.

utmost liberality consistent with a due observance of the forms and substance of legal requirements should be allowed. The state is interested in seeing that no citizen is illegally deprived of his liberty, and the law is designed to encourage and make easy an expeditious inquiry into the cause of an imprisonment whenever its legality is brought in question. It is noticeable that the form given by Mr. Church for an application made by a person in behalf of another held in custody charges that, "to the best of your petitioner's knowledge and belief," the cause of the restraint is as follows, and that "he is advised by counsel," "and so believes," that the imprisonment is illegal. Church, Habeas Corpus, 875.

11. There is one other point, which, though not made in the record or suggested in the argument, we have thought it proper to notice, for the benefit of those who may in the future apply for the writ under similar circumstances as those appearing in the present proceeding. The petition prayed for the issuance of the writ to the "Georgia Iron & Coal Company, a corporation, . . . and its officers, agents, and employees who have the charge and custody of the said Wess Simmons." The writ was directed to the corporation, "and to its officers, agents, and employees." It was served upon the superintendent of the corporation. The writ must be directed to the person having the person in custody, whether he be an officer of the law or a private individual. 4 Bacon, Abr. p. 531; 15 Am. & Eng. Enc. Law, 2d ed. p. 194. "If this cannot readily be determined, it may be addressed to anyone countenancing or consenting to the illegal detention or restraint." Church, Habeas Corpus, § 106, p. 167. We find no precedent in the books, however, for directing the writ to a corporation; and from the very nature of the case, it would seem to be clear that it cannot be so directed. See, in this connection, *Hall & B. Woodworking Mach. Co. v. Barnes*, 115 Ga. 945, 946, 42 S. E. 276. A corporation is an artificial being,—an entity,—and it is not conceivable how it can restrain the liberty of anybody. It, of course, could authorize the detention, and would doubtless be liable in a civil action for so doing. But how could a judgment ordering a corporation to discharge a person wrongfully held in custody be enforced? The corporation could not be attached for contempt, and we do not think that an officer or servant of the corporation could be attached for refusing to obey a writ directed to the corporation. Restraining another's liberty is necessarily a matter of individual conduct and responsibility, and it would certainly be no defense, on an attachment for contempt against an individual, that the restraint was ordered by a corporation, or even by another individual. But these views are not of serious moment now, for, applying the rule of liberal construction heretofore referred to, we think the writ may be treated as directed to the individuals concerned in the illegal restraint of the prisoner. It was directed to the agents of

the corporation, and served upon one of such agents, who responded, and presumably brought the prisoner into court; and hence the irregularity in the address of the writ presented no obstacle to an inquiry into the cause of the restraint. But such a method of addressing a writ is irregular and improper. It should be directed to the individual having the actual physical custody

and control of the person detained, and if this cannot readily be done, where the application is made by a third party, to some one who is manifestly a party to the detention, and aids and abets it.

Judgment reversed.

All the Justices concur except **Lumpkin**, P. J., absent on account of sickness.

NORTH DAKOTA SUPREME COURT.

E. E. WHEELER, *Appt.*,
v.

Ed CASTOR *et al.*

(.....N. D.....)

*1. In this action, judgment was taken by default. The summons was served only on the defendant Castor, and the copy delivered to Castor was signed by one W. H. Smith, of Michigan, North Dakota as attorney for the plaintiff. But his initials (W. H.) were so obscurely, ambiguously, and illegibly written that the same could fairly be read as either B. M., B. M. A., or W. H. The defendant and his attorney, acting in good faith, construed the signature to be that of B. M. Smith, and defendant's attorney, in due course, made diligent efforts to serve no-

*Headnotes by WARNER, Ch. J.

NOTE.—Right to open default judgment to let in defense of statute of limitations.

The plea of the statute of limitations, like the plea of usury, at one time was regarded as unconscionable, technical, and not meritorious. The weight of authority now is that after a default is excused a plea of the statute of limitations will be regarded as a meritorious and an issuable plea. Some of the early English and New York cases held the contrary, but they have since been overruled, and it seems to be the practice in New York to allow such a plea after excusing a default, if the plaintiff has not been placed in a worse position by the delay. In Illinois, Arkansas, Maryland, and Texas it seems that, after a default the plea of the statute of limitations will not be regarded as meritorious. Where the default is irregular or a nullity the defendant is entitled, as a matter of right, to plead the statute as a bar. A distinction is made in the cases between the right to plead the statute after opening a default, and the right to plead it on leave being given to amend a plea. In the latter class of cases it seems that the plea will be denied. The cases denying the right to plead the bar of the statute frequently cite this latter class of cases without noticing this distinction.

In *WHEELER v. CASTOR* it was held that it was discretionary with the trial court whether or not a default should be set aside; and it was further held that, where the default was excused, and the only plea offered was the statute of limitations, it would be regarded as a meritorious plea; and that it was no abuse of the discretion of the trial court to allow the plea after the opening of the default. The court said: "We are constrained to hold that the statute of limitations can no longer be regarded with disfavor by the courts, and that as a defense it stands on a par with other legal and meritorious defenses."

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tice of appearance and obtain a copy of the complaint from B. M. Smith, of Michigan, North Dakota; but no copy of the complaint was obtained, and B. M. Smith was not found. The judgment was entered January 28, 1901, in Nelson county, and later a transcript was docketed in Towner county, and defendant first learned of the existence of the judgment from the record thereof in Towner county. On July 10, 1901, defendant served notice of a motion to vacate the judgment and, after hearing counsel, the district court, by its order, vacated the judgment, and, in effect, granted a new trial. The plaintiff appeals from said order. The motion papers embraced the record of the judgment, and, in addition to showing diligence and excusing defendant's failure to appear in the action, contained a proper affidavit of merits. The affidavit also contained a statement to the effect that the defendant had a good and valid defense to the cause of action

A motion was made to set aside a service of summons for a jurisdictional defect in service, and at the same time a counter motion was made for judgment in default, and both motions were overruled and the defendant was relieved from default and was allowed to file an answer in which he pleaded the statute of limitations as a defense. On motion the court struck out that defense on the ground that a default would not be set aside to permit a defendant to avail himself of the statute of limitations as a defense to an action. This was held to be error. *Garvie v. Greene*, 9 S. D. 608, 70 N. W. 847. The court said: "The modern doctrine seems to be that where a judgment entered by default is opened, or leave is granted to answer, after the expiration of the time limited by statute, plaintiff's case is subjected to all the defenses that would have been available had no default ever existed. . . . Manifestly a party has a vested statutory right to set up and rely upon all legal defenses, including the statute of limitations, whenever and wherever available as such, and courts ought not to discriminate against such plea in considering an application for relief from default."

In an action of assumpsit the defendant was in default. The 10th court rule provided that a defendant in default shall, if required by plaintiff, show, by affidavit or otherwise, that he has a meritorious defense; and that he shall then plead issuably and proceed to trial. The defendant obtained leave to plead on terms, and, having filed the necessary affidavit of a meritorious defense, he pleaded *non assumpsit* and the statute of limitations. On a motion to strike out the plea of the statute of limitations, it was held that the same was within the definition of an issuable plea, and that it was a meritorious defense. *Wood v. Ward*, 1 Ohio Dec. Reprint, 589. The court said: "What right, however, has a court, appointed to ad-

- stated in the complaint, *viz.*, that said cause of action was barred by the statute of limitations. No proposed answer was served. *Held*, for reasons stated in the opinion, that the order appealed from was properly made.
2. **Held, further, that, in addition to a sufficient technical affidavit of merits,** the moving party (appealing to the favor) must set out a defense which goes to the merits of the action, and that strict practice requires that such showing of merits should be made by a proposed answer, verified, served, and filed with the motion.
 3. **Held, further, that, where a valid defense to the merits of the action is set out by affidavit, it is discretionary with the trial court to accept such affidavit in lieu of a verified answer.**
 4. **Held, further, that in this class of cases the burden is upon the moving party to show diligence in seeking relief, and a failure to do so is fatal to the application.**

5. **Held, further, that where the application is made under § 5298, Rev. Codes 1899, it is addressed to the sound judicial discretion of the trial court, and in such cases the order of the court below will not be disturbed unless it clearly appears that the same involves an abuse of discretion.**
6. **Held, further, that such orders are seldom disturbed by a reviewing court where the court below, in granting relief, directs a trial anew on the merits.**
7. **Held, further, that the statute of limitations is not, under modern authority, regarded with disfavor by the courts, but is regarded as a plea of equal merit with other lawful defenses to an action.**

(November 6, 1902.)

A PPEAL by plaintiff from an order of the District Court for Nelson County set-

minister justice according to law, to declare the law unjust, iniquitous, unconscionable? The law is made by another body, to which is delegated this all-important power of declaring what shall be, and what shall not be, the law of the land; the law by which all rights shall be acquired, prosecuted, or extinguished. Upon the courts devolves, solely the function of administering, of distributing justice according to those laws. For a court, therefore, to assume to declare the policy of a statute immoral, or a defense authorized by a statute unconscionable, is to libel the general assembly enacting the law; is to charge it with enacting laws authorizing parties to interpose unjust, iniquitous, dishonest, unconscionable defenses. For surely if the defense is unconstitutional after a default, it must be equally so before; and hence is unjust, dishonest, unconscionable in all cases. If all this is true, it may be a very good ground for repealing the law; but I have yet to learn that expediency is any ground for a court's refusing to execute a law."

So, in *Hane v. Goodwyn*, 1 Brev. 461, on a motion to set aside an order for judgment and for leave to plead *non assumpsit* and the statute of limitations, it was held that the plea was issuable within the rule of court, and not necessarily unconscionable, and should be allowed.

And the refusal to impose a condition that the defendant should not plead the statute of limitations was held to be the proper practice where judgment by default was taken, and the negligence of the defendant was excusable in that he was informed by the clerk that no business would be transacted by the court until after a certain date, before which day a default had been taken. *Anaconda Min. Co. v. Salle*, 16 Mont. 8, 39 Pac. 909. The court said: "The statute of limitations is a defense to which all men are entitled as a right. The views of courts, since statutes of limitation were first considered, have changed. Originally it was regarded as a statute of repose, and not one of presumption. This view changed, and the statute was regarded as one of presumption, and not of repose. The views changed again, the modern doctrine is that it is a statute of repose."

And in *Freeman v. Hill*, 45 Kan. 435, 25 Pac. 870, judgment had been taken on the pleadings, and there were three causes of action,—one on the bond, one for attorneys' fees, and one for a pump. The judgment was set aside, and the defendant filed an answer pleading, among other things, the statute of limitations. It was held that the court properly set aside the judgment rendered upon default, and al-

lowed the plea of the statute of limitations. The application to set aside the judgment was made at the same term the judgment was rendered. The court said: "There was no error in permitting Hill to plead the statute of limitations. . . . Under some of the decisions, where statutes of limitation were regarded as statutes of presumption only, an answer pleading such statutes was not considered meritorious or treated with favorable consideration. In this state, however as statutes of limitation are statutes of repose, such a rule does not apply."

And where the attorney for the defendant informed his client that the action was dismissed, but in fact a judgment had been rendered, and the client was present attending court, it was held that the judgment of default was properly vacated. The answer pleaded the statute of limitations and fraud in the procurement of the note sued upon. *Searles v. Christensen*, 5 S. D. 650, 60 N. W. 20. The court said: "We are not disposed to examine it very critically, for, upon the facts disclosed, we think that substantial justice requires that defendant have an opportunity to be heard in court, and present his defense to the note. If he has a good defense, he is entitled to have the court so decide. If not, no serious harm can result to the plaintiff."

In *Sossong v. Rosar*, 112 Pa. 197, 3 Atl. 768, the court said: "It is a very long time since this court ceased to regard the plea of the statute of limitations as an unconscionable plea. As long ago as in 1842 we said, *Gibson, Ch. J.*, in *Ekel v. Snevily*, 3 Watts & S. 273, 38 Am. Dec. 758: 'It was said in *Brown v. Sutter*, 1 Dall. (Pa.) 239, that a judgment will not be opened to let in the statute of limitations; but, as the plea of that statute has since been considered in *Shock v. McChesney*, 4 Yeates, 507, 2 Am. Dec. 415, and *Farmers' & M. Bank v. Israel*, 6 Serg. & R. 294, to be no longer an unconscionable one, the rules of practice would scarce be held so now.'"

In *Maddocks v. Holmes*, 1 Bos. & P. 228, on a motion for rule nisi to set aside a regular interlocutory judgment, which had been signed for want of a plea, on terms of pleading instantly, the motion was opposed unless defendants should be restricted from pleading the statute of limitations, and *Willet v. Atterton*, 1 W. Bl. 35, was cited to show that the court never let in that plea when they set aside a regular judgment; but it was held that the plea of the statute of limitations was not necessarily unconscionable and the rule was made absolute. The court said: "Of late it has been consid-

ting aside a default judgment in his favor. *Affirmed.*

The facts are stated in the opinion.

Messrs. Cochran & Corliss, with Mr. Henry G. Middaugh, for appellant.

Messrs. Brooke & Kehoe, for respondents:

When a party makes a showing of mistake, inadvertence, surprise, or excusable neglect, and applies promptly for relief after he has notice of the judgment, and shows by his affidavit of merits that prima facie he has a defense, and that the application is made in good faith, a court should not hesitate to set aside a default.

Griswold Linseed Oil Co. v. Lee, 1 S. D. 531, 47 N. W. 955; 3 Wait, Pr. pp. 665, 666; *Security Bank v. National Bank*, 2 Hun, 287; *New York v. Hollister*, 2 Hilt. 588; *Hill v. Crump*, 24 Ind. 291; *Bertline v. Bauer*, 25 Wis. 486; *Stafford v. McMil-*

lan, 25 Wis. 566; *Lynde v. Verity*, 3 How. Pr. 350; *Davenport v. Ferris*, 6 Johns. 131; *Tallmadge v. Stockholm*, 14 Johns. 342; *Packard v. Hill*, 4 Cow. 55; *Wieland v. Skillock*, 24 Minn. 345; *Gracier v. Weir*, 45 Cal. 53; *Farrar v. Consolidated Apes Min. Co.* 12 S. D. 237, 80 N. W. 1079.

Where the affidavit of merit states the nature of the defense, the service of the proposed answer will be excused.

Albert Palmer Co. v. Van Orden, 4 N. Y. Civ. Proc. Rep. 44.

A litigant relieved from default should be restored to his former right to plead and rely upon all the defenses he may have, legal, equitable, or both, and he may be relieved for the sole purpose of pleading the statute of limitations.

Garvie v. Greene, 9 S. D. 608, 70 N. W. 847.

The court should not undertake to say

ered as a fair plea in the King's bench (Rucker v. Hannay, 3 T. R. 124), though formerly it had been thought otherwise."

In New York some of the early cases held that the plea of the statute of limitations was unconscionable and on the same footing as a plea of usury; but these cases have been, in effect, overruled, and it is now held in that state that the plea of the statute of limitations may properly be allowed after setting aside a default, where the plaintiff will not be placed in any worse position than he would if the statute had been pleaded in time.

So, where a default was excused it was held that the court would not impose a condition that the defendant shall not plead the statute of limitations. *Gourlay v. Hutton*, 10 Wend. 595.

In *Fox v. Baker*, 2 Wend. 244, on a motion to set aside an inquest taken at the circuit, where the defendant's attorney denied having received notice of trial, but the service was satisfactorily shown, and the defendant swore to merits, the inquest was set aside, and the condition was imposed on the defendant of withdrawing the plea of the statute of limitations in analogy to the practice on opening a default and permitting the defendant to plead.

Referring to this case in *Lovett v. Cowman*, 6 Hill, 223, the court said: "In *Fox v. Baker*, 2 Wend. 244, the defendant was required to withdraw such a plea as one of the conditions for obtaining relief from an inquest, although he denied having received notice of trial. That was, I think, going too far. We have not of late been in the habit of imposing such hard terms where the defendant seeks to get rid of an accidental default. In *Gourlay v. Hutton*, 10 Wend. 595, a default was set aside without restricting the defendant from pleading the statute. A distinction was taken between opening a default when sufficiently excused, and permitting the defendant to add a plea. And see *Allen v. Mapes*, 20 Wend. 633."

In *Hawes v. Hoyt*, 11 How. Pr. 454, on a motion to set aside a judgment and subsequent proceedings, and for permission to defend, it was held that justice would not be furthered by allowing a plea of the statute of limitations.

This case was criticised in *Bank of Kinderhook v. Gifford*, 40 Barb. 659, where it was said that "courts have steadily found upon the spirit of these enactments, and, as to the usury and the statute of limitations, have uniformly held that after plea pleaded, an answer or pleading could never be amended so as to pre-

sent either defense. . . . Some decisions are found to go yet further, and to hold that, on setting aside a default, it should be on condition that neither statute should be pleaded. *Hawes v. Hoyt*, 11 How. Pr. 454; *Toole v. Cook*, 16 How. Pr. 142 [usury]; both by the same judge. 'But the weight of authority is decidedly the other way; holding that on opening a default properly excused the court will not impose as a condition that the defendant shall not set up what is termed a hard or unconscionable defense, as usury, or the statute of limitations. *Gourlay v. Hutton*, 10 Wend. 595. . . . There should be no selection or choice by the courts as to what law should be enforced, or what should be evaded or nullified; what should be favored, and what should be treated with disfavor."

In *Allen v. Mapes*, 20 Wend. 633, Overruling *Fox v. Baker*, 2 Wend. 244, the court said: "It is, no doubt, the constant practice in these appeals to the equity powers of the court to impose such terms on granting relief as the special circumstances of the case may seem to require; and where a defendant had let slip the opportunity of pleading what has sometimes been called an unconscionable defense, as the statute of usury or of limitations, leave to plead anew has been denied. . . . The nature of the defense should never be taken into consideration in granting applications of this kind, except under very special circumstances."

In *Benedict v. Arnoux*, 85 Hun, 283, 32 N. Y. Supp. 305, which did not disclose the defense offered on a motion to set aside a default, the court said: "It is claimed, however, upon the part of the plaintiffs, that the proposed defense is an unconscionable one, whatever that may mean. The court of appeals has held that all defenses which are defenses are entitled to the same consideration by the court, and that a defense is a defense whatever may be our private feelings in respect to it."

The title of the case in the court of appeals is not given, but was probably *Cope v. Wheeler*, 41 N. Y. 303, which held that "the defense of usury, while the statute against usury remains, is entitled to the same consideration as any other defense. It cannot be disregarded, or treated as unconscionable, and subjected to more strict rules of construction than other defenses."

In *Morris v. Slatery*, 6 Abb. Pr. 74, which held a default would not be opened to allow a defense of usury, the court said: "The cases

that certain defenses provided by law are hard and unconscionable, and therefore undertake to legislate against them.

Bank of Kinderhook v. Gifford, 40 Barb. 659; *Freeman*, Judgm. 1881, 545.

All defenses which are defenses are entitled to the same consideration by the court; and a defense is a defense, whatever may be our private feelings in respect to it.

Wilmerding v. Jarmulowsky, 85 Hun, 285, 32 N. Y. Supp. 983; *Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29; *Sheldon v. Adams*, 41 Barb. 54; *Freeman v. Hill*, 45 Kan. 435, 25 Pac. 870.

The operation of the statute of limitations, even as an obstacle to just claims, is not to be condemned or hindered.

A'Court v. Cross, 3 Bing. 329; *Bell v. Morrison*, 1 Pet. 360, 7 L. ed. 178; *Hawkins v. Barney*, 5 Pet. 457, 8 L. ed. 190; *Bradstreet v. Huntington*, 5 Pet. 402, 8 L. ed. 170; *Leffingwell v. Warren*, 2 Black, 606, 17

L. ed. 263; *Taylor v. Holmes*, 14 Fed. 498; *Campbell v. Haverhill*, 155 U. S. 617, 39 L. ed. 282, 15 Sup. Ct. Rep. 217; *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Mo-Queen v. Babcock*, 3 Abb. App. Dec. 129; *Acker v. Acker*, 81 N. Y. 148.

An application to open or vacate a judgment is addressed to the sound discretion of the court, and its exercise will not be disturbed on appeal, unless clearly apparent that the court has abused its discretion.

15 Enc. Pl. & Pr. pp. 281, 282; *Willett v. Millman*, 61 Iowa, 123, 15 N. W. 866; *Westphal v. Clark*, 46 Iowa, 262; *Independent School Dist. v. Schreiner*, 46 Iowa, 172; *D. M. Osborne & Co. v. Columbia County Farmers' Alliance Corp.* 9 Wash. 666, 38 Pac. 160.

Wallin, Ch. J., delivered the opinion of the court:

The record in this action shows that on

at law in our own courts to which I have been referred are *Jackson v. Varick*, 2 Wend. 294; *Fox v. Baker*, 2 Wend. 244; *Gourlay v. Hutton*, 10 Wend. 595; *Allen v. Mapea*, 20 Wend. 633; *Lovett v. Cowman*, 6 Hill, 224; and *Wolcott v. McFarlan*, 6 Hill, 227. Several of the cases relate to the statute of limitations; and, if it is settled that a defendant, upon being let in, will not be compelled to abandon a plea of the statute, it is equally clear he will not be allowed to amend, by pleading it *de novo*."

Where the propriety of opening a default in chancery was not disputed, it was held that the condition that the defendant shall not attempt to avail himself of the statute of limitations as a defense should not be imposed where there was no showing made by complainants that they would be in any worse condition than they would have been in had the answer been filed in due season. *Douglas v. Douglas*, 3 Edw. Ch. 300.

But in Illinois, Arkansas, Maryland, and Texas it seems that the courts do not regard a plea of the statute of limitations as a meritorious one, and that the refusal of such a plea on opening a default will not be held error. But in Arkansas this rule is held not to apply where the default judgment is a nullity.

So, where default was taken in assumpsit, and evidence was taken, and damages assessed, and leave was given to the defendant to plead to the action upon the condition that the judgment stands, it was held that the court properly refused to allow the plea of the statute of limitations to be filed, as, after the plaintiff closed her case, it was too late. *Dulle v. Lally*, 64 Ill. App. 292. In this case the court said: "There is, however, another view to be taken of the matter of the offer to file that kind of a plea. It is in its nature a plea that does not go to the merits of the cause of action. A judgment had already been recovered against the appellant, and was still in force. The trial then proceeding was to ascertain what the merits of that judgment were. There is no rule of law or practice that requires a court to set aside a judgment that has been lawfully rendered, except where it is made to appear that justice will be defeated if it be not done; and even if, under ordinary circumstances, the plea of the statute of limitations should have been permitted to be interposed under the exercise of a judicial discretion, yet when, as here, the object of this second trial was to discover if the actual merits of the case required the vacation of that former judgment, 61 L. R. A.

we do not think such a plea should have received any favor."

In *State v. Jennings*, 10 Ark. 438, the court said: "In no case have we found an authority where the defendant is in default, and must show that he has a meritorious defense, that the plea of limitations has been considered such."

In *Nelson v. Bond*, 1 Gill, 218 it was insisted that the rule to plead was extended, and thereby gave the defendant liberty to file a plea of the statute of limitations. The court said: "This would be rather a strange effect resulting from the plaintiff's courtesy to the defendant if it conferred upon him a right which he had lost by his default; to wit, to plead any other plea than one to the merits. To adopt such a construction of the rules of court would be to change the long-established practice in most of the judicial districts in Maryland, a change which might not tend to promote the ends of justice."

In *Wood v. Ward*, 1 Ohio Dec. Reprint, 589, it was said that the cases of *Nelson v. Bond*, 1 Gill, 218; and *State v. Jennings*, 10 Ark. 428, go upon the ground that the defense of limitations is neither honest, nor meritorious, and hence are predicated upon the ethics, and not upon the law, of the court making the decision.

In *Foster v. Martin*, 20 Tex. 119, on a motion to set aside a judgment by default, where the failure to answer was caused by inadvertence of counsel, it was held that the judgment should not be set aside in order to let in the defense of the statute of limitations, where there were no circumstances which rendered such defense equitable.

In this case the court said: "The motion to set aside the judgment was in the nature of a motion for a new trial. To entitle the defendant to have the judgment set aside as a matter of legal right, he should have brought his application substantially within the rules governing the granting of new trials. He should have made his application within the time prescribed, or shown some sufficient excuse for his neglect. His application should have shown a sufficient excuse for his failure to appear and make his defense to the action within the time allowed for pleading, and also that he had a meritorious defense. The application is deficient in all these particulars. It was not filed in time. Hart. Dig. art. 768. It states no sufficient excuse for his failure to make his defense (*Wright v. Thomas*, 6 Tex. 420); nor does it disclose merits. It is not enough to

January 28, 1901, a default judgment was entered in the court below in favor of plaintiff and against the defendant Castor; that a notice of motion, to be heard on July 31, 1901, to vacate said judgment, was on July 10th served on plaintiff's counsel in behalf of said defendant Castor; and that subsequently the district court, after hearing counsel upon the motion, entered an order vacating and setting aside the judgment, and awarding a new trial. From said order, plaintiff has appealed to this court. Error is assigned upon the order.

The moving papers submitted to the trial court in support of the application to vacate the judgment, in addition to the notice of motion and the record of the action, consisted of the affidavit of the defendant Castor and of his attorney, James V. Brooke.

say that the defendant has a good legal defense. That is a matter to be judged of by the court; and it should appear in what the defense consists, in order that the court may judge of its sufficiency. The application is to be determined upon equitable principles, and the court may well refuse it when asked to let in a mere legal defense, not founded in equity and justice. *Cochrane v. Middleton*, 13 Tex. 275. There is no error in the judgment, and it is affirmed."

In *Dowell v. Winters*, 20 Tex. 793, where the default was suffered under the mistaken belief that a pending injunction would be a bar, the court said: "It is obvious that such applications ought not to prevail, where the effect would be to delay the trial, unless upon a good excuse for the default, and the presentation of a meritorious defense; nor in any case, where it would be to let in an unconscientious, or a merely technical, defense. In a late case at Austin we held that the court rightly refused to set aside a default, where it would have been to let in the defense of the statute of limitations. *Foster v. Martin*, 20 Tex. 118." This quotation was approved in *Janes v. Langham*, 33 Tex. 604.

In *Wood v. Ward*, 1 Ohio Dec. Reprint, 589, discussing the question of the discretion of the trial judge in refusing a plea of the statute of limitations after opening a default, the court said: "How is this discretion to be exercised? There are only two ways in which it can be exercised, (1) arbitrarily, or (2) on a preliminary trial of the case, to enable the court to adjudge whether in conscience the defendant can make the defense. The latter course is impossible in practice, as it involves a full and complete trial of the case on its merits, before a court can understandingly decide whether the defendant can, with safety to his soul and conscience, be permitted to make a legal defense to a legal claim. The first method is not to be tolerated in a land of law. Men's rights are not to depend on judicial caprice, or mere arbitrary will. Whether a party is entitled to a certain defense is to be settled by law, and not by the arbitrary will of the judge. This is a discretion which can lead only to fraud and abuse, and is one which no judge should voluntarily assume. Wherever the law gives a legal right, let that right be preserved; let no judge step in between the party and the exercise of it."

In *Haines v. Lytle*, 1 Ohio Dec. Reprint, 198, where a default was set aside and leave was given to plead, it was held that the plea of the statute of limitations was not a meritorious defense, and that a plea to the merits was the

The affidavit of the defendant is as follows: "Ed Castor being duly sworn, on oath deposes and says as follows: (1) I am the Ed Castor who is one of the defendants in the above-entitled action. (2) That the summons in this action was served upon me some time during the first two weeks of December, 1900. (3) That thereafter I consulted my attorney, Jas. V. Brooke, of Cando, North Dakota, and within the time prescribed by law caused a notice of appearance in said action, and demand for a copy of the complaint, to be served on plaintiff's counsel. (4) That no copy of the complaint was served with said summons; that the summons served on me was signed by one B. M. Smith, attorney for the plaintiff, who gave his residence as 'Michigan, North Dakota,' and without the addition of any other words to indicate whether it was Michigan

only plea that could be filed under the leave given. The court said: "The supreme court (in *Sheets v. Baldwin*, 12 Ohio, 131) refused leave to file this plea because it was not a defense to be favored, and could not except under some peculiar circumstances, be deemed a meritorious defense."

This case is in conflict with *Wood v. Ward*, 1 Ohio Dec. Reprint, 589. The latter case contains the most comprehensive review of the authorities on this question that appears in the reports.

In *Wood v. Ward*, 1 Ohio Dec. Reprint, 589, referring to the case of *Sheets v. Baldwin*, 12 Ohio, 120, it was said that the plea of the statute of limitations was refused to that case because offered to amend the pleadings. The court further said: "And all the cases cited by the counsel for the plaintiff are cases where amendments to pleadings were not permitted for the purpose of adding the statute of limitations. It is the *dictum* of *Wood, J.*, which is cited on this point, in which he says that the authorities, English and American, concur in the doctrine that this defense is not permitted after a default. The authorities already cited show this *dictum* to be untrue."

Where, after the day for pleading had passed, the defendant filed his demurrer to the first count in the declaration and three special pleas of the statute of limitations, and the court, on motion, struck off the demurrer and pleas thus filed by defendant, but permitted him to plead the general issue, and that only, it was held that the trial court did not err in refusing the privilege of interposing a plea of the statute of limitations. *Newsom v. Ran*, 18 Ohio, 240. In this case the court said: "This is not a plea to the merits, and consequently is not ordinarily received after the rule day. See *Sheets v. Baldwin*, 12 Ohio 120, and numerous authorities therein cited."

In *Wood v. Ward*, 1 Ohio Dec. Reprint, 589, referring to the case of *Newsom v. Ran*, 18 Ohio, 240, *supra*, the court said: "In that case leave was, in the common pleas, refused to the plaintiff to plead the statute of limitations of either four or six years after a default, though that default had happened from the attorney's misunderstanding the practice of the court. The four-year limitation is introduced into our law from the statute of Massachusetts, and there it had been decided that this was a bar the administrator could not waive; that he was bound to make the defense; and, neglecting to do it, he himself must pay the debt, and could not charge it over on the estate. *Brown v. Anderson*, 13 Mass. 201; *Dawes v. Shed*, 15 Mass. 6, 8 Am. Dec. 80;

City, or some postoffice by the name of 'Michigan.' (5) That said demand for a copy of the complaint and notice of appearance was sent by registered mail to said B. M. Smith, at Michigan City, by defendant's attorney, on December 27, 1900, and was in due time returned by the postmaster at Michigan City, 'Unclaimed.' (6) That my attorney then wrote on January 19, 1901, to one Fred Kelley, a practising attorney at Lakota, the county seat of Nelson county, an inquiry to ascertain if a complaint had been filed, and received an answer from said Kelley that no complaint or other paper had been filed. (7) That my case was fully and fairly stated to said Jas. V. Brooke, my attorney, who resides at Cando, Towner county, North Dakota; and, after such statement, I am and was advised that I have a good and substantial defense on the

merits of the action, and I verily believe the same to be true. (8) That my defense to said action is 'that the cause of action set forth in said complaint did not accrue within six years before the commencement of this action'; that said suit or action was on a note long ago barred by the statute of limitations. (9) That defendant, relying on the fact that there was no response to the demand for a copy of the complaint, or acknowledgment of the appearance of his attorney, supposed the matter was held up or dropped. (10) That he never knew such judgment had been taken against him until its accidental discovery on the judgment docket of this county. (11) That said neglect in not putting in an answer grew out of the fact that the letter demanding a copy of the complaint was returned, 'Unclaimed,'

Allen's Petition, 15 Mass. 58; Thompson v. Brown, 16 Mass. 172; Heath v. Wells, 5 Pick. 140, 16 Am. Dec. 383. Here, then, an administrator was permitted to be made personally liable for a debt barred by the statute, because his counsel had misconceived the practice of the court. Is it possible that such a case is law? But no matter what the court below did, what did the supreme court decide? And the supreme court simply held that error would not lie upon what is a matter of discretion of the court.

In *Leaver v. Witcher*, 2 Comyns Rep. 560, Barnes Notes, 253, where the plaintiff having regularly signed judgment, defendant obtained a rule to set it aside on the payment of costs, pleading an issuable plea, defendant afterwards pleaded the statute of limitations. It was held that this plea should be set aside on the ground that the court never gave leave to plead this plea after regular judgment signed. This case and the following one have been, in effect, overruled in *Rucker v. Hannay*, 3 T. R. 124, and *Maddocks v. Holmes*, 1 Bos. & P. 228.

In *Willett v. Atterton*, 1 W. Bl. 35, "the plaintiff had signed judgment in assumpsit, which was owing to a mistake made by the defendant's attorney's clerk. I moved to set it aside on payment of costs. . . . It was suggested on the part of the plaintiff that the defendant meant to plead the statute of limitations. The court would not set aside the judgment, unless the defendant would undertake to plead the general issue."

In 1 *Selion on Practice*, 308, it was said that "the defendant may plead the general issue, and statute of limitations, after an order to plead issuably in both courts. *Rucker v. Hannay*, 3 T. R. 124. Though not long before decided otherwise. *Stadholve v. Hodgson*, 2 T. R. 391."

Where a default has been irregularly entered, it seems that, on setting the same aside, a plea of the statute of limitations may be filed. This has also been held in Arkansas, where it is generally held that the defendant is not entitled to file a plea of the statute of limitations after he makes such a showing as will excuse the default. Under some statutes, it seems that an administrator is entitled to plead the statute of limitations as a matter of right, and may rely upon such statute under the general issue.

The rule that default will not be set aside to permit a plea of the statute of limitations was held not to apply where the default had been irregularly taken. *Carnall v. Clark*, 27 Ark. 500. In this case no summons was found in the record, and the bill of exceptions shows 6) L. R. A.

that the default was set aside because the same was taken without notice to the defendant. The record of the default showed service of process, but, the default being set aside, the entry thereof was held to be no part of the record, and the court erred in striking out the plea of the statute of limitations.

An administratrix applied to the probate court to set aside a judgment allowing a claim against her, on the ground that she was unable from sickness to attend court on that day, and was entitled to credits on the note, which she believed she could establish by the next term. This was verified by affidavit, and the court set aside the judgment, and at the following term the defendant filed a plea of the statute of limitations; but this was stricken out on the ground that a fraud had been perpetrated upon the court by moving to set aside the original judgment to let in a meritorious defense, and then pleading the statute of limitations, and upon the further ground that, after judgment by default, defendant could not set up said defense by law after applying to the indulgence of the court for leave to plead. This was held to be error on appeal on the ground that the probate court had no jurisdiction of the person of the administratrix, in the absence of ten days' notice, as required by Ark. Rev. Stat. pp. 82, 83, § 95, providing that, if an executor or administrator shall refuse to allow any claim exhibited in accordance with the statute, such claimant may present his claim to the court of probate for allowance, giving the executor or administrator ten days' notice of such application. It was held that the defendant appeared, as she had a right to do, to ask the court to set aside a mere nullity, and when that was done she was in court for the first time, and consequently authorized to interpose any defense whatever. *Pennington v. Gibson*, 6 Ark. 447. The court said: "It will not be controverted, that when the defendant has been legally notified to appear and defend against the proceedings, and wholly fails to do so, but makes default, such default will not be set aside for the purpose of letting in a plea of the statute of limitations."

And where a judgment by default against administrators was set aside, and leave granted to plead to the merits of the action, and the defendants filed a general issue, it was held that they should have been allowed to rely upon the statute of limitations in relation to actions on notes, and that by suffering a judgment by default, they did not waive their right to insist upon the defense of the statute, under Hutchinson's Code (Miss.), 669, § 105, providing that an executor or administrator may make

and no copy of the complaint was ever served on me or my attorney."

The affidavit of James V. Brooke is as follows: "I, Jas. V. Brooke, being first duly sworn, on oath depose and say: (1) That I am an attorney at law duly qualified to practise in all the courts of the state of North Dakota, located and having my place of business in Cando, Towner county, North Dakota. (2) That on or about December 24, 1900, Ed Castor, known to me to be one of the defendants in the above-entitled action, came to my office, and showed and handed to me the summons hereto attached, marked 'Exhibit A'; that affiant read the same, and inquired if a copy of the complaint had been served therewith, and was informed by said Castor that no copy had been served; that affiant inquired fully into the merits of said action, and, in addition to other defenses, informed the defendant that he had a complete defense to said action, in the plea of the statute of limitations. (3) That said Castor then and there employed me to act as his attorney, and was informed that the first thing he must do was to serve notice of appearance, and demand a copy of the complaint. (4) That thereupon I addressed an envelope to 'B.

M. Smith,' and mailed by registered letter therein a notice of appearance and demand of a copy of the complaint. This was on December 27, 1900, as will appear from the postoffice receipt therefor, hereto attached, marked 'Exhibit B.' (5) That I received no response to said letter, no copy of the complaint, or other acknowledgment, until some time about the 20th of January, 1901, when the same was returned to me, unclaimed, from the postmaster at Michigan, North Dakota. The original envelope and inclosure, with the postoffice notation thereon, is herewith returned, marked 'Exhibit C.' (6) That on or about January 19, 1901, I, not understanding this, wrote to Fred Kelley, at Lakota, asking him if any papers had been filed, or complaint, as set out in summons, and some time after received his reply that there was no such complaint or other papers on file in the clerk's office of the clerk of the district court at Lakota, Nelson county, North Dakota. (7) That I then ascertained that there was an attorney at Michigan City named W. H. Smith; that I then inspected the summons again, and found the signature such as the original shows; that I verily believed at the time I mailed the notice of appearance and demand of a copy of the

any special defense under the general issue, and that he shall not be required to plead any other plea. *Sanders v. Robertson*, 23 Miss. 389. In this case the court said: "The defense set up was a bar to the action, and is now uniformly regarded as meritorious."

And in *Lejeune v. Hebert*, 6 Rob. (La.) 419, judgment by default was set aside by the filing of a plea of prescription to a conventional mortgage. This plea was one of the peremptory exceptions, under La. Code Pr. arts. 345, 346, providing exceptions which, without going into the merits of the case, show that the plaintiff cannot maintain his action, and may be pleaded specially in every stage of the action previous to final judgment. It was held that such exceptions did not present any issues on the merits, and, after the overruling of the same, the case could not be tried on its merits until put at issue by an answer or by a judgment regularly entered. The case does not discuss the right to file a plea of limitations after a default, but it seems to be a matter of right at any stage of the case, being in the nature of a statutory exception which would prevent a judgment.

Where a motion to open a default was overruled, and thereupon the parties stipulated that said default might be vacated upon condition that the defendant shall withdraw from the issues any pleading of title by limitation, and it was therefore ordered that the default be set aside upon said conditions, and not otherwise, it was held that the judgment that defendant was in default was erroneous, as he had filed a motion to strike out the amended complaint: that the stipulation in the journal entry was extorted from the defendant by means of adverse rulings of the trial court, and the machinery of a court could not be used to compel a party to surrender either a meritorious cause of action or defense. *Mitchell v. Campbell*, 14 Or. 454, 13 Pac. 190.

One of the counsel for the defendants examined the papers in a law case, and found a plea of the statute of limitations on file, which he supposed was regularly noticed on the record. On the calling of the case he announced himself

ready for trial, when plaintiff's attorney, suggested to the court that the issue was the statute of limitations, and that he had filed a bill in chancery to restrain the use of that defense, and continued the case to await the decree in chancery. At the next term, while the bill in chancery was pending, plaintiff's attorney took a judgment by default. It was held that the default should be set aside and the plea of the statute of limitations entered. It was also held that the plea of the statute was really on file, but the clerk had failed to make an entry thereof, and the plaintiff was without fault, and that, where the default has been irregularly entered, it is only required of the party in default to point out the irregularity, and to excuse himself from negligence without showing merits. *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218.

In *Whitaker v. Barker*, 2 Harr. (Del.) 413, the court said: "But as to the question whether the original judgment was erroneous, it is a principle that the act of limitation is a defense which must be pleaded. *Ballantine, Limitations*, 170-313; *Hodaden v. Harridge*, 2 Wms. Saund. 63a, note 6. Whether the court would open the judgment to let in this defense is a question for the court below, and not for us. Generally speaking, the court prescribes, as one of its terms of opening a judgment, that the statute of limitations shall not be pleaded. But we don't decide anything on this subject."

In *Berkson Bros. v. Coen*, 71 Miss. 630, 16 So. 204, the plaintiffs took out an attachment and entered up judgment by default without summoning the defendant. Twelve years afterwards they had the defendant summoned and moved to vacate their ancient void judgment, and the defendant answered and pleaded the statute of limitations. It was held that the plea was good, and the action was dismissed.

Where a judgment by default was set aside on motion of defendant, who pleaded the statute of limitations, it was held that the time lapsing after the declaration was filed could not be computed. *Kelly v. Harrison*, 69 Miss. 856, 12 So. 261.

I. T.

complaint that the signature was 'B. M. Smith.' I believe it now to be 'W. H. Smith,' but not from anything disclosed by the signature. (8) That at the time I knew of no one named Smith, an attorney at Michigan City, and I had only the signature to the summons to guide me; that I then had to guess at the postoffice. (9) That at the time I ascertained that there was a W. H. Smith, an attorney at Michigan City, long over thirty days had elapsed since the service of a summons. (10) That, about the time I so ascertained, the said plaintiff, on January 28, 1901, recovered a judgment by default against this defendant in the district court of Nelson county, North Dakota, for \$145.05, and \$9.80 costs,—in all \$155.45. This judgment was docketed in the office of the clerk of the court of Towner county on a transcript from Nelson county. It was from this that we discovered accidentally that such a judgment had been taken. (11) That I believe that the defendant has a complete defense to said action in the plea of the statute of limitations; the note on which said action is brought being, I am informed and believe, over thirteen years old, and never renewed by partial payment or in any other way, to stop the running of the statute. (12) That the failure to answer was caused by my having inadvertently and excusably been led into the mistake as to the signature of plaintiff's counsel; that this mistake was the reason of plaintiff's counsel's failure to receive my notice of appearance, and demand for a copy of the complaint, and consequently of his failure, I presume, to serve a copy of the complaint. (13) That this affidavit is made in good faith, and not frivolously or for mere delay; that I used all diligence to secure a copy of the complaint, and, had I done so, would assuredly have filed an answer in time."

The record embraced, among other papers, the copy of the summons served upon Castor. This was in proper form, except as to the signature of the plaintiff's attorney. Subjoined to the signature was the following language: "Attorney for plaintiff. Residence and postoffice address, Michigan, North Dakota." The surname of plaintiff's attorney, Smith, was legibly written next above the language we have quoted. The defect in the signature consists in the illegible manner in which the initials of the attorney are written. The initials appear to have been written without raising the pen from the paper, and the letters are so combined and blended together that it is difficult, if not impossible, to say what the initials are; and this difficulty was enhanced by the fact that the defendant, when the summons was served, had no acquaintance with an attorney named W. H. Smith, who resided at Michigan, North Dakota. Nor did Castor's attorney know any such attorney. It appears that James V. Brooke, the attorney retained by the defendant, and to whom the copy of the summons was delivered, while acting in good faith, construed the signature to be that of B. M. Smith, and, acting upon that construction, pro-

ceeded to serve notice of his retainer, and to demand a copy of the complaint, in the mode and manner fully detailed in the affidavits above set out. The copy of the summons is before this court, and the same has been examined by all members of the court, and we have reached the conclusion that the signature of the plaintiff's attorney as affixed to the copy of the summons is so ambiguous and obscurely written that it may fairly be construed to read either "B. M. Smith," "W. H. Smith," or "B. M. A. Smith." Hence we are of the opinion that the attorney for the defendant, who attempted to serve notice of his retainer upon the plaintiff's attorney in the manner set forth in said affidavits, was acting in good faith and with reasonable diligence in his endeavors in that direction. We shall, therefore, upon this record, rule, without recapitulating the facts embodied in the affidavits, that the moving papers submitted to the trial court fully excused the defendant's default in not answering the complaint; and we are further of the opinion that counsel for the plaintiff, by his negligence, became, and that he was, wholly responsible for the defendant's default, and, further, that the judgment entered by default was irregularly entered, by reason of the negligence of the plaintiff's attorney in his attempt to sign his name to the copy of the summons served on the defendant. We find, under these circumstances, that the default judgment was, by the fault and negligence of the plaintiff's attorney, irregularly entered, and also that the defendant has excused his failure to appear in the action in time to prevent the entry of a default judgment.

This leads up to a consideration of another and more difficult question. It is this: Did the defendant, by his moving papers, place himself in a position before the trial court which, under the statute and the established practice, entitled the defendant to the relief which he sought? We observe first that the mere fact that the judgment was irregularly entered was not, standing alone, enough to justify the court in vacating the same. The judgment was entered without fraud and by a court of competent jurisdiction, and hence there would be no propriety or justice in vacating the same unless a satisfactory showing was made by the defendant that he was prejudiced in his substantial rights by the entry of the judgment. Upon this point there is abundance of authority. In *Kirschner v. Kirschner*, 7 N. D. 291, 293, 75 N. W. 252, this court said: "Decrees will not ordinarily be opened to let in technical defenses. The defense must go to the merits." In the case at bar the defendant attempted to comply with this well-established rule. In the affidavits submitted, defendant set out an affidavit of merits, and also set out the defense which he claims to have as against the cause of action stated in the complaint. The form of the affidavit of merits is not criticised by the appellant's counsel, and we shall rule that while it is, perhaps, not technically in the best form, it is sufficient

in substance. The defense upon the merits is set out in the defendant's affidavit as follows: "That my defense to said action is that the cause of action set forth in said complaint did not accrue within six years before the commencement of this action; that said suit or action was long ago barred by the statute of limitations." It is not contended by counsel that the above quotation from the defendant's affidavit does not embody a defense which, if properly and seasonably pleaded by an answer, and proved at the trial, would defeat the plaintiff's recovery, but this defense is attacked upon the twofold ground that the same was not set out by a proposed answer, duly verified; and, secondly, that the defense—the statute of limitations—is not a meritorious defense, and hence does not comply with the rule which requires the moving party to show merits as a prerequisite of relief.

Neither of the questions presented by this contention of counsel has been directly passed upon in this jurisdiction, and the same are therefore important, as bearing upon the question of proper procedure in this class of cases. True, this court said in a case similar to this, in which the moving party served both an affidavit of merits and an answer setting out a defense, that the moving party had "pursued correct practice." See *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 25, 84 N. W. 581. We are still of the opinion that in strict practice a proposed verified answer should be served and submitted by the moving party, but the crucial question in this case is whether a defense to the merits, when embodied in an affidavit, merely, and not in a proposed answer, will be a substantial compliance with the rule requiring a defense on the merits to be shown. The authorities are in conflict upon this question, and the point has never been passed upon by this court. In *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80, it was held error to vacate a judgment under Comp. Laws, § 4034, without an affidavit of merits, the answer being unverified. In *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151, there was a verified answer, but no affidavit of merits. In that case the trial court was reversed, only two judges sitting in the case. Both judges wrote opinions in which they reached the common conclusion that the order vacating the judgment should be reversed. Judge Bartholomew based his conclusion upon independent ground, not connected with any question either of an answer or an affidavit of merits. Judge Corliss did not agree with the views of Judge Bartholomew as to the grounds of his conclusions, and, in a valuable concurring opinion, placed his concurrence in the reversal upon the fact that the moving party had omitted to submit an affidavit of merits as well as a verified answer. But the question presented here was not involved in that case, inasmuch as no answer was submitted in this case; and in this case there is an affidavit of merits, and no such affidavit was presented in the case last cited. In *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. 61 L. R. A.

W. 252, the vacating order was reversed because no sufficient affidavit of merits was presented to the trial court. This review of the cases decided by this court shows that none of them are squarely in point here, because all widely differed in their facts from the case at bar; and hence we are neither aided nor hampered in deciding this case by precedents of our own creation, and are at liberty, therefore, to decide the case in harmony with our own views of right and sound practice. Nor do we think a presentation of the conflicting views of other courts would serve any useful purpose in this opinion. We shall rule in this case with a view to settling the practice in this state in motions to vacate default judgments under § 5298 of the Revised Codes of 1899, as follows: First, a sufficient affidavit of merits is indispensable in all cases; second, it is the proper practice to serve and submit a proposed verified answer with the moving papers, setting up a defense which is valid on its face; third, where a verified answer is not submitted, the trial court may, at its discretion, accept in lieu of such answer an affidavit setting out a valid defense to plaintiff's cause of action. Such an affidavit, in our opinion, would serve the purpose of an answer, and constitute a substantial compliance with the strict rule which requires the submission of a proposed verified answer, embracing a defense.

This leads up to the question whether the defense to plaintiff's cause of action, viz., the statute of limitations, which is set out in the affidavits submitted upon the motion, is a valid defense in a case such as this, where the application is addressed to the favor of the trial court, and does not, therefore, rest upon any inflexible rule of law, or strict legal right. In motions of this character the trial court exercises the powers of a court of equity, and hence will be governed in passing upon such motions by the principles which obtain in courts of equity. It is for this reason that the equitable rule is established in this class of motions that a default judgment, though irregular, will not be set aside to admit a defense which is essentially unjust, repugnant to fair dealing, oppressive, or purely technical. See *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80, and *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252; also individual views of Judge Corliss in *Sargent v. Kindred*. In the case at bar the only defense set out to plaintiff's cause of action is the statute of limitations. It is undeniable, in the light of authority, that the earlier rule, established by the adjudications of the courts of England, as well as those of this country, was that the statute of limitations is not a meritorious plea. In *Hallagan v. Golden*, 1 Wend. 302, this language was used: "That part of the motion which asks for leave to add a notice of set-off is granted, but the application to add a plea of the statute of limitations is denied, with costs. Such a plea is never allowed to be added after issue is joined." In *Sheets v. Baldwin*, 12 Ohio, 120, the court says: "A default usually will not be set aside to

permit a plea of the statute of limitations." See also *Morris v. Slatery*, 6 Abb. Pr. 74, and *Reed v. Cowley*, 1 Nat. Bankr. Reg. 516, Fed. Cas. No. 11,644. The rule of these cases was sustained by an array of authority, but such rule, in our opinion, is not the modern rule. The more recent, and, we think, the better cases have abrogated the rule. The modern judicial view is that the statute of limitations is one of repose, and that as a defense the statute is now classed as meritorious, and as much so as other valid defenses. In *Campbell v. Haverhill*, 155 U. S. 610, 30 L. ed. 280, 15 Sup. Ct. Rep. 217, the court says: "Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired. As was said of the statute of limitations by Mr. Justice Story (*Bell v. Morrison*, 1 Pet. 351, 360, 7 L. ed. 174, 178): 'It is a wise and beneficent law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of the witnesses.'" In a recent South Dakota case (*Garvie v. Greene*, 9 S. D. 608, 70 N. W. 847) the following language is used: "The statute of limitations being a promoter of peace, tranquility, and diligence, suggested by and reposing upon the soundest principles of an enlightened public policy, the decisions are, we think, just, and of latest utterance, which hold that a litigant relieved from default should be restored to his former right to plead and rely upon all the defenses he may have, legal and equitable, or both, and that he may thus be relieved for the sole purpose of interposing the statute of limitations. The modern doctrine seems to be that where a judgment entered by default is opened, or leave is granted to answer, after the expiration of the time limited by statute, plaintiff's case is subjected to all the defenses that would have been available had no default ever existed. *Mitchell v. Campbell*, 14 Or. 454, 13 Pac. 190; *Sosson v. Rosar*, 112 Pa. 197, 3 Atl. 768." See also *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 48 L. R. A. 830, 81 N. W. 1027, 82 N. W. 535; *Freeman, Judgm.* § 542; 19 Am. & Eng. Enc. Law, 2d ed. p. 151; *Benedict v. Arnoux*, 85 Hun, 283, 32 N. Y. Supp. 905. Under these authorities, we are constrained to hold that the statute of limitations can no longer be regarded with disfavor by the courts, and that as a defense it stands on a par with other legal and meritorious defenses.

Only a single feature of this case remains for consideration. Appellant's counsel claim that the defendant, in his moving papers, has failed to show diligence in mov-

ing to set aside the judgment after he discovered that it had been entered. The judgment was entered in Nelson county on January 28, 1901, and the notice of motion was served by defendant on July 10th of the same year. It appears that after the entry of judgment in Nelson county a transcript thereof was docketed in the county of Towner, and, further, that the existence of the judgment was "accidentally," and for the first time, discovered by the defendant from the record in Towner county. But the proof fails to disclose the date of such discovery. There is therefore nothing in the proof submitted showing affirmatively that defendant was to any extent negligent after he knew of the existence of the judgment. Nevertheless it is well settled, in cases of this kind, that the moving party has the burden of showing diligence, and unless it is shown affirmatively the court will not ordinarily exercise its discretion in his favor. See *St. Paul Land Co. v. Dayton*, 39 Minn. 315, 40 N. W. 66; *Gerish v. Johnson*, 5 Minn. 23, Gil. 10. The rule which meets our approval is succinctly stated in 6 Enc. Pl. & Pr. p. 189, as follows: "It is not sufficient for the appellant to show a case within the statute of relief, and a good defense on the merits. He must also show proper diligence in prosecuting his remedy." And see authorities cited in note 2, Id. In this case diligence before ascertaining the existence of the judgment sufficiently appears, but the showing of diligence after such discovery is meager, and the same is not entirely satisfactory to this court. But a necessary inference from the proof submitted is that some uncertain interval of time elapsed after the entry of the judgment in Nelson county, and before a transcript was docketed in Towner county; and we think the inference may also fairly and reasonably be drawn from the proof that the discovery of the judgment was not made immediately after the filing of the transcript, but was made after the lapse of an interval of time of greater or less duration after the same was filed. We think, too, that it is a necessary inference from the proof that a reasonable period of time was requisite after the discovery of the judgment in Towner county in which to explore the judgment record in Nelson county. This was necessary in order to find the *datum* upon which the motion to vacate was predicated, and, after such *datum* was obtained, we are bound to infer that a further reasonable period must elapse, in which the advice of counsel could be sought and obtained. To this must be added a reasonable time for counsel to prepare and serve the papers after deciding upon a proper course to pursue in the case. Upon such a showing, we do not feel at liberty to rule that the trial court, in granting the relief, was clearly guilty in this case of an abuse of the discretion conferred upon that court by the statute which governs the case. The effect of the order appealed from is to afford the parties a trial *de novo* upon the merits, and in such cases a court of review is generally reluctant to

disturb an order made within the domain of judicial discretion. See *Pengilly v. J. I. Case Threshing Mach. Co.* (N. D.) 91 N. W. 63. Such orders are not, as a rule, disturbed by a reviewing court unless an abuse of discretion clearly appears. See 15 Enc. Pl. & Pr. pp. 281, 282.

The order appealed from will be affirmed.

All the Judges concur.

IOWA SUPREME COURT.

H. A. HOAGLIN and Wife

v.

C. M. HENDERSON *et al.*, *Appts.*

(.....Iowa.....)

1. A woman may enter into a partnership agreement with her husband, under statutory authority to acquire, own, and dispose of property to the same extent as her husband may do, and to make contracts and incur liabilities to the same extent as if unmarried.
2. One who has entered into partnership with a third person is not, in purchasing goods on behalf of the partnership from a former creditor, bound to disclose the fact of his partnership, so that his failure to do so will entitle the creditor to apply money paid upon the purchase price upon the old indebtedness, and refuse to fill the order.
3. A claim which the debtor holds against one of the partners cannot be set off in an action on a partnership claim.
4. The individual interests of a partner in a claim due the firm cannot be reached by garnishment in a court which can acquire no jurisdiction over the partnership or determine the interest of the partner in the claim.

(April 9, 1903.)

APPEAL by defendants from a judgment of the District Court for Wapello County in favor of plaintiffs in an action brought to recover money which had been paid to defendants in the purchase of goods, and applied by them upon an old account of one of the plaintiffs. *Affirmed.*

Statement by **McClain, J.:**

Action by plaintiffs, as a partnership doing business under the name of H. A. Hoaglin, to recover back a sum of money paid to defendants' agent as a part of the purchase price of a bill of goods ordered of defendants through said agent, which order the defendants refused to accept and fill. Defendants admit that the money sued for was paid to their agent for the purpose alleged by plaintiffs, and that the order was never accepted or filled by defendants, but allege, by way of answer, that the payment of the money was by Hoaglin in his own right, and

NOTE.—For other cases in this series as to business partnership between husband and wife, see *Gilkerson-Sloss Commission Co. v. Sallinger* (Ark.) 16 L. R. A. 526, and *note*; *Fuller & F. Co. v. McHenry* (Wis.) 18 L. R. A. 512; *Vall v. Winterstein* (Mich.) 18 L. R. A. 515; and *Haggett v. Hurley* (Me.) 41 L. R. A. 862.

6 L. R. A.

not while acting as member of a partnership; that said Hoaglin was already indebted to defendants in the sum of \$271 as balance of account due for goods previously sold and delivered by defendants to said Hoaglin, and that subsequently defendants tendered to said Hoaglin the balance of said sum of \$575, and that subsequent to the making of such tender, and before the commencement of plaintiffs' action, defendants, who are residents of and doing business in Chicago, in Cook county, Illinois, were garnished under an attachment sued out of the circuit court of that county in a suit therein pending, wherein Upham, Gordon, & Co. were plaintiffs, and said H. A. Hoaglin was defendant, on a claim of said Upham, Gordon, & Co. against said H. A. Hoaglin, to recover the sum of \$525, which garnishment proceeding was then still pending and undetermined in said court, and that defendants gave to said H. A. Hoaglin notice in writing of said garnishment. This pending garnishment proceeding was pleaded by defendants by way of abatement as to any claim of plaintiffs for the recovery of the balance of the money claimed in this action over and above the amount of said H. A. Hoaglin's indebtedness to defendants; that is, for the sum of \$303 tendered by defendants to said Hoaglin, and still held by defendants for the purpose of making the tender good. And defendants ask, also, by way of equitable relief, that if it shall be found that plaintiffs were partners, and that said sum of \$575 paid by Hoaglin to defendants' agent was partnership money, then that the interest of H. A. Hoaglin as partner therein be applied in satisfaction of defendants' balance of account, and ask that the equitable issue thus raised as to an accounting be transferred to the equity side of the calendar. This motion to transfer was overruled. Plaintiffs, by way of reply, deny the indebtedness alleged by defendants from H. A. Hoaglin to defendants on balance of account. On trial to a jury, verdict was rendered for plaintiffs for the amount sued for, and from a judgment on such verdict defendants appeal.

**Messrs. Heindel & Webber and Mc-
Nett & Tisdale**, for appellants:

There was no consideration for the settlement and alleged discharge and satisfaction of Hoaglin's debt. Such a settlement does not extinguish the debt.

Norris v. Slaughter, 3 G. Greene, 116; *Sullivan v. Finn*, 4 G. Greene, 544; *Bryan v. Brazil*, 52 Iowa, 350, 3 N. W. 117; *Bender v. Bean*, 78 Iowa, 283, 5 L. R. A. 596, 43 N. W. 216.

The interest of a debtor in partnership property may be reached by garnishment of a debtor of the firm.

Cow v. Russell, 44 Iowa, 556; *Enis v. Hays*, 48 Iowa, 86.

Husband and wife cannot become partners.

Heacock v. Heacock, 108 Iowa, 540, 79 N. W. 353; 1 Bates, Partn. 1st ed. § 139; *Lord v. Parker*, 3 Allen, 127; *Bowker v. Bradford*, 140 Mass. 521, 5 N. E. 480; *Payne v. Thompson*, 44 Ohio St. 192, 5 N. E. 654; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Gilkinson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 16 L. R. A. 528, 19 S. W. 747; *Artman v. Ferguson*, 73 Mich. 146, 2 L. R. A. 343, 40 N. W. 907; *Fuller & F. Co. v. McHenry*, 83 Wis. 573, 18 L. R. A. 512, 53 N. W. 896; *Seattle Bd. of Trade v. Hayden*, 4 Wash. 263, 16 L. R. A. 530, 30 Pac. 87, 32 Pac. 224; *Haggett v. Hurley*, 91 Me. 542, 41 L. R. A. 362, 40 Atl. 561.

Money paid by one partner to his individual creditor in satisfaction of a just debt, and received by the creditor without knowledge or notice that it is partnership money, may be retained by such creditor against the claims of the partnership or the other partners, although it was in fact money derived from the sale of partnership property.

Babcock v. Standish, 53 N. J. Eq. 376, 30 L. R. A. 604, 33 Atl. 385; *Wiley v. Allen*, 26 Ga. 568; *Dob v. Halsey*, 16 Johns. 34, 8 Am. Dec. 293; *Janney v. Springer*, 78 Iowa, 617, 43 N. W. 461.

A garnishment is a good plea in abatement in a suit brought in this state.

German Bank v. American F. Ins. Co. 83 Iowa, 491, 50 N. W. 53; *Neufelder v. German American Ins. Co.* 6 Wash. 336, 22 L. R. A. 287, 33 Pac. 870; *Embree v. Hanna*, 5 Johns. 101; *Connor v. Hanover Ins. Co.* 28 Fed. 549; *Rood, Garnishment*, 1st ed. § 201; *Willard v. Sturm*, 96 Iowa, 555, 65 N. W. 847.

Messrs. A. W. Enoch and Work & Work, for appellees:

Acceptance of money in full of account is a sufficient consideration to support such an agreement.

Larned v. Dubuque, 86 Iowa, 166, 53 N. W. 105; *Rice v. London & N. W. American Mortg. Co.* 70 Minn. 77, 72 N. W. 826; *Murray v. Snow*, 37 Iowa, 410; *Norman v. Thompson*, 4 Exch. 755.

A husband and wife can enter into partnership relation, or combine their several properties in business together.

Spafford v. Warren, 47 Iowa, 47; *Brigham v. Myers*, 51 Iowa, 400, 1 N. W. 613; *Suau v. Caffé*, 122 N. Y. 308, 9 L. R. A. 593, 25 N. E. 488; *Dressel v. Lonsdale*, 46 Ill. App. 454; *Louisville & N. E. Co. v. Alexander*, 16 Ky. L. Rep. 306, 27 S. W. 981; *Belser v. Tusculum Bkg. Co.* 105 Ala. 514, 17 So. 40; *Lane v. Bishop*, 65 Vt. 577, 27 Atl. 499; *Burney v. Savannah Grocery Co.* 98 Ga. 711, 25 S. E. 915; *Hamilton v. Hamilton*, 89 Ill. 350; *Dunifer v. Jecko*, 87 Mo. 284; *Schofield v. Jones*, 85 Ga. 823, 11 S. E. 1032; *Schlapback v. Long*, 90 Ala. 525, 8 So. 113; *Wells v. Caywood*, 3 Colo. 487; *Snell v. Stone*, 23 Or. 327, 31 Pac. 663. 61 L. R. A.

Defendant is not in a position to deny this partnership and appropriate its money.

Brumwell v. Stebbins Bros. 83 Iowa, 425, 49 N. W. 1020; *Winston v. Ewing*, 1 Ala. 129, 34 Am. Dec. 768; *People's Bank v. Shryock*, 48 Md. 427, 30 Am. Rep. 476; *Warner v. Perkins*, 8 Cush. 518; *Wellover v. Soule*, 30 Mich. 481; *Hirth v. Pfeifle*, 42 Mich. 31, 3 N. W. 239; *Sheedy v. Second Nat. Bank*, 62 Mo. 18, 21 Am. Rep. 407; *Atkins v. Prescott*, 10 N. H. 120; *Myers v. Smith*, 29 Ohio St. 120; *Pettes v. Spalding*, 21 Vt. 66; *Bates, Partn.* § 1103.

The pendency of a garnishment process in another state, whereby the debt for which an action is subsequently brought in a domestic court has been attached at the suit of another plaintiff, against the plaintiff in the second suit, is not generally pleadable in abatement of the latter.

14 Am. & Eng. Enc. Law, 2d ed. p. 783; *Lynch v. Hartford F. Ins. Co.* 17 Fed. 627; *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Eddy v. O'Hara*, 132 Mass. 56; *Jones v. Brandt*, 59 Iowa, 332, 10 N. W. 854, 13 N. W. 310.

McClain, J., delivered the opinion of the court:

The nature of the controversy involved in this case, and the questions of law arising therein, will be better understood from a brief narrative of the facts as shown in the evidence: H. A. Hoaglin had been engaged in business at Mt. Pleasant, and in January, 1900, sold out his business; receiving therefor a sum in cash entirely insufficient to pay the indebtedness contracted by him in conducting his business. Being without other property or resources, he proceeded to settle with his creditors, who were pressing for payment of their respective claims, by paying to each a portion of the indebtedness; taking receipts in full for the respective claims. It does not appear that these settlements were made on any uniform basis, or in pursuance of any agreement for composition with creditors. In some instances about one third of the claims were paid; in other instances, more. One of these creditors was the defendant firm, and through their attorney they accepted one third of their claim, and received in full for the entire amount. Thereupon H. A. Hoaglin, with his wife, who had previously been conducting a millinery business in her own name in connection with the business carried on by H. A. Hoaglin, removed to Ottumwa, and, as it is contended, entered into a contract to carry on a partnership business under the name of H. A. Hoaglin. This alleged firm was without other assets than \$250 of the wife's money, and \$500 borrowed by husband and wife on their joint note from the wife's sister. With this sum of money in hand, H. A. Hoaglin, without disclosing the fact that he was acting as member of the alleged firm, or that his acts were done otherwise than in his individual capacity, ordered through one Meades, the traveling agent for defendant firm, a bill of goods amounting to \$1,000; paying \$575 by draft

delivered to said Meades, and proposing to pay the balance on time. The order contemplated the immediate shipment of the goods from defendants' place of business, in Chicago, to H. A. Hoaglin, at Ottumwa. Meades, having no authority to accept an order, forwarded the order to defendants for acceptance and approval, accompanied by the draft, whereupon defendants refused to accept the order, and notified Hoaglin that they would retain so much of the money as was necessary to satisfy the balance of their previous indebtedness against him, and would pay over to him, or furnish him goods for, the surplus. Thereupon Hoaglin and wife, suing as partners, brought this action to recover from defendants the amount of money represented by the draft delivered by Hoaglin to Meades for defendants, and appropriated by defendants to their own use. The suit, as originally brought, was by attachment, and notice was by publication, but defendants entered an appearance and secured the dismissal of the attachment by giving bond to pay the amount of any judgment rendered.

The case was presented to the jury in the lower court on the theory that if the evidence showed Hoaglin and wife to have been partners, and the money paid by Hoaglin to Meades to have been partnership funds, then the attempted application by defendants of the money received through Meades to the satisfaction of the individual debt of Hoaglin was improper, and plaintiffs, as partners, were entitled to recover the entire amount so paid; and counsel for appellants present the question whether husband and wife can be partners, contending that there was no lawful partnership, and that the money paid by Hoaglin was his own money, out of which defendants had a right to recoup themselves to the extent of Hoaglin's previous indebtedness to them. We shall not stop to consider the question whether the acceptance by defendants from Hoaglin of a part of his previous indebtedness, under the agreement that the entire indebtedness should thereby be discharged, constituted an accord and satisfaction, but shall proceed at once to determine whether a legal partnership between husband and wife can exist in this state.

The common-law rule that married women cannot enter into a contract of partnership seems to be based on their incapacity at common law to contract for any purpose. *Coll-yer*, Partn. 5th Am. ed. § 15; *Parsons*, Partn. § 19; *Weisiger v. Wood*, 36 S. C. 424, 15 S. E. 597; *De Graun v. Jones*, 23 Fla. 83, 6 So. 925. The power of a married woman to enter into a contract of partnership, if it exists at all in any of the states in which the common-law system prevails, must depend upon statutory authority; and in several cases the question has been considered as to whether particular statutory enlargements of the powers of married women as to contracting and managing their separate property have rendered them competent to enter into partnership relations. Thus it has been held that authority to acquire, hold, and dis-

pose of property as a separate estate will sustain a contract of partnership made by a married woman with a person other than her husband. *Abbott v. Jackson*, 43 Ark. 212. And undoubtedly the general power to contract which is conferred upon married women in some states would support a contract of partnership. But on the question whether the statutes extending the powers of married women with reference to the making of contracts and the ownership and disposition of separate property confer the power to enter into the relation of a business partnership with the husband, the courts seem to be somewhat at variance, not only on account of differences in terms of the statutes in which the power is conferred, but also on account of differences of opinion as to the bearing of rules of public policy. In Massachusetts it is said that authority to buy and sell and enter into contract with reference to her personal property, to carry on trade, and to sue and be sued, does not involve power to enter into a partnership with the husband. *Lord v. Parker*, 3 Allen, 127. To same effect in states where the statutes give a married woman the right to control and contract with reference to her property, see *Payne v. Thompson*, 44 Ohio St. 192, 5 N. E. 654; *Fuller & F. Co. v. McHenry*, 83 Wis. 573, 18 L. R. A. 512, 53 N. W. 896; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Artman v. Ferguson*, 73 Mich. 140, 2 L. R. A. 343, 40 N. W. 907; *Gwynn v. Gwynn*, 27 S. C. 525, 4 S. E. 229; *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 16 L. R. A. 526, 19 S. W. 747. In other states, statutes to substantially the same effect have been held to so far enlarge the legal capacity of a married woman as to authorize her not only to enter into a partnership contract in general, but specifically to enter into such contract with her husband. *Toof v. Brewer* (Miss.) 3 So. 571; *Suau v. Caffé*, 122 N. Y. 308, 9 L. R. A. 593, 25 N. E. 488. It has been held, however, that where the statutes not only confer the right to own and contract with reference to her separate property, but also the general power to contract, the wife may not only enter into business partnership relations in general, but also specifically with her own husband, and this is said not to be contrary to any dictate of public policy. *Burney v. Savannah Grocery Co.* 98 Ga. 711, 25 S. E. 915; *Lane v. Bishop*, 65 Vt. 575, 27 Atl. 499. And see *Bernard & L. Mfg. Co. v. Packard*, 12 C. C. A. 123, 28 U. S. App. 84, 64 Fed. 309.

The question of public policy involved in these statutory enlargements of the powers and liabilities of married women must be determined with reference to the general tenor of the statutory provisions on the subject as they have been found in the different states. In this state, under the provisions of Code, §§ 3153, 3164, which give to married women the right to acquire, own, and dispose of property in the same manner and to the same extent as their husbands may do, and to make contracts and incur liabilities which may be enforced by or against them

to the same extent and in the same manner as if they were unmarried, it is not open to question that a wife may become surety for her husband, and be liable generally on such contract of suretyship, may become the general creditor of her husband, may be joint owner of property with him, and may be his agent, or may make him her agent, in the transaction of business. Citation of authorities to support these propositions would be wholly unnecessary. These unquestioned powers of a married woman in this state to deal with her husband would seem to cover all the powers and liabilities involved in entering into or continuing the relation of partner with her husband. The essential characteristics of a partnership seem to be joint ownership of property, and authority of each partner to bind the other partners by his acts with reference to the partnership property, and also to impose upon the others partnership liability. As these relations may be separately sustained between husband and wife, we see no reason why they may not be collectively created by entering into and carrying on the relation involved in the formation of the entity known as a partnership. The only objection which occurs to us is that involved in the denial of the capacity of husband or wife to maintain a suit in a court of law or equity against the other, except as such power is expressly conferred, as decided in *Heacock v. Heacock*, 108 Iowa, 540, 79 N. W. 353, in which we have held that the relations of husband and wife to each other are such as to preclude a suit by the one against the other for breach of contract or for tort, unless it be for the preservation or protection of the separate property; and it is argued that this inability of the wife to sue the husband would preclude the existence of a business partnership arrangement between them. But we do not think that the conclusion follows. The same argument would lead to the result that a valid contract cannot be made between them, such as a contract for the repayment of money advanced by one to the other; and yet, as we have suggested, that is not the law of this state, and there is no intimation in the *Heacock Case* that it was intended by that decision to declare that such contracts are necessarily invalid. It, no doubt, might at one time have been reasonably argued that, inasmuch as a right of action by the wife against the husband was denied to her, she was not competent to voluntarily enter into contract or joint property relations with him, such as would involve for their protection a general right to sue. But the time for that argument is past. The right to contract with the husband is now so well established that it would be inexcusable to say that its existence is negated by a holding that public policy forbids a suit by the wife against the husband on account thereof. It may well be suggested, also, that there is express authority for a suit by the wife against the husband to recover her property, or any right growing out of the same (Code § 3155), and therefore that, as the wife may at any time

terminate any business partnership relation which may exist with her husband, and thereby become practically a joint owner only with him in the partnership property, there would seem to be no impossibility of sustaining an action by her against him for any right growing out of their joint ownership. In short, we think that, in view of the statutory provisions extending the legal powers and rights of married women, we cannot say that there is any public policy recognized in this state which precludes the existence of a business partnership relation between husband and wife. None of the cases holding that such relation cannot exist are applicable to a condition of affairs as to the wife's capacity to make general contracts, and own and control her own property, such as exists in this state, except that of *Seattle Bd. of Trade v. Hayden*, 4 Wash. 263, 16 L. R. A. 530, 30 Pac. 87, 32 Pac. 224, and *Haggett v. Hurley*, 91 Me. 542, 41 L. R. A. 362, 40 Atl. 561, and we find ourselves unable to indorse the views expressed in these cases. Our conclusions find support, not only in the cases already cited, but also in *Belser v. Tusculum Bkg. Co.* 105 Ala. 514, 17 So. 40; *Schlapback v. Long*, 90 Ala. 525, 8 So. 113; *Fuller v. Ferguson*, 26 Cal. 546; *Re Kinkead*, 3 Biss. 405, Fed. Cas. No. 7,824; *Clark v. Hezekiah*, 24 Fed. 663; *Snell v. Stone*, 23 Or. 327, 31 Pac. 663.

Counsel for appellants argue that, as Hoaglin, in dealing with defendants' agent, Meades, did not disclose the fact of partnership, and both Meades and his principals were justified in assuming that the transaction was in his own name and right, the plaintiffs, as partners, cannot occupy any different position from that which Hoaglin would have occupied, had he acted for himself. But it will be noticed that Hoaglin had no occasion to disclose the partnership.

The transaction would have been perfectly valid and regular, and the goods purchased would have been the goods of the partnership, had they been shipped in accordance with the contract which Hoaglin made, for the fact of partnership is established by the verdict of the jury; and no wrong or fraud was perpetrated or intended, so far as the evidence shows, in the transaction between Hoaglin and Meades. Defendants have not been placed in any worse position, or in any way prejudiced, by lack of knowledge that Hoaglin was acting for the partnership. Had they accepted the order, and in good faith carried out the arrangements made between Hoaglin and Meades, they would have been in no way prejudiced, but would have acquired all the rights that it was intended they should acquire under that transaction. When they attempted to keep the money received by them, as Hoaglin's individual money, and to apply it to a wholly different purpose from that for which it was paid to them, they took their chances of being able to establish the fact; and if the money in fact belonged to a partnership, or to any other party, they must abide by the consequences.

Defendants, then, have no claim on the

money received by them from Hoaglin as partner, unless it is competent, in an action by the partnership to recover a partnership claim, for the debtor to set off a claim which he holds against an individual member of the partnership. It has been held by this court that, in an action by a member of a partnership, for an indebtedness due to him individually, the debtor may set off a claim against the partnership. *Allen v. Maddow*, 40 Iowa, 124. But there is no case in this court in which it has been held, conversely, that a claim against a partner can be set off against an indebtedness due to the partnership. It is true that under some circumstances a partner may apply partnership money to the payment of his own debt. *Dob v. Halsey*, 16 Johns. 34, 8 Am. Dec. 293; *Babcock v. Standish*, 53 N. J. Eq. 376, 30 L. R. A. 604, 33 Atl. 385. But certainly there is no rule of law by which he can be compelled to do so. To determine what interest Hoaglin, as a partner, had in the money paid by him as partnership money to the defendants, would involve a settlement and winding up of the partnership affairs. It certainly cannot be true that, whenever suit is brought on a partnership claim, the debtor, on the ground that he has a claim against the individual member of the partnership, can bring the partnership into a court of equity to be wound up, and to have the interest of each partner in each item of its property determined.

Moreover, the statute regulating counterclaims (Code, § 3570) requires that any new matter constituting a cause of action in favor of the defendant against the plaintiff, not arising out of the contract or transaction set forth in the petition, must, to be available as a counterclaim, be in favor of all the defendants, if more than one, and

against all the plaintiffs, if more than one, and that description does not fit this alleged counterclaim.

Something is claimed in behalf of defendants on account of a garnishment proceeding in Illinois, in which it was sought to hold defendants as debtors of Hoaglin. What is said in the preceding paragraph will dispose of this contention. Defendants were not debtors of Hoaglin, but of the firm composed of Hoaglin and his wife; and it would be manifestly absurd to contend that Hoaglin's individual interest in this indebtedness due to the firm could be reached in a court having no power to acquire jurisdiction of the partnership, or determine the interest of one partner in the partnership claim. *Winston v. Ewing*, 1 Ala. 129, 34 Am. Dec. 768; *Sheedy v. Second Nat. Bank*, 62 Mo. 17, 21 Am. Rep. 407; *Myers v. Smith*, 29 Ohio St. 120; 2 Bates, Partn. § 1103.

As to defendants' counterclaim, and also the defense made by reason of this alleged garnishment, it may be suggested that the only method provided by statute for reaching the individual interest of a partner in satisfaction of a debt due by him is pointed out by Code, §§ 3904, 3977, 3978, which authorize the levy of an attachment or an execution by equitable proceedings to ascertain the nature and extent of such interest. There was in this case no attachment or execution against Hoaglin individually, and therefore there was no opportunity for applying the provisions of these sections.

After considering all the questions raised in behalf of appellants, we reach the conclusion that the judgment of the Trial Court should be affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FRANKLIN SAVINGS BANK

v.

John COCHRANE, Jr.

(182 Mass. 586.)

1. An extension of time without the consent of the mortgagor, to an assignee of the mortgaged property, who has assumed the debt and agreed with the mortgagee to pay it, discharges the liability of the original mortgagor.
2. A corporation is bound by the act of its treasurer in contracting to pay a mortgage upon property which has been transferred to the corporation, where the directors have ceased to hold meetings, and permit the treasurer to attend to the management of the financial and fiscal affairs of the company.

3. A director of a corporation who has transferred mortgaged property to it upon its agreement to assume and pay the mortgage, does not, by permitting the treasurer of the corporation to act on its behalf in the management of its fiscal affairs, consent to his negotiating an extension of the time for payment, so as not to be discharged by such extension, of which he has no knowledge.

(February 25, 1903.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to enforce payment of a mortgage note from the maker. *Overruled.*

The maker of the note conveyed his inter-

NOTE.—The rule that an officer of a corporation has only such powers as are conferred upon him expressly or by implication from the course of business, which is considered, in respect to the powers of a president and vice president, in a note to *Wait v. Nashua Armory Asso.* (N. H.) 61 L. R. A.

14 L. R. A. 356, manifestly applies to the treasurer.

On the specific question of the acquiescence by the director in the acts of the treasurer as affecting the personal liability of the director, the above case seems to have no exact precedent.

est in the property to a corporation of which he was a member, the corporation assuming and agreeing to pay the debt. The corporation subsequently secured extension of time for the payment of the debt without the consent of the maker of the note.

Further facts appear in the opinion.

Messrs. Hutchins & Wheeler, for plaintiff:

The execution of the extensions did not release the maker of the note.

Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437.

Where a grantee agrees with the grantor to pay a mortgage on the property, the mortgagee can only sue the grantee in the name of the mortgagor; and such an action will be dismissed at the request of the mortgagor and grantor, although the mortgagee objects.

Coffin v. Adams, 131 Mass. 133; *Creesy v. Willis*, 159 Mass. 249, 34 N. E. 265; *Pren-tice v. Brinshall*, 123 Mass. 291.

A mortgagor and a grantee of his, who has agreed with him to pay the mortgage, do not stand in the relation of principal and surety, so far as the mortgagee is concerned.

Corbett v. Waterman, 11 Iowa, 86; *Board-man v. Larrabee*, 51 Conn. 39; *Connecticut Mut. L. Ins. Co. v. Mayer*, 8 Mo. App. 18.

The treasurer of the carpet company had no authority to execute the extensions.

Fay v. Noble, 12 Cush. 1; *Merchants' Nat. Bank v. Citizens' Gaslight Co.* 159 Mass. 505, 34 N. E. 1083; *Lester v. Webb*, 1 Allen, 34.

By the acceptance of the deed from Cochrane of the equity of the property, with the recital that the grantee assumed and agreed to pay it, the carpet company came under no legal obligation to the plaintiff to pay the debt.

Coffin v. Adams, 131 Mass. 133; *Creesy v. Willis*, 159 Mass. 249, 34 N. E. 265; *Pren-tice v. Brinshall*, 123 Mass. 291; *Stark Bank v. United States Pottery Co.* 34 Vt. 144; *England v. Dearborn*, 141 Mass. 590, 6 N. E. 837.

If the extensions were binding agreements, it is because the treasurer had the implied assent and authority of the directors to make them; and, as the defendant was one of the directors, a finding that they were binding agreements involves, necessarily, a finding that the defendant, who was one of the directors, consented to them.

Reisen v. Graves, 41 N. Y. 471; *Lester v. Webb*, 1 Allen, 34; *Strafford Bank v. Crosby*, 8 Me. 191; *Swire v. Redman*, L. R. 1 Q. B. Div. 536; *Oakford v. European & A. Steam Shipping Co.* 1 Hem. & M. 182.

Messrs. Moorfield Storey and Ezra R. Thayer, for defendant:

The Cochrane Carpet Company and the defendant were, as between themselves, principal and surety.

Rice v. Saunders, 152 Mass. 108, 8 L. R. A. 315, 24 N. E. 1079.

The carpet company's agreement to pay the mortgage debt was not affected by Rev. Laws, chap. 110, § 46.
61 L. R. A.

Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Walton v. Ruggles*, 180 Mass. 24, 61 N. E. 267; *Paro v. St. Martin*, 180 Mass. 29, 61 N. E. 268; *Beecher v. Marquette & P. Rolling Mill Co.* 45 Mich. 103, 7 N. W. 695; *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328; *Rochester Sav. Bank v. Averell*, 96 N. Y. 467; *Thomas v. Citizens' Horse R. Co.* 104 Ill. 462.

Unless a stockholder objects, the mortgage stands. A creditor cannot raise the point.

Antietam Paper Co. v. Chronicle Pub. Co. 115 N. C. 143, 20 S. E. 366; *Hervey v. Illinois Midland R. Co.* 28 Fed. 169; *Barrett v. Pollak Co.* 108 Ala. 390, 18 So. 615; *Alabama Iron & Steel Co. v. McKeever*, 112 Ala. 134, 20 So. 84.

When the bank was notified of the defendant's position, he was entitled to the rights of a surety as against it.

Guild v. Butler, 127 Mass. 386; *Holme v. Brunskill*, L. R. 3 Q. B. Div. 505; *Bolton v. Salmon* [1891] 2 Ch. 54; *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437; *Rouse v. Bradford Bkg. Co.* [1894] A. C. 586.

Where a grantee of the equity of redemption assumes the mortgage with notice to the mortgagee, an extension of the mortgage discharges the surety.

Union Mut. L. Ins. Co. v. Hanford, 153 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Dec. 130; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Travers v. Dorr*, 60 Minn. 173, 62 N. W. 269; *Metz v. Todd*, 36 Mich. 473; *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139; *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960; *Cook v. Berry*, 193 Pa. 377, 44 Atl. 771; *Curry v. Hale*, 15 W. Va. 867; *Bunnell v. Carter*, 14 Utah, 100, 46 Pac. 755; *Schroeder v. Kinney*, 15 Utah, 462, 49 Pac. 894; *Miller v. Kennedy*, 12 S. D. 478, 81 N. W. 906; *Wayman v. Jones*, 58 Mo. App. 313.

Although the mortgagee had no right of action at law against the grantee, he could, by a bill in equity, enforce the grantee's agreement to pay the mortgage.

Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494.

The relation of principal and surety in the present case does not depend on any question of the grantee's personal liability, but would have existed if the property had been sold subject to the mortgage without any promise to assume it, and there had, therefore, been no right of action in anyone against the grantee. In that event the land would have been the principal debtor.

Pratt v. Buckley, 175 Mass. 115, 55 N. E. 889; *Pearson v. Bailey*, 180 Mass. 229, 62 N. E. 265; *Rice v. Sanders*, 152 Mass. 114, 8 L. R. A. 315, 24 N. E. 1079; *Hermanns v. Fanning*, 151 Mass. 1, 23 N. E. 493.

If the mortgagee, by giving an extension, cuts off the right of the original mortgagor to pay the mortgage and get the benefit of a foreclosure, the mortgagor is discharged to the extent of the value of the land, even

if there was no assumption of the mortgage by the grantee.

Murray v. Marshall, 94 N. Y. 611; *Spencer v. Spencer*, 95 N. Y. 353; *Travers v. Dorr*, 60 Minn. 173, 62 N. W. 269; *Curry v. Hale*, 15 W. Va. 867; *Bunnell v. Carter*, 14 Utah, 100, 46 Pac. 755; *Boston Penny Sav. Bank v. Bradford*, 181 Mass. 199, 63 N. E. 427.

Even if authority to grant the extension was not expressly given in the by-laws, the treasurer had it by virtue of his office.

Fay v. Noble, 12 Cush. 1; *Merchants' Nat. Bank v. Citizens' Gaslight Co.* 159 Mass. 505, 34 N. E. 1083; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322.

The treasurer had authority by holding out and the course of business.

Lester v. Webb, 1 Allen, 34; *Holden v. Upton*, 134 Mass. 177; *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 13 L. R. A. 559, 28 N. E. 245; *Merchants' Nat. Bank v. Citizens' Gaslight Co.* 159 Mass. 505, 34 N. E. 1083.

A surety is discharged when time is given to his principal, even when he knows of the extension and makes no objection, unless he actually consents to it.

Lambert v. Shetler, 71 Iowa, 463, 32 N. W. 424; *Edwards v. Coleman*, 6 T. B. Mon. 567; *Brandt, Suretyship*, §§ 345, 346.

Loring, J., delivered the opinion of the court:

The first contention of the plaintiff in this case is that the execution of the extensions of the mortgage made by and between the plaintiff savings bank, the mortgagee, and the Cochrane Carpet Company, the grantee of the equity of redemption, did not operate to discharge the maker of the mortgage note, even though they were duly executed, and were made without his consent. The ground on which this contention is made is that by the assumption of the mortgage debt in the conveyance of the mortgaged property to it the Cochrane Carpet Company did not become liable, as between it and the plaintiff, to pay the debt, and for that reason an agreement between it and the carpet company was not an agreement giving time to the principal debtor. But, without going further, it is enough to dispose of that contention that by the first extension the carpet company did agree with the plaintiff to pay the mortgage debt, and by the second extension time was given to it, the principal debtor.

The second contention is that the evidence did not warrant a finding that the carpet company was bound by the two extensions executed in its behalf by its treasurer. We think that it did. It appeared in evidence that, although the by-laws provided that meetings of the directors should be held at least monthly, they were held only at irregular intervals, and "there was no record of any meeting held between September 25, 1893, and February 16, 1898." It further appeared that the treasurer attended to the actual management of the financial and fiscal affairs of the company, and to all finan-

cial matters, and that, "with reference to making and extending notes, . . . he made them and extended them as the necessities of the business required." The company stopped active business in 1893, and after that the treasurer attended to all its business affairs. This evidence warranted a finding that the directors knew that the treasurer was undertaking to act for the corporation in all financial matters requiring action, and acquiesced therein, and on that ground that the corporation was bound by the extension made on April 11, 1892, as well as by that made March 28, 1895. *Lester v. Webb*, 1 Allen, 34; *Holden v. Upton*, 134 Mass. 177, 180; *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 285, 13 L. R. A. 559, 28 N. E. 245.

The plaintiff's last contention, and the only one seriously insisted upon at the argument, is that the defendant, having, as one of the directors, left to the treasurer the conduct of its affairs, is bound by his acts, and cannot escape from the position of having consented to what the treasurer did. It was held in *Polak v. Everett*, L. R. 1 Q. B. Div. 669; *Lambert v. Shetler*, 71 Iowa, 463, 32 N. W. 424, and *Edwards v. Coleman*, 6 T. B. Mon. 567, that it is not enough that a surety knows of a binding agreement between the creditor and the principal debtor, amounting to a variation of the original contract. He must not only know, but must consent. In *Woodcock v. Oxford & W. R. Co.* 1 Drew. 521, it was held that the fact that the surety, as solicitor for the principal debtor, drew the agreement which was relied on as the variation of the original contract, was a sufficient concurrence to bar the surety's being discharged. And in *Polak v. Everett*, L. R. 1 Q. B. Div. 669, more fully reported in this connection in 45 L. J. Q. B. N. S. 369, and 34 L. T. N. S. 128, it appeared that the variation of the contract between the principal debtor and the creditor which constituted the variation consisted in the sale of certain book debts by the debtor and creditor to a joint-stock company, of which the surety was not only a director, but also a chairman of the board. It appeared that he was present at the meeting at which the joint-stock company voted to buy the accounts, but that he did not consent to the bargain (see 34 L. T. N. S. 128, 129); that he signed the minutes of the meeting, but "protested against it as adverse to his interests," and gave no warning to the creditor (see 45 L. J. Q. B. N. S. 369, 371). *Swire v. Redman*, L. R. 1 Q. B. Div. 536, relied on by the plaintiff, was not decided on the ground that there was a consent in that case, but on the ground that, where the debtors were originally liable as principals, they could not make him a surety by a subsequent agreement of which the creditor had knowledge, but to which he did not assent; and the case was overruled by *Rouse v. Bradford Bkg. Co.* [1894] A. C. 586. The case of *Oakford v. European & A. Steam Shipping Co.* 1 Hem. & M. 182, also relied on by the plaintiff, went on the ground that, where one partner retires under an indemnity from the

remaining partners, who assume the assets and agree to conduct the business, and one of the assets is a continuing contract, the remaining partners are the agents of the retiring partner to act under the contract. The other case relied on by the plaintiff—*Strafford Bank v. Crosby*, 8 Me. 191—is a case of “mere delay to prosecute the principal.” See p. 104. In the case at bar it is found as a fact that the defendant did not know of the extensions made by the carpet company; and in our opinion, when the defendant, as a director of the carpet company, allowed the treasurer to take such action in behalf of the corporation as he thought the interests of the corporation demanded, he

did not thereby put himself in the position of having consented, with regard to his personal and individual interests, to any and all acts of the corporation which the treasurer did in its behalf, and of which he was ignorant. By his acquiescence he has held out the treasurer as having authority to act for the corporation, but he has not put himself in a position where he cannot say he was ignorant of the agreement made by the corporation in pursuance of that ostensible authority, and has not given his consent thereto, so far as his personal interests are concerned.

Exceptions overruled.

MICHIGAN SUPREME COURT.

Re William STEGENGA.

(.....Mich.....)

1. **Charter authority to punish disorderly persons** of all sorts empowers a municipal corporation to do more than provide for the punishment of those already punishable under the provisions of the general law.
2. **A municipal corporation may provide for the punishment of persons loitering about the streets and barrooms in idleness, without habitation or visible means of support, and without being able to give a satisfactory account of themselves, under charter authority to punish disorderly persons of all kinds.**

(April 21, 1903.)

APPPLICATION for a writ of habeas corpus to procure the discharge of petitioner from custody to which he had been committed for violation of a municipal ordinance. *Petition dismissed.*

The complaint upon which the proceedings were founded charge that on the 20th day of February, 1903, and for a long space of time previous thereto, at the city of Grand Rapids, defendant was found loitering about the common barrooms and wandering about the streets by day and night without any lawful means of support, and without being able to give any satisfactory account of himself, contrary to the provisions of the ordinance.

Further facts appear in the opinion.

Mr. H. Everett Moorman, for petitioner:

A person may be guilty of the acts and conduct charged in this complaint, and still not be a vagrant.

This ordinance is unconstitutional because it violates the right of personal liberty.

Black, Const. Law, § 6; *Re Frazee*, 63

Mich. 399, 30 N. W. 72; *Robison v. Miner*, 68 Mich. 573, 37 N. W. 21; 9 Am. & Eng. Enc. Law, 2d ed. p. 515; *Pinkerton v. Verberg*, 78 Mich. 584, 7 L. R. A. 507, 44 N. W. 579.

The common council of the city of Grand Rapids neither has, nor has had, either the power, or the authority, to enact the ordinance upon which this complaint is based.

Black, Const. Law, pp. 439, 440, §§ 190-192; *Alton v. Aetna Ins. Co.* 82 Ill. 45; *Grand Rapids v. Newton*, 111 Mich. 48, 35 L. R. A. 226, 69 N. W. 84; *Re Jordan*, 90 Mich. 4, 50 N. W. 1087; *Re Way*, 41 Mich. 299, 1 N. W. 1021.

Mr. S. W. Barker, for the People:

The city charter of Grand Rapids is a special law, and, in so far as it conflicts with the general law, it supersedes said general law.

1 Dill. Mun. Corp. § 37; *Hewitt v. Gage*, 71 Mich. 287, 39 N. W. 56; *Seibold v. People*, 86 Ill. 33.

This ordinance is entirely reasonable, considered in the light of our Michigan decisions or the common law.

4 Bl. Com. chap. 13; *Robison v. Miner*, 68 Mich. 572, 37 N. W. 21; 9 Am. & Eng. Enc. Law, 2d ed. *Disorderly Persons*.

There is a difference between the term “disorderly” and the term “vagrant.”

People v. Kelly, 99 Mich. 84, 57 N. W. 1090; *Grand Rapids v. Williams*, 112 Mich. 247, 36 L. R. A. 137, 70 N. W. 547; *People v. Elmer*, 109 Mich. 493, 67 N. W. 550; *Love v. Detroit Recorder's Ct. Judge*, 128 Mich. 545, 55 L. R. A. 618, 87 N. W. 785; *Parker & W. Public Health & Safety*, p. 52, § 41.

The unconstitutionality of a portion of an ordinance does not render the entire ordinance void.

Com. usc of Titusville v. Clark, 195 Pa.

NOTE.—For other examples in this series of similar ordinances regulating conduct or dealing with disorderly persons, or persons loitering in streets, see *State v. Hunter* (N. C.) 8 L. R. A. 529; *State v. Austin* (N. C.) 25 L. R. A. 283; *Ex parte Smith* (Mo.) 33 L. R. A. 606; *Grand Rapids v. Newton* (Mich.) 35 L. R. A. 61 L. R. A.

226; *Grand Rapids v. Williams* (Mich.) 36 L. R. A. 137; *Dunn v. Com.* (Ky.) 43 L. R. A. 701; *Ex parte McKarber* (Tex. Crim. App.) 42 L. R. A. 587; *Gastineau v. Com.* (Ky.) 49 L. R. A. 111; and *Hechinger v. Maysville* (Ky.) 49 L. R. A. 114.

634, 57 L. R. A. 348, 46 Atl. 286; *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149.

Hooker, Ch. J., delivered the opinion of the court:

The defendant was charged with being a disorderly person, within the provisions of an ordinance of the city of Grand Rapids, and, upon a trial by jury in the superior court of that city, was convicted and sentenced. He is before this court on habeas corpus.

The return shows that he is detained by the sheriff of Kent county, under the command of a commitment from said court, reciting that he was "convicted of having been found loitering about in common barrooms, and wandering about the streets, by day and by night, without any lawful means of support, and without being able to give any satisfactory account of himself, at the city of Grand Rapids for the period of two weeks." Copies of the complaint, judgment, and commitment are attached to the return.

Section 10 of title 3 of the charter of Grand Rapids provides that "the common council shall have power, within said city, to enact, make, continue, establish, modify, amend, and repeal such ordinances, by-laws, and regulations, as it deems desirable, within said city, for the following purposes: (1) To prevent vice and immorality, to preserve public peace and good order, and to prevent and quell riots, disturbances, and disorderly assemblages; . . . (20) to provide for the punishment of vagrants and all persons drunk or 'disorderly' on the streets or public places of the city; . . . (34) to punish common prostitutes and 'disorderly persons of all kinds.'"

The ordinance in question is as follows:

An Ordinance to Amend Section 1, of an Ordinance Entitled "An Ordinance Relative to Disorderly Persons in the City of Grand Rapids."

The common council of the city of Grand Rapids do ordain as follows:

Section 1. That section 1 of an "Ordinance Relative to Disorderly Persons in the City of Grand Rapids, as amended October 28, 1901," be and the same is hereby amended to read as follows:

Section 1. Any person who shall have actually abandoned his wife, child, or children, or either, or who neglects or refuses to provide for his family, wife, child, or children; all persons who shall make any improper noise, disturbance, or riot, or shall be engaged in any illegal or improper diversion, or shall use any indecent, insulting, or immoral language, or shall be guilty of any indecent or immoral conduct, or behavior in any place in the city of Grand Rapids; all tipplers, drunkards, and common prostitutes, all persons who shall collect in crowds and bodies for unlawful and mischievous purposes in any place in said city, to the annoyance or inconvenience of citizens or others, and all persons found in a state of intoxication in any place whatever in said city; any person who shall wilfully assault another in said city, or be engaged in or 61 L. R. A.

aid or abet in any fight, quarrel, or other disturbance in said city; any person who shall make any indecent exposure of his or her person in any street, lane, alley, or elsewhere in said city; all persons that collect or stand in crowds, in front of or about any church or place of worship in said city, during service, or the gathering or departing of the congregation, or that collect or stand in crowds or loiter about or obstruct free and uninterrupted passage on any sidewalk in said city or in any hall, stairway, vestibule, or passageway leading to any store, office, court room, or public hall, or building in said city; all persons that stand, loiter, or stroll about in any place in said city awaiting or seeking an opportunity to obtain money or other valuable thing from others by trick or fraud, or to aid or assist therein; all persons that shall engage in any fraudulent scheme, device, or trick to obtain money or other valuable thing, in any place in said city, or aid or abet, or in any manner be concerned therein; all ropers, steerers, or cappers, so-called, for any gambling room or house, or for any gambling game, trick, or device, or who shall engage in any such practice, in any public streets in said city; all persons found loitering about in any hotel, block, common barroom, dramshop, gambling house, or disorderly house, or wandering about the streets, either by night or day, without any lawful means of support, or without being able to give a satisfactory account of himself or herself; and all persons that show, sell, or offer for sale or exhibit any indecent or obscene picture, drawing, engraving, book, or pamphlet in said city, shall be deemed disorderly persons, and upon conviction thereof, shall be punished as provided in § 7 of this ordinance.

It is contended that the complaint fails to charge a punishable act, and that the ordinance is void, and beyond the authority of the common council to enact.

It is urged: First, that it attempts to charge vagrancy, and nothing else, and that the allegations of the complaint fail to conform to the settled definition of vagrancy, reliance being had upon *Sarah Way's Case*, 41 Mich. 301, 1 N. W. 1021. Second, that if it be contended that defendant was proceeded against as an alleged disorderly person, the conviction was void, for the reason that the complaint does not charge misconduct within the statutory or common-law meaning of the term "disorderly."

We may pass the first question, with the remark that the complaint does not purport to charge vagrancy, and the prosecution makes no claim that the petitioner was convicted of vagrancy. We have seen that the charter gives the authority to the council to provide by ordinance for the punishment of all persons who shall be disorderly on the streets or public places, and, under § 34, "to punish disorderly persons of all kinds." Acting under these provisions, the ordinance in question was made. It provides that one chargeable with the conduct stated in the

complaint shall be considered disorderly. Petitioner's counsel say that this was beyond the power of the council, for the reason that the common law did not make such act a crime, nor does our statute. In other words, the claim rests upon the proposition that the council may not make an offense of that which would not be so under existing rules of law. There is no lack of authority to the effect that a council cannot, by ordinance, make an offense, when such action would be inconsistent with (*i. e.* opposed to, or in contravention of) a settled law or policy of the state, unless the authority is clearly conferred. §§ 89, 319, and note 2, § 329. It is, however, equally certain that the condition of society in cities is such as to call for more stringent regulations than those usually provided for the state at large, and there are really but two questions here: (1) Whether, in granting the charter powers hereinbefore mentioned, the legislature used the term "disorderly" in the sense of its statutory or legal definition; and, if not, then (2) whether the ordinance is reasonable, and does not transgress the constitutional rights of personal liberty.

1. What is meant by the term "disorderly persons of all kinds?" We have a statute (Comp. Laws, § 5923) which enumerates many acts thereby made to constitute disorderly conduct, and the actors disorderly persons, subject to punishment under its provisions, and while the punishment prescribed thereby in confined to the classes mentioned therein, it does not follow that no other acts are disorderly, or that the actors are not disorderly persons in the ordinary sense of the term. This statute is not a limitation upon the legislature to either declare other acts disorderly, or to authorize municipal authorities to punish such acts within reasonable bounds, which is a common practice. The case of *Grand Rapids v. Williams*, 112 Mich. 247, 36 L. R. A. 137, 70 N. W. 547, sustained such action under the charter in question, holding that one who peeks into the windows of the occupied house of another is punishable under this ordinance. This conviction is inconsistent with petitioner's contention. It is true that it is said in that case that the act is one punishable "as an immoral act," authorized by the first subdivision quoted from the charter, which permits the passing of ordinances "to prevent vice and immorality," and not under the power to punish disorderly "persons of all kinds," found in another subdivision; but we have no statute that makes such an act disorderly, or even punishable, any more than we have in the present case. It was said that this was an immoral act, but the ordinance explicitly declared that all persons guilty of immoral conduct should be considered disorderly persons. This ordinance, like the statute, does not attempt to punish all disorderly persons, but only such as it designates, and it calls such as violate its provisions disorderly persons. We think it clear that, when the charter mentions "disorderly persons of all kinds," it shows a legislative intent to

do more than to permit the city to provide for the punishment of those already liable under the provisions of the general law. Interpreting this language in its ordinary sense, under the statute, Comp. Laws, § 50, makes the provision effective, while to follow the suggestion of petitioner's counsel would be to emasculate it and make it comparatively worthless. Again, it is significant that, while subdivision 20 of the charter confers the power to punish disorderly persons, thereby clearly covering all persons coming within the statute and common law, subdivision 34 emphasizes the power, and enlarges upon the term used in subdivision 20, by including "all kinds of disorderly persons."

Counsel has cited some of our own cases, which he relies upon as supporting his contention, and these should be considered.

The *Case of Sarah Way*, 41 Mich. 301, 1 N. W. 1021, arose under a city ordinance. This was a charge of vagrancy. It was held that, under the charter of Detroit, vagrancy meant such cases of vagabondage as come fairly within the common-law meaning of the word, and the opinion states that "vagrancy was expressly distinguished from disorderly conduct generally" by the charter, Laws 1861, p. 201, No. 136. This language serves the double purpose of explaining why the term "vagrancy" was held to be restricted in that case, and of showing that vagrancy may ordinarily be considered disorderly conduct, but not where a contrary intent is manifest. We may reasonably infer that but for this the result might have been different in the *Sarah Way Case*, and that she might otherwise have been punishable as a disorderly.

The *Case of Sarah Jones* did not arise under an ordinance. She was charged with being a disorderly person for reasons given. It was held that the case alleged did not come within the definition of the existing statute. In our opinion, neither of these cases militates against the validity of this ordinance or charge, unless we are to say that the provision of this ordinance is an unreasonable or unwarranted abridgment of liberty. The following are distinctive cases of that kind: *Re Frazee*, 63 Mich. 401, 30 N. W. 72; *Grand Rapids v. Newton*, 111 Mich. 48, 35 L. R. A. 226, 69 N. W. 84.

The case of *Pinkerton v. Verberg*, 78 Mich. 573, 7 L. R. A. 507, 44 N. W. 579, does not involve the validity of an ordinance, but rather the legality of the act of the officer in assuming it to have been violated.

But it is not certain that this man was not a disorderly person, punishable at common law. For two weeks he loitered about the streets and barrooms, in idleness, without apparent habitation, and without any means of support, according to the charge. Yet he lived, and the inference is not unreasonable that he was supported in idleness by others in some way. He loitered about barrooms (*i. e.*, tipping places), and gave no satisfactory explanation of his conduct. Blackstone says (4 Bl. Com. 169) that all idle persons are punishable, while the stat-

ute 17 Geo. II., chap. 5, provided that idlers and disorderly persons, rogues and vagabonds, and incorrigible rogues should be punishable; idlers and disorderly persons by a month's imprisonment, and the other classes by more severe penalties. And, if it be said that this statute is no part of our common law, idle persons were punishable under ancient statutes, which in their turn merely declared the common law in that respect. See 4 Bl. Com. 169. The uniformity of the practice of authorizing and passing and enforcing ordinances for the punishment of mendicants, idlers, and vagabonds is a circumstance that indicates the general recognition that such persons may be treated as lawbreakers, and punished in accordance with the general law of the land.

But little need be said on the other branch

of the case, for the foregoing discussion shows that it is not an invasion of constitutional right to punish conduct in fact disorderly, and dangerous to and destructive of good order.

It does not follow that this ordinance would justify the conviction of all arrested under it, or that each of its provisions, standing by itself, would constitute an offense. We do not say that they would, or would not.

In this case, however, we are satisfied that the acts charged, and of which the petitioner was convicted, constitute an offense under this ordinance, and *the petition will be dismissed*, and the petitioner remanded to the custody of the respondent.

The other Justices concur.

MISSOURI SUPREME COURT.

WERTHEIMER-SWARTS SHOE COMPANY, *Appt.*,

v.

UNITED STATES CASUALTY COMPANY, *Respt.*

(172 Mo. 135.)

1. A provision of a policy insuring against loss by the accidental discharge of an automatic fire extinguisher, that notice shall be given of "any known defect" which shall render the system more than usually hazardous, and that it shall be immediately repaired, refers to defects in the system itself, and not to those in the fasteners of shutters on the windows of the buildings, although the use of the latter in a defective condition may make possible the breaking of the apparatus and its consequent discharge.
2. The discharge of an automatic fire extinguishing apparatus is not caused by a wilful act, within the meaning of an exemption clause in a policy insuring against loss caused by such discharge, where it is due to the placing of brace rods attached to window shutters upon the pipes so that, when the shutters are blown open by the wind, the hooks on the rods catch the pipes and break their connections, where there is nothing to show knowledge that such negligence would result in the discharge of the pipes.
3. The requirement in a policy of insurance against loss by the accidental discharge of an automatic fire extinguishing apparatus, that assured must use all reasonable means to save and preserve the property insured, refers to care to be taken after an accidental discharge of the apparatus, and not to care to prevent an accident.
4. The verdict is conclusive as to the value of property in a building at the time of an accidental discharge of an automatic fire extinguisher, in determining whether or not there shall be an apportionment of the loss under a policy insuring against such

loss, but providing that, in case the value of the property is more than a certain amount, the insurer shall be liable only for such proportion of the face of the policy as the amount named bears to the value of the property in the building.

5. One insured against loss by the accidental discharge of automatic fire extinguishers is not guilty of negligence in failing to instruct an employee not to fasten window shutters to the pipes of the apparatus, where he is properly instructed how to fasten them, and there is nothing to cause the employer to anticipate that they will be fastened to the pipes.
6. That an automatic fire extinguisher was discharged by the negligent act of the insured or his servant is not sufficient to defeat liability on a policy insuring against loss by its accidental discharge.
7. Modification of an instruction requested by a party, which leaves it more favorable to him than he is entitled to, is not ground for reversal upon his complaint.

(February 18, 1903.)

A PPEAL by plaintiff from a judgment of the St. Louis Circuit Court in favor of defendant in an action brought to recover the amount alleged to be due on an insurance policy. *Reversed.*

Statement by **Valliant, J.:**

This is a suit on a policy insuring against the accidental discharge of an automatic sprinkling apparatus, designed as a fire extinguisher, erected in plaintiff's establishment. The terms of the policy covered loss or damage, to the limit of \$7,500, to property in plaintiff's shoe factory, caused "by the accidental discharge or leakage of water from the automatic sprinkler system" in plaintiff's place of business. The petition set out the terms of the policy, and averred that plaintiff's goods were damaged, to the amount named, by the accidental discharge of the apparatus, etc. The answer admitted the issuance of the policy, denied all other

NOTE.—The above case raises a question as to a new kind of insurance, on which there seem to be no precedents.

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averments, and set up several affirmative defenses, founded on certain clauses in the policy therein pointed out, *viz.*: Clause 7, which requires the assured to immediately notify the company, in writing, of any known defect in the apparatus, rendering it more than usually hazardous, to cause it to be repaired, and in the meantime to use such additional precaution as safety required. Then it stated that a defect known to plaintiff existed at the time of the accident, and had existed for a long time before, which defect consisted in hooks attached to iron shutters in the building, that were suffered to become worn or bent so that when the shutters were closed the hooks so adjusted themselves, or were so adjusted by plaintiff or its servant, as to extend over and catch upon a pipe in the sprinkler machine, and thereby render the system unsafe, and more than usually hazardous, for that, when a force would be applied to the shutter, it was liable to break the pipe; that plaintiff failed to notify defendant of this defect, failed to repair it, and failed to use additional precautions in regard thereto. Also clause 9, which declares that the policy does not cover loss resulting, among other causes, from "the wilful act of the assured, or by the neglect of the assured to use all reasonable means to save and preserve the property insured hereunder, . . . nor from any loss or damage caused by an employee of the assured under twelve years of age." Then the answer states that the damage resulted from the wilful act of the plaintiff, in this: that on the date of the alleged injury "certain large and heavy iron fire shutters at one of the windows in the sixth story of the building occupied by plaintiff, and mentioned in said policy of insurance, were partly, but not tightly, closed by the servants and agents of the plaintiff, and certain hooks or rods attached to said shutters, and intended to be fastened in the sill of said window in order to form brace rods to prevent the closing of said shutters when opened, were by the servants, agents, and employees of the plaintiff voluntarily, intentionally, and deliberately fastened to, or hooked around and over, a pipe forming part of said automatic sprinkler system, said pipe being located underneath a workbench in said sixth story, near to the said window, and at about the height of the said window sill; that, because of being so fastened to the sprinkler pipe aforesaid by means of said brace rods, the movement or swaying of one or both of the said iron shutters produced a pulling strain on the sprinkler pipe, and by said strain the pipe was bent and broken, and water was discharged at the point of the breakage so caused by the wilful act of the plaintiff's servants and employees. And defendant says that said discharge of water would not have occurred, nor would the alleged injury of plaintiff's goods have ensued, except for the aforesaid voluntary and wilful conduct of the servants and employees of the plaintiff, and that by the said conduct of its servants and employees the plaintiff's goods in the premises

aforesaid were by the plaintiff voluntarily exposed to great, unnecessary, and needless danger, and to a risk not within the contemplation of said policy of insurance, and not insured against by this defendant, and that the plaintiff's loss resulted from its own neglect to use all reasonable means to save and protect the insured property, in this, to wit: that the window shutters above mentioned were provided with certain devices for closing and fastening the same, which plaintiff suffered to become defective, so that they would not close as they were designed to do, and that in consequence the servants of plaintiff, the day before the accident, being unable to fold the rods in their proper places, allowed them to project into the room, and either fastened them on the pipe of the sprinkler, or left them where they were liable to fall on it, and the consequence was that on the next day (Sunday), when everybody was absent from the premises, the iron window shutters swayed, and put a strain on the pipe, through one of the rods, and thereby broke the pipe, and the apparatus was discharged; that plaintiff's servants had, for a considerable time prior to the injury complained of, fastened the rods to the pipe in that way, and plaintiff knew it or would have known it if it had exercised ordinary care: and that it had never instructed its servants not to do so." A further defense set up in the answer was that it was shown by a schedule attached to the policy that the value of the property covered was \$75,000, and the policy provided that if, at the date of an accident thereunder, the value of the property should exceed that amount, the defendant should not be liable "for more than such proportion of the aggregate liability hereunder than the cash value so stated in said schedule shall bear to the total cash value of such property at the time of said loss," and the answer averred that the value of the property at the time of the accident was \$125,000. Reply, general denial.

There is little, if any, dispute about the facts. Plaintiff's establishment, which is a shoe factory, was supplied with an automatic sprinkler. It was a device having pipes running through the factory, under the workbenches, etc., designed to discharge water into the building in case of accidental fire. It was set to discharge itself when the temperature about it should reach a given degree. But it was of such a character that it was liable to be discharged by accident, and so to flood the premises with water when there was no fire to be extinguished. It was to indemnify the plaintiff against such accidental discharge that this contract of insurance was entered into. The windows in plaintiff's factory were provided with iron shutters, for the fastening of which, when closed, there were iron bars, and for holding them open during the day there were iron brace rods, about 3 feet long, with hooks at the end to fit into eyelets on the sills. When the shutters were closed, the bars were designed to be thrown into a socket, to hold them, and the brace rods were to be folded on the window sills. The

duty of closing these shutters and adjusting the bars and brace rods for the windows near his workbench devolved on an employee of plaintiff named Whittaker, aged nineteen years, who had been in the employ of plaintiff about three weeks, and whose main work was cutting shoe tongues. There was a pipe of the sprinkler under Whittaker's workbench, but he testified that he did not know what it was, and that no one had instructed him in regard to it. There was testimony, however, tending to show that he had been instructed in the manner of closing the shutters, throwing the bars, and folding the brace rods. He testified that during the two or three weeks he was engaged in work there he had usually closed the shutters to the window in question, and, instead of folding the brace rods on the window sill, had drawn them into the room and laid them on the sprinkler pipe. At closing time on the Saturday evening before the accident, after closing the shutters to the window nearest his workbench, he experienced some difficulty in throwing the bar that was to hold them closed, so he merely closed them, and drew the brace rods into the room, and laid them on the sprinkler pipe. He said: "I closed them as usual, putting the rods over the pipes, and I could not close the bar; and I stayed there until everybody had gone, and finally could not close it, and left."

Q. Did you ask anybody to help you to close it? Did you do anything about getting anybody?

A. There was no one there. . . .

Q. What reason did you have for going away and leaving the shutters and rods in that condition?

A. I never was told any different. I thought the pipe would support the rods,—hold the shutter.

It appears that on the next day, Sunday, in the afternoon, when there was no one in the factory, the unfastened shutter was blown open by the wind, pulling the brace rod which was attached by its hook to the sprinkler pipe with it, breaking the pipe's connection, and causing the sprinkler to be discharged. The apparatus was supplied with an automatic fire alarm, which immediately gave notice to the fire department, and in fifteen minutes the salvage corps was on hand, and the deluge was stopped. The parties selected arbitrators—one each—who agreed on the award of \$6,850.15, which amount, with interest, was the jury's assessment of damages. There was testimony tending to show that at the time of the accident the value of the property covered by the policy did not exceed \$75,000. The cause was tried by a special jury called at the instance of the defendant. The verdict was for the plaintiff for \$7,158.21. Defendant filed a motion for a new trial, which the court sustained; assigning as the ground therefor that it had given erroneous instructions. From the order granting a new trial, the plaintiff appeals. The points presented 61 L. R. A.

in the brief for respondent, as relating to the instructions, are that the first instruction for the plaintiff was erroneous, the modification by the court of the fourth instruction as asked by defendant was erroneous, and that the peremptory instruction for defendant should have been given. The purport of the instructions complained of will be referred to hereinafter.

Messrs. Lyon & Swarts for appellant.

Messrs. Percy Werner and W. E. Fisse, for respondent:

The burden of establishing the amount of its recovery is upon the plaintiff.

Barry v. Farmers' Mut. Hail Ins. Asso. 110 Iowa, 433, 81 N. W. 690; *Cory v. Boylston F. & M. Ins. Co.* 107 Mass. 147, 9 Am. Rep. 14; *Swift v. Union Mut. Marine Ins. Co.* 122 Mass. 576; *Paddock v. Commercial Ins. Co.* 104 Mass. 521.

Valliant, J., delivered the opinion of the court:

1. Our attention is first directed to the issues made by the pleadings. The answer sets up several affirmative defenses, founded on certain clauses in the policy making conditions in the insurance. Of these, the first pleaded is clause 7, which is: "The assured shall immediately notify the company in writing of any known defect which shall render the said sprinkler system more than usually hazardous, and he shall cause such defect to be immediately repaired, and shall in the meantime use such additional precaution as may be required for safety." Then the answer sets up as a breach of that condition the alleged defect in the fastening of these window shutters, and the manner of their use. That defense rests on a misconception of the meaning of the policy on that point. The reference made in that clause of the policy is to a defect in the sprinkling machine, against whose accidental discharge the contract for indemnity was entered into. The clause has no reference to a defect in the fastenings of the window shutters nor to any other contrivance in the plaintiff's establishment. Clause 9 is as follows: "(9) This policy does not cover loss or damage resulting from the explosion, rupture, collapse, or leakage of steam boilers or steam pipes; nor resulting from any interruption of business or stoppage of any work or plant; nor resulting from freezing; nor resulting from fire or violation of law: nor resulting from or caused by the wilful act of the assured, or by the neglect of the assured to use all reasonable means to save and preserve the property insured hereunder; nor resulting from or caused by invasion, insurrection, riot, civil war or commotion or military or usurped power, or by order of any civil authority; nor resulting from or caused by earthquakes or cyclones, or by blasting or explosions of any kind; or by the fall or collapse of any building or buildings; nor does this policy cover any loss or damage to accounts, bills, or currency, deeds, evidences of debt, money, notes or other securities, curiosities, drawings,

jewels, manuscripts, medals, or models; nor any loss or damage caused by an employee of the assured under twelve years of age." The answer founds two defenses on this clause, viz., first, that the injury "resulted from and was caused by the wilful act of the plaintiff;" second, that it was caused by plaintiff's failure to "use all reasonable means to save and preserve the property insured." In support of the charge that the injury was caused by the wilful act of the plaintiff, the answer specifies that the servant, in closing those window shutters, voluntarily, intentionally, and deliberately placed the brace rods, with their hooks, over the pipes of the sprinkler, with the result that, when the shutter swung, the rods pulled the pipe out of connection. Even if the wilful act of a servant could be construed in that connection as the wilful act of the master, which is not conceded, still there is nothing in the answer to indicate that the servant intended to set the sprinkling machine in operation. The most that can be said of the conduct of the servant, as there stated, is that he was negligent. It is not stated that he knew that the consequence of putting the rods where he did would be the discharge of the machine. There is scarcely ever a negligent act that has not, somewhere in its source, some act having the appearance of having been intentionally done. The servant intentionally laid the rods on the pipe, but he did not intentionally discharge the sprinkling apparatus. A man sometimes intentionally throws down a lighted match, but it does not necessarily follow that he thereby intentionally caused the conflagration that was started as a result of his match falling where it did the mischief. Mere negligence, even of the insured himself, does not defeat the policy. "Mere carelessness and negligence, however great in degree, of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy. Indeed, one of the principal objects of insurance against fire is to guard against the negligence of servants and others; and therefore, while it may be said generally that no one can recover compensation for an injury which is the result of his own negligence or want of care, the contract of insurance is excepted out of the general rule. Nor does it make any difference whether the negligence is that of the insured himself or of others. The law looks only at the proximate cause of the loss." 2 May, Ins. 4th ed. § 408. The specifications in the answer under this head are not sufficient to support the general charge that the damage complained of was the result of the wilful act of the plaintiff, and therefore there is no such issue in the case. The second defense under this 9th clause is founded on the subdivision which declares that the policy does not cover loss or damage "caused by the neglect of the assured to use all reasonable means to save and preserve the property insured thereunder." In support of that charge, the answer reiterates what was before averred in regard to the

defect in the shutter appliances and their uses, and that plaintiff had suffered them to become defective and remain so, and had failed to instruct its servants not to fasten the rods to the sprinkler pipes. The "reasonable means to secure and preserve the property" referred to in that subdivision of clause 9 are means to be used after the accidental discharge of the machine, to prevent greater loss than necessary. It has no reference to the care the plaintiff should take to prevent the accident. The term "to save and preserve the property insured hereunder" carries the meaning of property in peril and in need of preserving, and, in the connection used, it can have no other reference than the occurrence of the peril insured against. Clause 3 of the policy is: "In the event of loss hereunder, the assured shall immediately protect the property from further damage, separate the damaged property and put it in the best possible order. He shall make a complete inventory," etc. Whilst that clause prescribes certain duties to be performed by the assured in case of loss, yet it does not in express terms except from the insurer's liability loss which might have been avoided, notwithstanding the accident, if the assured had used all reasonable means at that time to secure and preserve the property insured. The subdivision of clause 9 now under discussion supplements the requirement of clause 3, and excepts such avoidable loss from the risk taken by the insurer. If we should construe this clause to mean, as defendant contends, that the plaintiff cannot recover for the damage to his goods if by reasonable care he could have guarded against the accident, then it takes all the life out of the policy, and renders the defendant liable only when the plaintiff and his servants have been without negligence. What indemnity would there be in an insurance policy purporting to cover property in a factory like this, where there are perhaps hundreds of servants, if the insurer were liable only in case no one was negligent? If the insurer did not intend by this policy to take the risk of negligence of the insured, why did it specify that it did not take the risk of loss by the insured's wilful act? And, if it did not intend to take the risk of the negligence of plaintiff's servants over twelve years of age, why did it specify that it did not take the risk of the negligence of a servant under the age of twelve years? If there was any doubt as to this construction of the clause in question,—if it was as susceptible of the construction contended for by defendant as of that above given,—the rules of construction would require us to construe it most favorably to the insured, as the following cases cited in the brief of appellant hold: *Columbia Ins. Co. v. Lawrence*, 10 Pet. 517, 518, 9 L. ed. 516, 517; *Louisville Underwriters v. Durland*, 123 Ind. 544, 7 L. R. A. 399, 24 N. E. 221; *Feibelman v. Manchester Fire Assur. Co.* 108 Ala. 200, 19 So. 540; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *Shawalter v. Mutual F. Ins. Co.* 3 Pa. Super. Ct. 448; *Karow v. Con-*

tinental Ins. Co. 57 Wis. 68, 46 Am. Rep. 17, 15 N. W. 27; *Catlin v. Springfield Ins. Co.* 1 Sumn. 434, Fed. Cas. No. 2,522; *Mickey v. Burlington Ins. Co.* 35 Iowa, 174, 14 Am. Rep. 494; *Guarantee Co. v. Mechanics' Sav. Bank & T. Co.* 28 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766. Clause 8 of the policy is to the effect that if, at the date of the accident, plaintiff's goods in the factory amounted in value to more than \$75,000, the defendant would be liable only for such proportion of \$7,500, the limit of liability, as \$75,000 bears to the actual value of the stock of goods at that date. The answer states that the goods at that date were of the value of \$125,000. There was substantial evidence to the effect that the goods at the date of the accident did not exceed in value \$75,000, and, although there was some evidence to the contrary, yet the question was submitted to the jury under proper instructions, and their verdict is conclusive on that point. If the above analysis of the answer is correct, there are no issues of fact in the case, except those tendered by the petition, and the general denial in the answer and the plea relating to the value of the goods. And even as to the general denial, it was almost, if not quite, overcome by the affirmative averments in the answer showing how the accident occurred.

2. The first instruction given for the plaintiff stated the contract of insurance as contained in the policy, and then stated that if the jury believed from the evidence that the plaintiff's goods were damaged "by the accidental discharge or leakage of water from said automatic sprinkler," etc., the plaintiff was entitled to recover. "And the court further instructs the jury that by the words 'accidental discharge or leakage of water' is meant discharge or leakage of water which happened by chance or out of the ordinary course of things, and without the wilful act or design of the plaintiff. And the court instructs the jury that, even though they believe from the evidence that the plaintiff's servant Whittaker was negligent in permitting the hooks attached to the shutters to extend out over or around the sprinkler pipe, yet, unless the jury believe from the evidence that said negligence caused the damage complained of, and was known to the plaintiff, or might, by the exercise of ordinary care and diligence, have been known to the plaintiff, or unless the jury believe from the evidence that the plaintiff failed to use such means to save and preserve the aforesaid property as a reasonably prudent person would have used under like circumstances and conditions, then such negligence, if any, will not defeat the right of the plaintiff to recover." The argument against this instruction is that it was improper to refer to the act of Whittaker as an act of negligence; that he was not guilty of any negligence, because he had not been properly instructed; that his act was the act of the plaintiff, and the plaintiff's act in failing to properly instruct its servant was, in the language of the policy, a failure "to use all reasonable means to

save and preserve the property insured hereunder." There was evidence tending to show that this boy had been instructed to close the shutters, and how to place the brace rods. There was no evidence that anyone told him not to hook them on the sprinkler pipe, and, if the plaintiff was guilty of any negligence, it was in failure to give that caution. How the plaintiff, or anyone else, could have anticipated that this boy would have hooked those rods on that pipe, is not suggested by anything in the record. It seems that he had been laying the rods on the pipe for two or three weeks, but it does not appear that anyone knew it. Besides, merely resting the rods on the pipe would not have produced this result, if the boy had fastened the shutter. It was the leaving of the shutter ajar and unfastened that produced the result. The boy had never left it unfastened before, and the plaintiff had no notice and no reasonable opportunity to discover that he had left it unfastened on that occasion. There is no dispute but that he was ordered to close the shutter, and was shown how to fasten it. Therefore, even if this policy excepted losses caused by the neglect of the insured, there was no evidence that the insured was guilty of any negligence which caused this loss. It was the negligence of the servant only. It is complained that the instruction was erroneous in not defining the term "wilful act of the plaintiff." There was no foundation in the evidence for a defense based on the theory that the injury resulted from a wilful act of the plaintiff, and there was no occasion for an instruction on that point. The only error in the instruction was that it was more favorable to the defendant than it should have been, in this: That it applied the requirement "to use all reasonable means to save and preserve the property" to the plaintiff's duty in discovering how the boy was conducting the business of closing the shutter, whereas that requirement applied, as we have seen, only to avoiding unnecessary damage after an accident. But the instruction adopted the defendant's construction of the clause of the policy, and the cause was submitted to the jury on that theory, the jury found the issue for the plaintiff, and that is the end of it. The complaint as to the modification of the fourth instruction as asked by the defendant is of the same character, and follows the same line of argument, as that in relation to the first instruction for the plaintiff, which we have above discussed. The instruction, as modified and given, is as follows: "The court instructs the jury that, under the terms of its policy offered in evidence, the defendant did not insure the property of the plaintiff therein mentioned against loss or damage caused by or resulting from the neglect of the plaintiff to use all reasonable means to save and preserve such property from loss or damage by water discharged from the sprinkler system mentioned in the policy; that by the expression, 'use all reasonable means to save and preserve the property,' used in the policy, is meant that the plaintiff and its employees

while acting in the scope of their employment, should use every means that a person of ordinary prudence and caution, in a like or similar situation, would adopt in the management, operation, and control of said sprinkler system, to prevent any discharge or leakage of water therefrom, and to protect the property from the consequences of any such discharge or leak. The degree of care which the plaintiff and its employees were required to exercise under the circumstances was such care as was reasonably commensurate with the situation, and the danger of a discharge or leakage of water reasonably to be apprehended, in view of the character, location, and construction of this sprinkler system, the arrangements of the building in which it was located, the nature of the property insured, character of the business carried on by the plaintiff, the number of persons employed by it in its business conducted in this building, the nature of their duties, and the circumstances that might produce an interference on their part with this sprinkler system, together with such other circumstances as would reasonably influence and govern a person of ordinary prudence similarly circumstanced. If the jury believe from the evidence that the loss or damage here sued for was caused by or resulted from the failure or neglect of the plaintiff, or its employees acting within the scope of their employment, to use all reasonable means to save and preserve the insured property from loss or damage through the leakage or discharge of water from the aforesaid sprinkler system, as defined in this instruction, and *that such failure or neglect was known to plaintiff, or by the exercise of ordinary care and diligence might have been known to plaintiff, in time to have prevented any discharge or leakage of water from said sprinkler system*, then the jury will find in favor of the defendant." The modification is indicated by the words in italics. This instruction, like that given at the request of the plaintiff, was more favorable to the defendant than the law sanctioned. It, in effect, excepts from the risk loss occurring through the negligence of the insured or its servants. The proposition is thus expressed in the brief of defendant's learned counsel: "We submit that, under the terms of this policy, no injury can be regarded as an accidental injury which could have been avoided by reasonable effort on the part of plaintiff." To sustain that proposition would be to overthrow a well-established principle that lies at the foundation of insurance. This argument is followed up by the counsel who say that the failure of the plaintiff to instruct its employee concerning this machine is such want of care as to preclude a recovery, and, in their argument on the point of wilfulness, they say that the

failure to so instruct the servant took his act out of the category of negligence, and made it the wilful act of the plaintiff. Counsel say that this policy differs from one of fire insurance, and is peculiar. If it is correctly interpreted by the counsel, it has very little, if any, force as insurance against an accident. The criticism of the court's modification is that it does not direct a verdict for the defendant merely because the discharge of the machine was caused by the neglect of the plaintiff or its servant, but required the jury, also, to find that that neglect was known to the plaintiff, or by the exercise of ordinary care would have been known. It is argued that an instruction that the plaintiff knew, or by the exercise of ordinary care would have known, of its own negligence, is meaningless. That criticism is founded more on the form of the expression than the substance or the meaning. No juror of ordinary intelligence would have any difficulty in understanding that it related to the plaintiff's knowledge of its servant's negligent act. There was not a particle of evidence that this plaintiff knew, or by the exercise of ordinary care could have known, of the negligent act of this servant which resulted in this catastrophe. He had for two or three weeks been in the habit of laying the brace rods on the sprinkler pipe, and it may be argued that in that period the plaintiff had an opportunity to have discovered that practice. But no injury resulted from that practice, and it is not suggested how any injury could have resulted from it. That act became a dangerous factor in bringing about the result when it united with another act,—that of leaving the shutters ajar and unfastened. That act was never done but that one time, and the evidence shows that it was unknown to plaintiff, and could not, without extraordinary watchfulness, have been discovered. The instruction should have been refused; but, since the court adopted the defendant's theory as to the negligence feature of clause 9, in so far as to apply it to plaintiff's duty before the accident, the modification still left the instruction more favorable than defendant was entitled to.

On the conceded facts of the case, the plaintiff was entitled to recover, and no judgment for the defendant could have been sustained. There was no error in the instructions of which the defendant has any right to complain. The court erred in sustaining the motion for a new trial.

The judgment is reversed, and the cause remanded to the Circuit Court, with directions to overrule the motion for a new trial, and enter judgment in accordance with the verdict.

All concur.

NORTH CAROLINA SUPREME COURT.

J. H. WIGGINS

v.

James PENDER, Admr., etc., of John Armstrong, Deceased, *et al.*, *Appts.*

(132 N. C. 628.)

1. An assignee is not deprived of the benefit of a covenant of warranty in a conveyance of real estate by the fact that he is not named in the covenant, if assigns are named in the habendum clause of the deed.
2. The reconveyance of land deeded with a covenant of warranty by way of mortgage containing like covenants will not prevent an action on the original covenants in favor of one who purchases at the foreclosure sale.
3. The statute of limitations does not begin to run against liability on a covenant of warranty in a deed of real estate until there is an eviction.
4. As between different persons to whom a common grantor had conveyed the same parcel of land, the elder deed gives the better title.
5. Counsel fees incurred in defending the title cannot be included in the damages to be awarded for breach of warranty of real estate, unless the covenantor has been notified to come in and defend.
6. That no real assets had descended to the heirs of one who warranted the title to real estate will not prevent the recovery of a judgment against his administrator for breach of the covenant.

(May 12, 1903.)

APPPEAL by defendants from a judgment of the Superior Court for Edgecombe County in favor of plaintiff in an action to recover damages for breach of warranty in the sale of real estate. *Modified and affirmed.*

Statement by Walker, J.:

This action was brought to recover damages for the breach of a covenant of warranty, and was heard in the court below upon the following statement of facts agreed upon by the parties:

On the 18th day of December, 1876, John Armstrong, the intestate of the defendant Pender, executed to Preston Justice and D. R. H. Justice a deed for a certain tract of land lying in said state and county for the recited consideration of \$850. That the said deed contained the following covenant, to wit: "And the said John Armstrong and wife, Margaret, covenant that they are seised of said premises in fee, and have the right to convey the same in fee simple; that the same are free from all encumbrances; and that they will warrant and defend the

said title to the same against the claims of all persons whomsoever." On the same day the said Preston and D. R. H. Justice reconveyed the said premises to the said John Armstrong by deed of mortgage to secure the purchase price, in fee, with all rights, privileges, and appurtenances thereto belonging, with usual power of sale in the event of default. That in the said deed of mortgage to the said Armstrong the said Justice warranted the title to the said land in fee simple for themselves, their heirs and assigns, to the said Armstrong, his heirs and assigns. The said land was thereafter sold under said mortgage in a foreclosure proceeding under order of the court, and the same was conveyed in fee simple by the commissioner of the court to the ancestor of the plaintiff, "with all privileges and appurtenances thereto belonging, to him, his heirs and assigns," without covenants of warranty; and thereafter said land was allotted and set apart to the plaintiff in the division of his father's estate. At April term, 1901, of the superior court, A. L. Parrish and wife, Maggie, brought their action against the above-named plaintiff to recover from him the possession of said land and the rents and profits thereof. That the said Maggie claimed said land by virtue of a deed by John Armstrong and wife prior in date to his deed to the said Justices, and in said action it was adjudged that the said Maggie Parrish was entitled to recover the possession of the land and the rents and profits thereof, for that the said Armstrong had only a life estate in the land at the date of his deed to the Justices. That the plaintiff was evicted and ousted from said land under and by virtue of said judgment, and has since brought this suit, and paid to the said Maggie the sum of \$250.44 as rents and profits of the land, and paid the further sum of \$18 costs of said action. That \$100 was a reasonable attorney's fee for defending said action against the plaintiff. John Armstrong died in July, 1885, and on the 10th day of July, 1885, Margaret Armstrong duly qualified as his administratrix, and the said Margaret died in 1892, and thereafter, to wit, on May 6, 1901, James Pender duly qualified as administrator *de bonis non* of said John Armstrong. The plaintiff brought this action on May 6, 1901. Maggie Parrish died in the spring of 1902, leaving a will, and one child, and on the 27th of October, 1902, A. L. Parrish qualified as executor of the will and as guardian of the child. It is agreed that the amount of damage which the court shall consider in the plaintiff's recovery, if the court be of the opinion that he is entitled on these facts to recover the same, is \$850, the purchase price of the land, and the sum of \$218.99, being the rent, profits, and costs up to April 15, 1901, when judgment was recovered against the plaintiff as above stated, and he was ousted, and the interest on \$1,068.99 from said date, and the further sum of \$50.

NOTE.—As to when covenants of seisin or for quiet enjoyment run with the land, see *notes* to *Alken v. Franklin* (Minn.) 6 L. R. A. 361, and *Barry v. Guild* (Ill.) 2 L. R. A. 334; also *Thomas v. Bland* (Ky.) 11 L. R. A. 240, and *Mygatt v. Coe* (N. Y.) 11 L. R. A. 646, 24 L. R. A. 850.

61 L. R. A.

paid as rent since said judgment, with interest thereon from December 5, 1901, and the further sum of \$100, reasonable attorneys' fees, paid by the plaintiff in defending the title to the land in said suit.

Judgment was rendered for the plaintiff against the defendant James Pender, as administrator alone, for the sum of \$1,166.99, with interest on \$1,068.99 from April 15, 1901, and costs, from which judgment the defendant appealed.

The following are the contentions of the defendant as appears from the case agreed:

(1) That the plaintiff was not the assignee of the covenants contained in the deed from John Armstrong to Preston and D. R. H. Justice, and cannot maintain this action for the breach of same. (2) That the covenants contained in said deed were extinguished by the reconveyance of said land to John Armstrong by the said Preston and D. R. H. Justice, and no right of action accrued thereon to the plaintiff. (3) That any cause of action arising upon the covenants in said deed is barred by the statute of limitations pleaded in the answer. (4) That it does not appear from the "agreed statement of facts" that A. L. Parrish and wife recovered said land of the plaintiffs by reason of a paramount title. (5) That neither the costs nor attorneys' fees incurred by the plaintiff in the suit of A. L. Parrish and wife should be included in the damages, for that no notice was given the defendant to defend said action. (6) That on the facts agreed the plaintiff is not entitled to recover.

The defendant also contended in his brief that it does not appear from the agreed facts that any real assets descended to the heirs of Armstrong.

Messrs. Gilliam & Gilliam, for appellants:

Where a deed contains a warranty to the grantee, but not to his assigns, such assigns can neither maintain an action on such covenant, nor defend under it against the grantor.

Smith v. Ingram, 130 N. C. 100, 40 S. E. 984; *Co. Litt.* 384b; *Malone*, *Real Prop. Trials*, p. 397; *Rawle*, *Covenants*, § 309; *Rujner v. McConnell*, 14 Ill. 168.

Messrs. John L. Bridgers and G. M. T. Fountain, for appellee:

It being gathered from the deed that the purpose was to convey a fee title, the words "heirs and assigns," occurring in the warranty, could be transferred to the operative words of the conveyance.

Allen v. Bowen, 74 N. C. 155; *Staton v. Mullis*, 92 N. C. 626.

So we can in the deed under consideration transfer the words, "their heirs, assigns, etc.," from the operative words of conveyance to the warranty.

Phillips v. Thompson, 73 N. C. 545.

The covenant runs with the land.

Lewis v. Cook, 35 N. C. (13 Ired. L.) 193; *Rickets v. Dickens*, 5 N. C. (1 Murph.) 343, 4 Am. Dec. 555; *Markland v. Crump*, 61 L. R. A.

18 N. C. (1 Dev. & B. L.) 94; *Peters v. Bowman*, 98 U. S. 56, 25 L. ed. 91.

The habendum and warranty of a deed are to be construed together.

Miller v. Texas & P. R. Co. 132 U. S. 662, 33 L. ed. 487, 10 Sup. Ct. Rep. 206; *Bally v. Wells*, 3 Wils. 25; *Willard v. Tayloe*, 8 Wall. 571, 19 L. ed. 505; *Hagar v. Buck*, 44 Vt. 290, 8 Am. Rep. 368; *Coleman v. Bresnahan*, 54 Hun. 622, 8 N. Y. Supp. 158; *Wead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 149; *Doty v. Chattanooga Union R. Co.* 103 Tenn. 564, 48 L. R. A. 160, 53 S. W. 944; 8 Am. & Eng. Enc. Law, 2d ed. p. 190.

Walker, J., delivered the opinion of the court:

The argument in this case was confined to the first contention of the defendant, namely, that the plaintiff is not the assignee of the covenant contained in the deed from Armstrong to the Justices, as the covenant does not contain the word "assigns," and he cannot, therefore, maintain this action for a breach of the same. This important question was discussed with much learning and ability, but the other exceptions were not argued by counsel, though they were not abandoned, and it is, therefore, our duty to consider and decide them in connection with the exception just mentioned.

It is a mistake to suppose that the modern covenant for title is to be construed by the same rigid rule as the ancient warranty. The latter never existed in this state, and in England, by statute of 3 & 4 Wm. IV., the effect of warranty in tolling a right of entry was taken away, and the writs of *warrantia chartæ*—when the warrantee was impleaded in an assize, and a voucher or vouchee to warranty in a real action, by the help of which the party wishing to obtain the protection of the warranty might have defended himself or received lands of equal value in price of those he had lost—were abolished, so that the warranty of real estate, which had long been disused, has no practical operation; and, indeed, we are told by Blackstone that the covenant in modern practice entirely superseded it. 2 *Sharswood's Bl. Com.* 303, and notes.

The defendant's counsel relied on the case of *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984, but it will be seen by reference to Coke that in the passage quoted in that case, *viz.*, "If a man doth warrant land to another without this word 'heirs,' his heirs shall not vouch; and, regularly, if he warrant land to a man and his heirs without naming assigns, his assignee shall not vouch," he referred to the ancient warranty, for in the very next passage he says, "But note, there is a diversity between a warranty that is a covenant real, which bindeth the party to yield lands or tenements in recompense, and the covenant annexed to the land, which is to yield but damages, for that a covenant is in many cases extended further than the warranty." *Co. Inst.* 384b. He further says that, even though the assignee is a stranger to the covenant,—that is, not a privy in contract,—he can, nevertheless,

have an action on the covenant for a breach, because the covenant runs with the land. "In this case the assignees shall have an action of covenant, albeit they were not named, for that the remedy by covenant doth run with the land, to give damages to the party grieved, and is in a manner appurtenant to the manor. . . . See in *Spencer's Case* [5 Coke, 18a], before remembered, divers other diversities between warranties and covenants which yield but damages." Co. Inst. 385a. And so it was resolved in *Spencer's Case* that, "if a man makes a feoffment by this word *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch, but, if a man make a lease for years by this word *concessi*, or *demisi*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of covenant; for the lessee and his assignee hath the yearly profits of the land which shall grow by his labor and industry for an annual rent, and therefore it is reasonable when he hath applied his labor, and employed his cost upon the land and be evicted (whereby he loses all), that he shall take such benefit of the demise and grant as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to. . . . The principle does not depend upon tenure, but upon privity of estate. The question involved is whether the parties have sufficient mutual relation to the land which the covenant concerns, or, as it is commonly expressed in the cases, whether there is a privity of estate, which is considered necessary when there is no privity of contract. It will be seen that the necessary relation is something different from the ancient privity of estate, and that in many cases the expression is used in a modern sense. . . . The original and ancient warranty was a real covenant, the remedy on which was by voucher or writ of *warrantia chartæ*, and which bound the covenantor to replace the lands, in case of the eviction of the grantee, by others of equal value. The modern covenants of title, which are often spoken of as personal covenants because the action on them is a personal action, have taken the place of this. . . . All of these are for the benefit of the land, and as loss suffered by breach of any usually, if not always falls on the owner of the land, there would seem much practical advantage if the owner of the land, who suffers loss by a breach of any of them, could have his action against the covenantor. . . . But, however it may be with covenants of seisin and against encumbrances [which are necessarily broken, if at all, when made], a covenant of warranty—that is, the covenant to warrant and defend—is always regarded as a prospective covenant, the benefit of which will run with the land to any successive grantees, and of which there will be no breach until eviction. . . . This covenant of warranty binds the original grantor and his personal representatives to the owner of the land, and any owner during whose

possession a breach occurs can sue any or all previous covenantors, even though the deed under which he himself claims has no covenant of warranty. . . . In order that an assignee should be so far identified in law with the original covenantor, he must have the same estate,—that is, the same status or inheritance,—and thus the same *persona quoad* the contract. The privity of estate which is thus required is privity of estate with the original covenantor, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books. . . . In this case privity of estate is considered as something entirely different from tenure. Clearly, the presence of tenure is not necessary to enable covenants, either as to their benefits or their burdens, to run with the land." *Spencer's Case*, 1 Smith, Lead. Cas. 9th ed. 174. and notes.

It is said by Mr. Rawle, in his excellent work on Covenants, that, "in the earliest days of the law of which we have accurate knowledge, warranty, which, like homage, was a natural incident of tenure, passed with the transfer of the estate, and inured to the benefit of the owner for the time being. When, later, deeds were introduced, and the warranty was either express or was implied from the word of grant, *dedi*, neither the heir nor the assign of the grantee could take advantage of the warranty unless expressly named. But while this was so as to warranty, it was not so as to certain covenants; and chiefly among these were the covenants for title, the benefits of which passed with the land to the heir or the assign, though not expressly named. Just why or how this was so is nowhere stated in the old books with such precision as would preclude argument. In more modern times, amidst much differences of opinion, the doctrine has been variously supposed to depend upon privity of tenure, or privity of estate, upon the nature of the estate, upon the nature of the covenant, and upon the relation of the covenant to the estate; and the difficulty of the questions themselves is not less great than the practical importance of their results. But, whatever may have been the grounds on which the doctrine was originally based, it has been from the earliest times consistently held, both with regard to the ancient warranty and the modern covenants for title, that they run with the land to its owner for the time being; that is to say, the owner of the land is considered entitled to the benefit of all the warranties and covenants which the prior owners in the chain of title may have given." 5th ed. p. 292. §§ 203, 204. He further says, quoting from Coke the passage above mentioned: "As respects the rights of the assignee, a distinction always existed between warranty and the covenants for title. Thus the warranty implied by the word *dedi* could not be taken advantage of by the assignee of him who had received it, but, 'if a man make a lease for years by the word *concessi*, or *demisi* (which implies a covenant), if the assignee

of the lessee be evicted, he shall have a writ of covenant.' So with respect to the warranty and the covenant when expressed in words. 'Regularly,' says Coke, "if a man warrant land to another and his heirs without naming assigns, his assignee shall not vouch,' but with respect to a covenant the rule is different, and the assignee could take advantage of it though not named." Id. § 318.

We have the authority of Chancellor Kent for saying that the remedy by the ancient warranty never had any practical existence in this country, and the personal covenants have superseded the old warranty, the remedy upon them being by action of covenant against the grantor or his representatives to recover compensation in damages for the land lost by the eviction for failure of title. Upon eviction of the freeholder, no action of covenant lay at common law upon the warranty. The party had only a writ of *warrantia chartæ* upon his warranty to recover a recompense in value to the extent of the value of his freehold. The covenant of warranty and the covenant of quiet enjoyment are not strictly personal, like the covenant of seisin, which is broken when the deed is delivered if the title is defective; but they are prospective in their operation, and an ouster or eviction is necessary to constitute a breach. These covenants are, therefore, in the nature of real covenants, and run with the land conveyed, and descend to the heirs, and vest in assignees or purchasers. 4 Kent, Com. 13th ed. pp. 471 (538) *et seq.*

It is said in Minor's Institutes: "Covenants which run with the land are those which affect the nature, quality, or value of the thing granted, where there is a privity of estate between the contracting parties,—as a covenant to be answerable for the title. Covenants of this description pass with the land, and are binding on and in favor of the assignee, although assigns be not expressly named. The most important by far of covenants which run with the land are those which relate to the title." 2 Minor, Inst. p. 718. "Covenants for title are termed real covenants, and pass to the assignees of the land by the common law, who may maintain actions on them against the vendor and his real and personal representatives; and as to covenants relating to the land it seems that an assignee may maintain an action on the covenants, although the covenants were entered into with the original grantee and his heirs only." 2 Sugden, Vendors, 9th ed. p. 89. "A covenant which has for its object something annexed to, or inherent in, or connected with, real property—such as a covenant for quiet enjoyment, for repairs, for payment of rent—runs with the thing demised, and the assignee, though not named therein, is bound thereby, and entitled to the advantages of it." 1 Leigh, Nisi Prius, p. 820; *Sacheverell v. Froggatt*, 3 Wms. Saund. Rep. 371; *Bally v. Wells*, 3 Wils. 25; *Tatem v. Chaplin*, 2 H. Bl. 133; 3 Washb. Real Prop. pp. 497-504. Certain covenants are appurtenant to 61 L. R. A.

the estate granted by the deed in which such covenants are contained, and bind the assignees of the covenantor, and vest in the assignees of the covenantee in the same manner as if they had personally made them. In England all covenants for title are considered as appurtenant to the land, and to run with it. But in this country the covenants for title considered as running with the land are those for quiet enjoyment, for further assurance, and of warranty. 2 Devlin, Deeds, § 940; *Mygatt v. Coc*, 142 N. Y. 86, 24 L. R. A. 850, 36 N. E. 870. In the case of *Bradford v. Long*, 4 Bibb, 225, the court says: "In this country the covenant of warranty is considered as only binding the party to give damages as a compensation for the loss of the land warranted; and such a covenant is in this respect more extensive than the ancient warranty, for the assign, though not named in the covenant, may have a remedy for breach of it;" citing Co. Litt. §§ 386b and 385a, *supra*. The covenant of general warranty is one that runs with the estate in reference to which it is made, and may be availed of by anyone to whom the same may come by conveyance sufficient to transfer the title to the land. *Chandler v. Brown*, 59 N. H. 370. "It is of the nature of this covenant to partake of the estate in the land, and pass with it by descent or purchase, so long as it remains unbroken." *Ford v. Walsworth*, 19 Wend. 337. "It was a covenant incident to the estate, made for its security and protection, beneficial to the person to whom the estate should come, but to no other." *White v. Whitney*, 3 Met. 86.

The above authorities establish the proposition that the covenant of warranty is a covenant real, in the sense that it is annexed or incident to the estate conveyed by the deed, and runs with it inseparably for the benefit of all who may succeed to the title by purchase, and who sustain the relation toward the original covenantee of privies in estate, whether these should succeed to the title as assignees who are expressly named as such in the covenant or not. *Lewis v. Cook*, 35 N. C. (13 Ired. L.) 193; *Markland v. Crump*, 18 N. C. (1 Dev. & B. L.) 94, 27 Am. Dec. 230.

In this state the warranty has been treated as a personal covenant annexed to the estate, and running with it as a safeguard and protection to the grantee and his heirs or the assignees or purchasers of the estate in question, and is not regarded strictly as a covenant real, within the meaning of the old law and the operation of the principles concerning real actions. A more liberal construction is given to it with the view of "meeting more fully the intention of the parties and the ends of justice." *Spruill v. Leary*, 35 N. C. (13 Ired. L.) 419; *Southerland v. Stout*, 68 N. C. 449; *Markland v. Crump*, 18 N. C. (1 Dev. & B. L.) 95, 27 Am. Dec. 230; *Blount v. Harvey*, 51 N. C. (6 Jones L.) 189.

But in this case we think the covenant by a clear and necessary implication must in-

ure to the benefit of the plaintiff as assignee, although the word "assigns" was not used in the warranty. The words "heirs and assigns" are used in the habendum, and the grantees are also named in the habendum, but not in the warranty. Can it be supposed that the grantor did not intend a covenant for the benefit of the grantee? Yet this must be true unless it is held that the covenant should be construed as made for the benefit of those who are named in the habendum. In *Herrin v. McEntyre*, 8 N. C. (1 Hawks) 410, this court held that, when the habendum in a deed is to a man and his heirs forever, he may recover for an eviction on a general warranty, though his name is not mentioned in the warranty, and though it is not stated in the clause of warranty to whose benefit it shall inure, for "it is the nature of a warranty to run with the estate, and," as Coke says, "though in the clause of the warranty it be not mentioned to whom, etc., yet shall it be intended to the feoffee." Co. Litt. § 384. If it inure to the feoffee when not named in the warranty, why not as well, and with equal reason, to the heirs and assigns, to whom the estate is limited in the habendum, when they are not named in the warranty?

We conclude, therefore, that the plaintiff can maintain this action for the breach of the covenant, unless barred of a recovery for some other reason set up in defense. The reconveyance of the land by mortgage from the Justices to Armstrong did not have the effect of extinguishing the covenant, but the mortgagee was entitled to the benefit of the covenant in the mortgage as an indemnity against the acts of the Justices in so far as necessary to protect the estate he held as security for the debt from any defect of title which might arise from said acts. There was no estoppel or rebutter, and when the land was sold the benefit of the original covenant passed to the purchaser. This subject is fully discussed in Rawle, Covenants, §§ 266, 217, and 218, and the cases are there collated. See also 3 Washb. Real Prop.; *Reusser v. Carney*, 52 Minn. 397, 54 N. W. 89; *Lewis v. Cook*, 35 N. C. (13 Ired. L.) 193; *Markland v. Crump*, 18 N. C. (1 Dev. & B. L.) 94, 27 Am. Dec. 230. "Where land is conveyed by deed of warranty, and the same premises at the same time are reconveyed in mortgage with like covenants, the covenants in the mortgage deed will not operate to preclude the maintenance of an action on the covenants of the absolute deed." *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504. Nor will they operate by way of rebutter to prevent circuitry of action. *Haynes v. Stevens*, 11 N. H. 28; *Sumner v. Barnard*, 12 Met. 459; *Hubbard v. Norton*, 10 Conn. 422.

The plaintiff's cause of action is not barred by the statute of limitations. It did not accrue until there was an eviction, which took place in 1901, and the statute does not commence to run until the right of action has accrued.

We are also of the opinion that it sufficiently appears in the case that there was 61 L. R. A.

eviction by one holding a paramount title. It is admitted that Mrs. Parrish brought her action against the plaintiff and recovered judgment, and that by process issuing upon said judgment the plaintiff was evicted. Both parties claimed under John Armstrong, and Mrs. Parrish held a deed from Armstrong prior in date to the deed from him to the Justices, under which the plaintiff in this action claims. As the parties were estopped to deny the title of John Armstrong, the older deed of Mrs. Parrish was sufficient to show that she held the better title as between her and the plaintiff.

The next question in the case relates to the damages, and especially to the right of the plaintiff to have counsel fees which he paid out in defending the suit of *Parrish v. Wiggins* included in the recovery. The covenant of warranty is a contract of indemnity, and, while the usual rule is that the plaintiff recovers only the amount of the purchase money and interest, it is held by many courts outside of this state that he can recover also any amount he is compelled to pay as costs and expenses in defense of the title, so that he may be fully indemnified against any loss by reason of the breach of the covenant, provided always the cost and expenses so paid by him are reasonable. It seems to be conceded in some of the cases that he is entitled to recover as a part of his compensation or damages the cost of defending the suit in which the judgment against him for the possession of the premises was given, and also that attorneys' fees may be included when the warrantor has been notified of the suit, and requested or vouched to come in and defend the title; and it is held in the greater number of cases that he is entitled to recover attorneys' fees whether the covenantor was notified or not. The reason for this rule, as gathered from the cases, would seem to be based upon the following considerations: If the covenantee defends the suit in good faith, and with proper diligence, what he does is for the benefit of the covenantor, and such expenses as are necessarily incurred by him are, therefore, inseparably connected with his claim of indemnity. It would be too much to require the grantee in a deed of warranty to decide at his peril on the validity of a title set up in opposition to that which the grantor undertook to convey. By the covenant the grantor agrees, not only to warrant, but to defend, the title; and if the covenantee is compelled to make the defense, or suffer a judgment by default, he should recover in an action on the covenant, as it is a contract of indemnity, what he has thus been compelled to pay out. *Smith v. Compton*, 3 Barn. & Ad. 407; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Rickert v. Snyder*, 9 Wend. 416; *Ryerson v. Chapman*, 66 Me. 557; *Meservey v. Snell*, 94 Iowa, 222, 62 N. W. 767; *Harding v. Larkin*, 41 Ill. 420. Whether these considerations should induce us to allow counsel fees as a part of the damages is a question we need not decide until it is actually presented in a case before us. While,

as we have already said, it seems to be held in a majority of the cases that the covenantee may increase his damages by the amount of reasonable costs and counsel fees paid by him in defending the suit for the recovery of the land without giving notice to the covenantor, we prefer to adopt the rule which appears to us to be more in consonance with reason and right, and to recognize and enforce the just principle that a man should be heard before he is required to pay, or to have his day in court, or at least a chance to have it. We think that the covenantor was entitled to notice to come in and defend the suit, and that he should not be adjudged to pay any counsel fees without having had an opportunity to comply with his contract and defend the suit himself, or, if he desired to do so, to submit to judgment, and save any additional costs and expenses, if he should discover that his title was so defective as to render useless further resistance to the suit. This view is well expressed in the case of *Chestnut v. Tyson*, 105 Ala. 163, 16 So. 726: "Had notice been given to the appellants [covenantors], they might have thought proper to defend the suit, and employ their own counsel, or they might have come to the conclusion that the title of the plaintiff in the ejectment could not be successfully resisted, and they might, therefore, have determined not to incur a useless expense in making a defense, and preferred to perform their covenant by paying to the appellees the amount of damages to which they might be entitled." *Crisfield v. Storr*, 36 Md. 129-151, 11 Am. Rep. 480. Of course, this rule would not apply to such of the costs of the ejectment suit as would be adjudged against the defendant therein, though no defense was made, as upon default, for instance; and these, we apprehend, might be recovered on the covenant notwithstanding notice to the covenantor had not been given, since it is only the expenses of defending the suit which he would have upon notice, the election of incurring or not." The rule we propose to adopt is the safest and best, as it is easy and convenient for the covenantee to give such notice, and, besides, important advantages might accrue to him from doing so. There is no hardship in the rule, as there would or might be if a contrary rule were laid down.

The appellant does not except to the allowance of the costs of the other suit in which plaintiff lost the land, but does except to the award of counsel fees as part of the damages, because no notice of the suit was given. As it does not appear in the case that any such notice was served on the defendant, this exception is sustained, and the judgment of the court below is modified accordingly.

The last objection to the plaintiff's right to recover upon the facts stated cannot be sustained. It is not necessary, in this case, that real assets should have descended to the heirs of Armstrong. They are not sued in the case for the breach; and in an action

on the covenant, as distinguished from the ancient warranty, the plaintiff is not required to show that the heirs received real assets. The plaintiff is not trying to avail himself of the warranty by way of rebutter. The ordinary covenants for title are personal covenants in the sense that they are binding on the personal representative of the covenantor, and, though they run with the land, they are not strictly real covenants within the meaning of the ancient feudal law. *Cartier v. Denman*, 23 N. J. L. 260. This is like any other action on a covenant sounding in damages, and the judgment will be satisfied out of the assets of the covenantor, whether personal or real, in like manner as a recovery upon any other obligation. Under our present procedure the plaintiff merely recovers judgment for his damages, and he must obtain satisfaction, not by execution, but by a proceeding to have the assets of the intestate applied to its payment. There must be assets, it is true, before the plaintiff's claim can be satisfied, but the fact that no assets have descended to the heirs will not defeat the plaintiff's right to have a judgment against the administrator. If there are no personal or real assets, the plaintiff will get nothing on his judgment. That is all.

There was error in the judgment of the court below as above indicated, and judgment will be entered in accordance with the principles stated in this opinion.

Judgment modified and affirmed.

STATE of North Carolina, *Appt.*,
v.

Albert JONES.

(132 N. C. 1043.)

A man cannot be prosecuted for criminal trespass for entering upon his wife's land with intent to make his residence there, although she has left him and removed from the premises upon good grounds for believing that he has been guilty of adultery, and has forbidden him again to enter upon them, and the Constitution provides that her property shall be and remain her sole and separate estate.

(*Clark, Ch. J., dissents.*)

(April 21, 1903.)

A PPEAL by the state from a judgment of the Superior Court for Wake County acquitting defendant of the charge of criminal trespass. *Affirmed.*

The facts are stated in the opinion.

Mr. Robert D. Gilmer, Attorney General, for the State.

NOTE.—For the somewhat similar question of the right of a wife suing for divorce to an injunction to restrain her husband from interfering with her property or entering her dwelling pending suit, see, in this series, *Lyon v. Lyon* (Ga.) 42 L. R. A. 194.

Montgomery, J., delivered the opinion of the court:

The wife of the defendant, who was the owner of the premises on which they resided up to November, 1892, left on that day, and has remained off ever since, having good grounds for believing that the defendant had been for some time living in adultery with a woman in the neighborhood. She had, before she left her home, urged upon the defendant to leave her premises, that she might live there alone, and he refused to do so. The defendant had been living on the land all the while, although, shortly after having left herself, she ordered the defendant to leave, and not to enter again. Upon his frequent ingress and egress and refusal to leave, a warrant was issued for entering upon the land after being forbidden. He was found guilty in the court of a justice of the peace, and fined. From that judgment he appealed to the superior court. The above facts were found by a special verdict in the superior court, and upon them the court adjudged that the defendant was not guilty.

We can see no error in the judgment. Notwithstanding the fact that the wife may have good grounds to suspect the defendant husband of immoral conduct, they are still, in the eye of the law, husband and wife, and there has been no separation by a decree for a divorce, *a mensa et thoro*. This case presents the novel feature of a wife seeking a judicial separation from her husband by the criminal action of trespass. In *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324, the husband and wife occupied the same house and farm, the property of the wife, and the action by the wife against the husband was an action of ejectment. He had taken possession of the property, was using it as his own, and had been appropriating the rents and profits to his own use, without applying any part of the same to the wife's comfort and support. This court held that the wife was entitled to an order for the possession of the property, but that the husband could not be ejected from the premises, for that was "a proposition fraught, as I conceive, with the most dangerous consequences to society, to wit, that a wife may, under the forms and with the sanction of law, at her own will, and without cause, eject her husband from her dwelling and society because the house is her separate property. I can never agree that either husband or wife can, without committing those offenses which the law designates as causes of divorce or separation, invoke the aid of the courts to render a judgment, the unavoidable consequences of which would be a separation of man and wife. Nothing less than an express and positive statute to that effect can control or destroy that highest of all the obligations imposed in the marriage relation,—that man and wife shall live together. Any decision of the courts, the direct or incidental result of which is to destroy the sanctity of marriage in that particular, can but weaken and undermine the surest foundation upon which the structure of society, and, through it, our political institutions, rest, and command

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our confidence." The court further said: "By the matrimonial contract the husband and wife are to live together, and the law, divine as well as human, has, whether wisely or unwisely, made him the ruler of the household; and the well-understood and well-defined legal duties, relations, and obligations of the marriage compact cannot be abridged or changed at the will of either, or otherwise or for other causes than are prescribed in the statute in relation to divorce and alimony." In that case the parties were occupying together the premises; but does the fact in the present case that the wife has abandoned her husband and their home, and made her residence elsewhere, alter the principle involved in the case from which we have just quoted? Are not the purpose and effect of the present action, if successful, the separation of the husband and the wife and the destruction of the home relations? Can it be that a wife may, whenever she sees fit, leave her home, and take up her residence in another place, refuse the society of her husband, and indict him as a trespasser if he puts his foot upon the wife's abandoned property, the place he has made his home? Have we reached that stage of social progress when the sacred relation of husband and wife and the hallowed influences of the home are converted into mere traditions, without power to influence, and dreams instead of relations? It would seem so to us if we were to hold that the indictment in this case was lawful and proper.

If the husband should commit any of those acts which the law points out as causes of divorce, the wife may effect a separation from him under the chapter of the Code on divorce and alimony, and only in that way. The case of *Taylor v. Taylor*, 112 N. C. 134, 16 S. E. 1019, does not have application to the facts of this case. There the plaintiff, who was the wife of the defendant, brought an action against him to recover possession of her land, and for an injunction to restrain him from interfering with her exclusive control and management of her property. The court said: "The plaintiff is entitled to the possession of the land, exclusive of the husband, until a reconciliation has been effected." But the parties had been divorced *a mensa et thoro*.

No error.

Clark, Ch. J., dissenting:

This is a criminal action begun before a justice of the peace against the defendant for entering upon a certain tract of land, the property of his wife, after being forbidden by her so to do, and without license therefor. Code 1883, § 1120. Found guilty, and fined \$1 and costs, the defendant appealed to the superior court, where the jury found, in a special verdict, that the wife of the defendant, having good grounds to believe that her husband was and had been for some months living in adultery with a woman in the neighborhood, urged him to leave the premises, that she might live alone. This he refused to do, whereupon she left, and has remained away ever since. She then ordered

her husband to leave that tract of land, and not enter on it again, but he refused to observe this order, and has since that time repeatedly been off of said land, but has always returned thereon, living there continuously, contrary to her will. Upon these facts it was error in his honor to hold that the defendant was not guilty. The Constitution, art. 10, § 6, provides that the property of any female, whether acquired before or after marriage, "shall be and remain the sole and separate property of such female," the only restriction being the requirement of the written assent of the husband to conveyances by her. In *Tiddy v. Graves*, 126 N. C., at page 622, 36 S. E. 128, it was held, quoting and approving the exact language of Merrimon, Ch. J., in *Walker v. Long*, 109 N. C. 510, 14 S. E. 299, as follows: "This provision is very broad, comprehensive, and thorough in its terms, meaning, and purpose, and plainly gives and secures to the wife the complete ownership and control of her property as if she were unmarried, except in the single respect of conveying it. She must convey the same with the assent of the husband. It clearly excludes the ownership of the husband as such, and sweeps away the common-law right or estate he might at one time have had as tenant by the curtesy initiate." Since the Constitution, as has thus been held uniformly, secures to the wife the "complete ownership and control of her property as if she were unmarried," and has "swept away any common-law right or estate the husband might at one time have had as tenant by the curtesy initiate," it follows that the defendant had no more right to enter upon his wife's land, *qua* land, and continue to reside there, after being forbidden to do so, than if she were unmarried. This court has never trenched upon the above plain provision of the Constitution, so as to give him a right to occupy her realty, and use it for his residence, in her permanent absence therefrom, contrary to her prohibition. His occupation of the dwelling and continuous use of the premises might well prevent her getting a tenant or exercising the complete ownership and control guaranteed to her by the Constitution. All the court has ever held is that, when the wife is residing upon the premises, the husband has the right of ingress to her and egress because of his marital right to enjoy her society. *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324, which is based throughout on this ground. This right, it said, he cannot be deprived of except by proceedings in divorce, either absolute or *a mensa et thoro*. But when, as here, the wife does not reside upon the premises, but has purposely removed therefrom to prevent his coming there, there is no right of ingress and egress to her. She is not there. He has no right *jure mariti* to occupy the residence when she has left it permanently, or to enter upon any of her lands (save to come to her when there), if forbidden by her so to enter. Her ownership and control are sole, and excludes, as Merrimon, Ch. J., above says, any common-law right the husband ever had. As

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reiterated in *Tiddy v. Graves*, 126 N. C. 622, 36 S. E. 128, the right to tenancy by the curtesy after the death of the wife is purely statutory, and then only as to property the wife does not devise. He has no right whatever as to her land while she is living. His right of ingress and egress is not as to her land, but as to her presence, and does not exist as to any premises where she is not.

In *Jones v. Coffey*, 109 N. C., at page 518, 14 S. E. 85, it is stated that the husband "has the right of ingress and egress and marital occupancy, but can assume no dominion over her land or rents, except as her properly constituted agent;" and in *Thompson v. Wiggins*, 109 N. C., at page 510, 14 S. E. 301, it is said that such rights give him, as against the world, a bare seisin that makes him a freeholder, and as such eligible to sit on juries, but with no dominion over the realty, and with only the right of ingress and egress and occupancy, recognized by *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324; and that, as we have seen, is only egress and ingress to her, and joint occupancy of the dwelling where she resides. In *Ex parte Watts*, 130 N. C., at page 242, 41 S. E. 291, Douglas, J., said that a surviving husband "had no interest whatever in the land, not even the right of curtesy, as that was destroyed by the will of the wife." As late as *State v. Black* (1864) 60 N. C. (1 Winst. L.) 266, 88 Am. Dec. 436, this court reaffirmed the common-law doctrine that a husband had a right to whip his wife "if no permanent injury be inflicted;" Pearson, Ch. J., saying: "A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself." Blackstone and other authorities to same effect, cited in *Vann v. Edwards*, 128 N. C., at top of page 428, 39 S. E. 66. Ten years later, in *State v. Oliver* (1874) 70 N. C. 60, Settle, J., says: "The courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances." Though the Constitution of 1868 contained no provision as to the "rights of person" of married women, its enhancement of their status by their complete emancipation as to property rights rendered inevitable this change in the decisions. Married women were recognized as being *sui juris*. They no longer forfeited their rights by the fact of marriage.

While the "rights of person" have been thus secured to married women by judicial decision, the constitutional provision as to their property rights is equally as broad and explicit that "all their property, real and personal," whether acquired "before or after marriage, shall be and remain the sole and separate property of such female," with complete and absolute control over the same, even to the power of disposing of the same by will, the sole exception being (and no statute can add any further restriction) that her "conveyances" require the hus-

band's written assent. The effect of similar provisions elsewhere is thus clearly summed up by Judge Cooley (*Snyder v. People*, 26 Mich. 109, 112, 12 Am. Rep. 302): "At the common law, the power of independent action and judgment was in the husband alone. Now it is in her, also, for many purposes. But the authority in her to own and convey property and to sue and be sued, is no more inconsistent with the marital unity than the corresponding authority in him. She is still presumptively his agent to provide for the household, and he is not deprived of the rights or relieved of the obligations of head of the household, except as by their dealings and intent to that effect is indicated. . . . The property is hers alone, but the residence is equally his. . . . The wife's dwelling house can be considered that of the husband only while he makes it such in fact, and there is no such legal identity as can preclude her house being considered in legal proceedings against him as the dwelling of 'another' when it is no longer his abode." A *fortiori*, it cannot be his dwelling house when it has ceased to be hers. In *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578, it is well said, after summing up the duties and obligations of husband and wife: "These duties and obligations upon husband and wife were not the result of the arrangement of their property at common law, but of the contract of marriage, and the relation thereby created," which remain still unchanged, though, as to the separate property of the wife she is now the same as a *feme sole*. She need not join her husband in a suit to recover it, or for trespass to it. She may even prosecute a suit against him for any unlawful interference with her property. Our Code 1883, § 178, expressly provides that, "when the action concerns her separate property, she may sue alone," and also that she "may sue her husband" in regard thereto. *Shuler v. Millsaps*, 71 N. C. 297 (in which the court says: "We are called upon to make a new departure, leaving old ideas behind, and adapting ourselves to the new order of things"); *McCormack v. Wiggins*, 84 N. C. 278; *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324; *McGlennery v. Miller*, 90 N. C. 215; *Taylor v. Apple*, 90 N. C., at page 346; *Barnes v. Barnes*, 104 N. C. 613, 10 S. E. 304. The right of the wife to the preservation and disposal of her separate property, says Smith, Ch. J., in *State v. Edens*, 95 N. C., at page 695, 59 Am. Rep. 294, she may now assert against her husband as well as against a stranger in an action at law, as is decided in *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324. The "action at law" is not there restricted to the civil side of the docket, and there is no reason why it should be if the wife thinks a criminal proceeding in this case can assert and protect her right to the exclusive control of her property more expeditiously and cheaply, or is a more appropriate remedy. In the "Century of Law Reform," a most excellent collection of twelve lectures delivered at Lincoln's Inn by eminent lawyers upon the present status of the law in Eng-

land, it is said (p. 373) that "a wife may get an injunction restraining her husband from entering her house," and (p. 376) that a wife can take out criminal proceedings against her husband for stealing her property. In the present case the wife cannot have a divorce, though the husband is living in open adultery, because he has not "abandoned her and lived in adultery, as our statute requires" (*House v. House*, 131 N. C. 140, 42 S. E. 546), but for a good cause, as the jury finds, she has left him. If, therefore, she cannot forbid him to go upon her separate property, and to live there in her absence, she has lost that absolute control of her property as she had it before marriage, and which a constitutional provision guarantees shall remain in her after marriage. If she cannot forbid him to go there, she cannot ask a court to forbid his doing so, and his character and conduct may, and doubtless would, prevent her getting a tenant for that tract of land. What self-respecting tenant would share the house with the husband and his paramour? Besides, if he has a right to occupy the house at all as husband, he has a right to the whole of it. But the Constitution forbids him any right to his wife's property. In *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324, it was held that he had the right of ingress and egress to the wife's presence, though not to any dominion over her land or occupancy of the house, except in conjunction with her. But even the right of access to her person, if contrary to her will, has since that decision been denied, though there was no divorce, in the famous *Clitheroe Case* (*Queen v. Jackson* [1891] 1 Q. B. 671) by a unanimous bench in the court of appeal in England. Lord Chancellor Halsbury, Lord Esher, M. R., and Fry, L. J., delivering opinions. That case attracted the attention of lawyers throughout the world, and has been generally accepted as settling the right of a married woman to be free as to her person, as well as her property, from the control of her husband, unless she is willing to his companionship. He can sue for divorce if his own conduct so entitles him. As the wife cannot by habeas corpus compel the husband to abide with her, so it was held in the *Clitheroe Case* that the husband could not enforce the unwilling companionship of the wife. The law now recognizes the equality of rights of both parties to the marital relation, and no longer asserts the inferiority or subjection of women. The question here involved is not the propriety of husband and wife living together notwithstanding he is living in adultery with another woman. The husband and wife are not living together, and there is no process by which the courts can make her live with him. It is not an issue of divorce, but of property rights. The sole question is, Can the husband infringe upon the wife's right to have the sole custody of her property, which the Constitution has guaranteed to her, or can the courts disregard the guaranty because man and wife ought to live together? Is

there any higher law than the Constitution? Besides, the husband's occupying the wife's property in her absence and against her prohibition, is not living with her, even constructively. Certainly, as the wife was not living on this property, the husband had no right to go there and occupy the house

against the prohibition of the owner. He had no interest in the property. The wife has sole right to control it, and as fully as if she had remained single.

The judge should have sustained the action of the justice of the peace.

LOUISIANA SUPREME COURT.

Joseph C. SPEYRER

v.

Felix MILLER, Impleaded, etc., Appt.

(108 La. 204.)

- *1. Where a homestead is seized, and the seizure is enjoined, the matter in dispute in the injunction suit is the homestead, and not the amount of the judgment sought to be executed; and the injunction suit must be filed in another court than that of the seizure, if the latter court has not jurisdiction *ratione materiae*.
2. Where the land and movables claimed as homestead are seized in a justice-of-the-peace court, and an injunction is sued out in the district court, the movables may be included in the injunction, notwithstanding that the justice-of-the-peace court would have jurisdiction as to them.
3. An affidavit for injunction in these words, "I swear that all the facts contained in the foregoing petition are true," is sufficient.

*Headnotes by PROVOSTY, J.

4. Where the amount in which bond should be given has not been fixed by the judge, the injunction must be dissolved, and cannot be saved by invocation of the doctrine that an injunction will not be dissolved where it appears that another writ could be sued out immediately.
5. The practice of including in one injunction several separate seizures made by creditors between whom there is no privity is not to be encouraged, and can be sanctioned only in highly exceptional cases, where evidently no inconvenience can be occasioned to the defendants in injunction, and no complication can possibly arise.
6. An order requiring a bond to be given in favor of each of the defendants is not complied with by giving bond in favor of the defendants jointly.
7. Statutory damages on the dissolution of an injunction will not be allowed where, the merits not having been gone into, the court cannot say that the equitable remedy of injunction has been abused.

(May 26, 1902.)

NOTE.—Amount in dispute in case of injunction against the enforcement of liens or claims against specific property.

- I. Injunctions in favor of debtors.
 - a. Against the sale of exempt property, 781.
 - b. In other cases, 782.
- II. Injunctions in favor of third parties.
 - a. Claimants of property, 783.
 - b. Mortgagees and other lienors, 785.
- III. Uniting interests of several parties, 786.
- IV. Summarily, 787.

I. Injunctions in favor of debtors.

a. Against the sale of exempt property.

In SPEYRER v. MILLER it was held that the matter in dispute was the real value of the property claimed as a homestead, and not the amount of the judgment sought to be executed, where the debtor sought an injunction in the district court against the sale of exempt property under executions from a justice of the peace. La. Code Pr. arts. 617, 629, provide that it is for the court which has rendered the judgment to take cognizance of the manner of its execution. An exception had been ingrafted on the Code by the decisions in that state, so that, where the property of a third person was seized, and the value of the property exceeded the limit of the jurisdiction of the seizure court, it was held that the only question that could be raised was that of the ownership of the property seized, and that the value of the property tested the jurisdiction of the court. The rule was further extended in the SPEYRER CASE to apply to a defendant in an execution seeking to restrain a levy on exempt property. The court said: "Hence, in the case of an ordinary

defendant in execution the amount of the judgment is always and inevitably the amount in dispute, and the test of the jurisdiction, no matter in what shape the litigation may frame itself. But this reason does not hold in the case of the homesteader. While he owes the debt his homestead property is not liable for it, and every dollar of the property taken away from him by the seizure would be that much property of which he would have been deprived in violation of the rights secured to him by the Constitution and laws of the state. His homestead is a right additional to and independent of his ordinary right of ownership. It is an additional tenure by which he holds the property, and, in a litigation involving the question of homestead *vel non*, it is not his ordinary tenure of ownership that he is vindicating, but this special, separate, Constitution-conferred tenure. In vindicating this tenure he stands toward the seizure in precisely the same attitude as the third person whose property has been seized. The property seized is not more liable to the seizure in his case than in the case of the third person. He, as much as the third person, raises an issue not touching the validity of the judgment or the regularity of the execution, but confined strictly to the liability of the property to the seizure." This decision seems to be in accord with the weight of authority.

In McGinty v. Richmond, 27 La. Ann. 606, where an injunction was sought by the debtor to prevent the sale of his homestead under a judgment, it was held that the value of the property was not to be considered, but that, if the parish court had the jurisdiction necessary to authorize it to render a judgment, it had jurisdiction to prevent that judgment from

A PPEAL by defendant Miller, constable, from a judgment of the Judicial District Court for the Parish of St. Landry, in favor of plaintiff in an action brought to enjoin the enforcement of an execution against homestead property. *Reversed.*

The facts are stated in the opinion.

Mr. William J. Sandoz, for appellant:

District courts are without jurisdiction to enjoin the execution of judgments of justices of the peace in their own parish.

Stevenson v. Weber, 29 La. Ann. 108; *Goodrich v. Hunton*, 29 La. Ann. 375; *Dufossat v. Berens*, 18 La. Ann. 339; Code Pr. 604.

The execution of a judgment can be enjoined by no other court than that from which the writ issued.

Arthurs v. Villere, 43 La. Ann. 414, 9 So. 127.

being satisfied by the sale of property not subject to seizure.

This decision was overruled in *SPRYER v. MILLER*, the court saying: "The first reason, namely, 'that the value of the property seized is not to be considered,' is not a reason, but a decision of the case. Whether such value is to be considered is the very question up for decision, and we have endeavored above to demonstrate the affirmative of that question. The second reason, namely, 'that, if the parish court had the jurisdiction necessary to authorize it to render a judgment, it had jurisdiction to prevent that judgment from being satisfied by the sale of the property not subject to seizure,' has as an argument the defect of proving too much. It proves that in the case of the seizure of a third person's property the seizure court has jurisdiction to enjoin the sale, regardless of the value of the property. This reason would overthrow a settled jurisprudence."

An execution from the district court was sought to be enjoined in the county court on the ground that the property levied upon was exempt. The value of the property was within the jurisdiction of the county court. It was held that the county court had jurisdiction to enjoin the sale of the property under execution, under Tex. Const. art. 5, § 16, providing that county courts shall have exclusive jurisdiction also of civil cases when the matter in controversy shall exceed \$200 and not exceed \$500, exclusive of interest, and concurrent jurisdiction with the district court when the matter in controversy shall exceed \$500 and not exceed \$1,000, and the county court shall have power to issue writs of injunction necessary to the enforcement of the jurisdiction of said courts. *Anderson v. Larremore*, 1 Tex. App. Civ. Cas. (White & W.) § 947, p. 532. The amount of the execution was not stated in this case.

So, where the defendant in an execution issued from the justice's court for \$35 obtained an injunction against the sale thereof in the district court, on the ground that the property was exempt from execution, it was held that the district court had jurisdiction to grant the injunction. *Alexander v. Holt*, 59 Tex. 205. This was on the ground that the district court had power to grant injunctions in cases in which a court of chancery, under the settled rules of equity power, had power to issue the same. It did not involve any question as to what was the amount in controversy.

And in *Stein v. Frieberg*, 64 Tex. 271, where a levy under an execution from a justice was made upon a mare of the value of \$150 that was

This is not a suit involving "title to real estate," because plaintiff's title is expressly recognized by defendants when they seize the property which he claims as a homestead.

Code Pr. 1144; La. Rev. Stat. 640.

Where the defects in the injunction proceedings are vital to the issuance of the writ, the judge is bound to dissolve it. The insufficiency of the affidavit, or the failure of the order to fix the amount of the bond, is fatal on demurrer.

Code Pr. 304; *Green v. Huey*, 23 La. Ann. 704; *Mason v. Fuller*, 12 La. Ann. 68; *Bell v. Riggs*, 37 La. Ann. 813; La. Rev. Stat. 463, 1753.

There being no identity or privity of interest between the three parties made defendants in this suit, they cannot be joined in one suit.

claimed to be exempt, and an injunction was issued by the district court to prevent the sale, it was contended that the amount in controversy was too small to give jurisdiction to the district court. It was held that, under the general power to issue writs of injunction, in cases in which a court of chancery under the settled rules of equity would have power to issue them, the court had the power to issue the injunction without reference to the amount in controversy.

In *Grangell v. Taylor*, 105 La. 324, 29 So. 885, on an appeal from an injunction against the seizure of notarial fees amounting to \$250 on a judgment of \$2,000 in garnishment, it was held that the appellate court had no jurisdiction. La. Const. 1898, art. 85, provides appellate jurisdiction where the amount in controversy exceeds \$2,000. In this case the injunction was obtained by the debtor against the judgment creditor. The ground of the injunction was not stated, and it was not shown whether it was on the ground that the notarial fees were exempt or not.

b. In other cases.

The rule seems to be well settled that, in actions by the debtor in execution against the plaintiff in the judgment to enjoin an execution sale of his property, in the absence of special statutory provisions, the amount of the execution, and not the value of the property seized, determines the jurisdiction of the enjoining court.

A judgment debtor sought to enjoin a sale of his real estate for the balance due on an execution after it had been partly satisfied by a sale of personalty. It was held that the appellate jurisdiction was tested by the amount enjoined. *Francisco v. Gauthier*, 35 La. Ann. 393. In this case the court said that it was otherwise when third parties sought to enjoin a levy on their property.

And on an injunction against a sale under a mortgage note of \$250 it was held that the appellate court had no jurisdiction, although the land levied upon was worth more than \$300, and the plaintiff in the injunction suit prayed for \$500 damages and \$100 attorney's fees. *Holland v. Duchamp*, 12 La. Ann. 784. It was claimed that the order of seizure was premature.

And where an injunction against an execution sale was sought by the judgment debtor on account of irregularities in the proceedings, it was held that the amount in dispute, and not the value of the property levied upon, de-

Broadwell v. Smith, 28 La. Ann. 172; *Mayor v. Armant*, 14 La. Ann. 177; *Garland*, Code Pr. 56, 2, (d).

Mr. Charles Frederick Garland for appellee.

Provosty, J., delivered the opinion of the court:

Three of the creditors of the plaintiff, Joseph Speyer, obtained judgment against him in the justice of the peace court, and caused execution to issue against him, and his property to be seized. Between these creditors there existed no privity of interest. The judgments and the executions were separate. The property was already under seizure by virtue of an execution issued by the district court, and the seizures were made on the top of this other seizure, and there was pending in the district court an injunc-

tion suit involving the question of the liability of said property to seizure; the same being claimed to the homestead. Under these circumstances, it was thought advisable to stay proceedings on the three seizures until this question of homestead should have been determined in the district-court suit and accordingly the parties entered into an agreement to that effect, and, in pursuance of this agreement, proceedings were stayed on the three seizures. And so matters remained until the termination of the district-court suit, when the constable proceeded to advertise the property for sale without renewing his notice to the seized debtor that he would so proceed unless the debt was paid. The district-court suit had been settled without a trial, and therefore had not determined the question of the alleged exemption of the property from seizure. In

terminated the jurisdiction of the appellate court. *Bruneau v. Haughton*, 16 La. Ann. 47.

In *Wheeler & W. Mfg. Co. v. Whitener*, 2 Tex. App. Civ. Cas. (Willson) § 15, p. 23, which was an action in the county court by the debtor to enjoin the execution of a justice's judgment, it was held that the amount in controversy in the injunction was the amount of the justice's judgment, and not the value of the property levied upon. The grounds for the injunction were not stated.

And in an action to annul and enjoin a judgment as between the parties, it was held that the jurisdiction of the appellate court depended on the amount of the judgment sought to be annulled, and not on the value of the property seized or the amount of the damages claimed. *Cushing v. Sambola*, 30 La. Ann. 426.

In an action of nullity accompanied with an injunction against the execution of a judgment, although the property was worth more than \$300 and the judgment less than that amount, it was held that the supreme court had no jurisdiction on an appeal, although a claim for \$500 damages was made. *Poree v. Vallsche*, 15 La. Ann. 292. In this case the court held that the large claim for damages would be treated as unreal, and was intended to afford a pretext for the recourse to the appellate court.

In an action by a debtor to annul several small judgments against him amounting to \$244, and to enjoin their enforcement, where he alleged that the property seized exceeded in value \$1,000, it was held that the matter in dispute was the amount of the judgments sued to be annulled, and, as they did not exceed \$300, the supreme court had no jurisdiction to grant a mandamus requiring the judge of the district court to grant an appeal. *State ex rel. Minlocq v. Fourth Judicial Dist. Judge*, 18 La. Ann. 398.

In *Dickinson v. Union Mortg. Bkg. & T. Co.* 64 Fed. 895, which was an action to enjoin the exercise of a power of sale in a mortgage of \$3,500 and claiming payment by complainant of usury amounting to \$1,696, and to prevent a cloud on plaintiff's title, it was held that the Federal court had jurisdiction. The court adopts a quotation in its ruling as follows: "The proper criterion of the value of the matters involved in the controversy is to be found in the value of the property, the possession or enjoyment of which will be affected by the result of the litigation." This would seem to be a ruling that the value of the real estate controlled the jurisdiction. But the opinion further states: "It will be observed that, although the complaint states the loan of \$3,500, and the execution of the note and the mortgage, it nowhere offers to pay any sum admitted to be due, but prays an 61 L. R. A.

injunction against the exercise by the defendant of its power under the mortgage deed. It is plain, therefore, that the controversy between the plaintiff and the defendant is in great part over the exercise of this power, the value of which to the defendant is measured by the sum to secure which this power is given to it. The motion to remand is refused." The effect of this decision, therefore, seems to be that it is the value of the mortgage power which measures the jurisdiction, and which would necessarily be akin to the amount of an execution or a judgment. Further than this the court does not notice the distinction that is made in the cases between the value of the property to be sold and the value of the debt for which it is sold.

II. Injunctions in favor of third parties.

a. Claimants of property.

The weight of authority seems to be that, where the property of third parties is seized under a writ against another, and an injunction against the sale is sought, the value of the property seized determines the jurisdiction of the court in granting the injunction.

Property was seized under a *fi. fa.* from a parish court, and the value of the property exceeded the sum to which the jurisdiction of that court was limited. It was held that a third party claiming to be the owner might obtain an injunction from the district court. La. Code Pr. art. 397, required that relief should be sought before the court from which the execution issued. It was held that this case would be an exception, as the value of plaintiff's interest exceeds \$300, and the parish court is incompetent to take cognizance of such a case. *Chapelle v. Lemane*, 12 Rob. (La.) 519.

In *McDonogh v. Doyle*, 9 Rob. (La.) 302, it was held that, where the value of the property seized under a *fi. fa.* from a parish court was beyond the jurisdiction of the court from which the writ was issued, a third party whose property was seized might obtain an injunction from the district court. This was held to be an exception to La. Code Pr. arts. 395, 397, 617, 629, *infra*. In this case the amount of the execution was not stated, but the petitioner alleged that the levy was upon a building on his grounds, and that it exceeded in value the jurisdiction of the parish court.

And where a party set up title in himself to a slave shown to be worth more than \$300, and based his injunction or opposition on his right of ownership as against an execution issued from the parish court, it was held that a question was presented which the parish court

proceeding with the three executions, the constable, for economy's sake, consolidated the three notices of sale into one, heading it with the titles of the three suits, and announcing that the sale was being made to satisfy the three writs. The plaintiff then went into the district court and sued out the present injunction. The grounds of injunction are: First, that at the time of the advertisement the writs in the constable's hands had expired; second, that plaintiff "has never been notified of the advertisement of his said properties for sale, nor of the contemplated date of the sale thereof, nor has he been notified to appoint an appraiser on a date fixed to meet the appraiser to be selected by the plaintiffs to appraise his property before the sale thereof; third, that the property is exempt from seizure under the homestead law, except the roan horse,

the buggy, and the cow Betsy, which are exempt because not belonging to the plaintiff, but to his children. The constable and all the creditors in the seizures were made defendants. They excepted that the district court could not enjoin the process of the justice court. This exception was overruled as to the immovables, and sustained as to the movables. Defendants then further excepted on the grounds that the affidavit was insufficient, that the order granting the injunction does not fix the amount of the bond to be furnished, that there was a misjoinder of parties, and that the bond is a joint one, and does not name the amount of the obligation of the plaintiff and his surety towards each of the three defendants. They prayed the dissolution of the writ, with statutory damages. These exceptions having been overruled, the defendants answered to the

could not try, as that court was one of limited jurisdiction, and the district court had jurisdiction to grant an injunction. *Hagan v. Hart*, 6 Rob. (La.) 437. This was held to be an exception to La. Code Pr. arts. 395, 397, 617, 629, providing that opposition by a third person pretending to be the owner of the thing seized must be made before the court which gave the judgment. In this case the amount of the execution was not stated.

Where third parties sought to enjoin the sale of property seized on execution against another, and in which property plaintiff claimed superior rights, it was held that the value of the property seized determined the jurisdiction on appeal. *Meyer v. Logan*, 33 La. Ann. 1055. The court said that "there is nothing in dispute except the property."

So, where an injunction was sought by a third person against an execution sale of specific property, alleging ownership, it was held that the value of the property, and not the amount of the judgment sought to be satisfied out of it, determined the jurisdiction of the court. *Rhodes v. Black*, 34 La. Ann. 406.

In the following cases brought to enjoin the sale of plaintiff's slave under an execution against a third party, it was held that the value of the property seized determined the jurisdiction of the court in the injunction proceedings. *Boulligny v. White*, 5 La. Ann. 31; *State v. Seventh Judicial Dist. Judge*, 12 La. Ann. 48. In the first case the amount of the execution was not stated, but the value of the property levied upon was shown to be more than sufficient to bring the case within the jurisdiction of the court.

And where the value of property was less than an appealable amount, and belonged to a third person, who obtained an injunction against the sale of the same under execution, it was held that the damages claimed by the injunction defendant could not be added to give the court jurisdiction, as the remedy in such a case was by an action on the injunction bond. *Thompson v. Lemelle*, 32 La. Ann. 932.

Where a third person enjoined the seizure of his property under a writ of *fi. fa.* against another, it was held that the matter in dispute was the value of the property, and the value thereof regulated the right of appeal. *Testart v. Belot*, 32 La. Ann. 603. In this case the amount of the execution was unappealable, but the value of the property seized was within the jurisdictional amount.

In *Brown v. Young*, 1 Tex. App. Civ. Cas. (White & W.) § 1240, p. 712, where an execution from a justice's court was levied upon goods found in possession of defendant in the 61 L. R. A.

execution; and two other parties brought an action alleging that they were partners with the defendant, and that he had no interest in the goods, but that they were the exclusive owners, and asked for an injunction for \$100 damages and an alternate judgment for the goods, or their value, \$242.—It was held that the county court had authority to grant the injunction. The court said: "The amount in controversy was the value of the goods levied upon, which was \$242, and not the amount of the judgment and execution."

A third party, in opposition, obtained an injunction to prevent a sale under execution against another party of a schooner of value exceeding \$500. It was held that an appeal would not be dismissed for want of jurisdiction. *Gogreve v. Windhorst*, 21 La. Ann. 298. In this case the amount of the execution does not appear, and the jurisdiction of the supreme court was limited to \$500.

And where a levy was made upon a mill, and an injunction against the sale was obtained by a third party claiming the mill under two different titles, and the mill was worth \$2,000, and \$100 for damages was claimed, it was held that the controversy involved \$2,100, and was one which the supreme court had jurisdiction to determine. *Henry v. Tricou*, 36 La. Ann. 519. In this case it was contended that the supreme court ceased to have jurisdiction over this case in consequence of the recent amendment to La. Const. art. 81, providing that the supreme court shall have jurisdiction only whenever the matter in dispute whatever may be the amount therein claimed, shall exceed \$1,000 exclusive of interest." The court said: "It is true that this case was decided after the promulgation of the governor's proclamation of the adoption of amendment to article 81 of the Constitution; but, whether it was then determined or not is immaterial, for the reason that the suit brought by Ullmann, in the form of an intervention, coupled with an injunction, involved the ownership of the whole mill, under two different titles, one to half from Moody, another to the remaining half from a sheriff's sale, under a writ levied after seizure under plaintiff's writ. The mill was worth \$2,000, and \$100 for damages were claimed *in supra*. So that the controversy involved \$2,100, and is one over which this court would still have jurisdiction to determine."

And where a third party sued out an injunction in the district court against the seizure of his property on an execution issued from a justice's court for \$100, alleging the value of the property to be \$400, and alleged damages in the sum of \$500, it was held that the appel-

merits; pleading: First, that in view of the fact that the proceedings under the writs were stayed in pursuance of an agreement with plaintiff, the latter is estopped from taking advantage of the expiration of the writs; second, "that the stay of execution granted by the district court in plaintiff's suit against Berkson Bros. operated a stay of execution of other executions until the determination of said injunction suit; third, that plaintiff was served with all legal notices required by law; fourth that "the only legitimate manner of legally testing the value of the homestead claimed by this plaintiff is as provided under article 244 of the Constitution of Louisiana for the year 1898, to wit, that the property must be offered for sale by the executive officer under due process of law, when it shall not be sold unless the sale thereof realizes more than the

sum of \$2,000, in which case the beneficiary shall be entitled to that amount. Respondents declare that a sale of said property will realize more than the sum of \$2,000." They prayed the dissolution of the writ, with \$50 damages as attorneys' fees. The court made the injunction peremptory, basing its judgment on the want of notice, and abstaining from passing on the question of homestead.

1. Under this state of the facts and the pleadings, the first question coming up for examination is the exception to the jurisdiction. The rule is that one court cannot enjoin the process of another, and in this state that rule has matured into statute law. Code Pr. arts. 617, 629; *State ex rel. Police Jury v. Livaudais*, 39 La. Ann. 984, 3 So. 185; *Arthurs v. Villere*, 43 La. Ann. 414, 9 So. 126. An exception to the rule is recognized where the property of a third

late court was without jurisdiction, as the matter in dispute was the ownership of the groceries received, and the value thereof was far below the jurisdiction of this court. *Ribet v. Contreras*, 28 La. Ann. 18. The court said: "The demand for \$500 was evidently made to give this court a jurisdiction it did not otherwise have."

b. Mortgagees and other lienors.

It seems that the question of jurisdiction in case of injunction in favor of a lien holder contesting a levy on property on which he has a lien is determined by the amount of the execution contested, and not by the value of the property. The cases adopting this rule do not discuss the distinction made between actions by third parties and actions by the judgment debtor, although they adopt the rule applicable to the latter class of cases.

A party obtained eight judgments before a justice of the peace, and each in a sum less than \$100, and caused an execution to issue in each and all of his judgments, under which the constable seized property of the defendant of the value of several hundred dollars, and subsequently an execution issued in favor of another party from the same justice for less than \$100, and the constable was proceeding to advertise and sell the property under the junior execution. The holder of the prior execution sued out an injunction from the district court to restrain the constable from proceeding to execute the junior writ. The injunction was dismissed by the district court on the ground that it had no jurisdiction, and the court of appeals refused to take jurisdiction of an appeal from that judgment as the lower limit of the jurisdiction of that court was \$100. *State ex rel. MacKenzie v. Court of Appeals Judges*, 39 La. Ann. 508, 2 So. 68. A mandamus was brought in this case to compel the judge to entertain an appeal. The court said: "Assimilating his proceeding to the revocatory action, relator first contends that the matter in dispute exceeds \$100, because the sum total of his eight judgments, added together, exceeded \$400, exclusive of interests and costs. But he cannot thus cumulate the different amounts of distinct and separate judgments so as to create an appealable interest not disclosed in any one of the judgments in question. This principle was quite recently reaffirmed by this court in the case of *Marshall v. Holmes*, 39 La. Ann. 313, 1 So. 610. But relator also contends that the test of jurisdiction is in the value of the property seized, which is shown to exceed the sum of \$500. That argument is also erroneous.

The real matter in dispute is the alleged misconduct of the constable, whose course threatens relator with a loss equal to the amount of the last judgment rendered against the common debtor. The crucial question involved in the controversy hinges upon the right of the plaintiff in that case to execute a judgment in a sum less than \$100 on property which had already been seized at the instance of this relator. Neither party claims any privilege on the property of their common debtor in the hands of the constable; and the contest is reduced to a simple struggle for the first proceeds realized from the sale of the property."

A marshal had levied an execution upon land for the sum of \$600 and \$35 costs. The complainant held a mortgage to a large amount, which he was proceeding to foreclose on the land, and claimed that the property was not chargeable with the judgment, and that he was in danger of losing his mortgage by the execution sale, and praying for an injunction. It was insisted by the complainant that the jurisdiction depended on the value of the property upon which the execution was laid and the amount of the complainant's interest in it, and, as the property was worth more than the sum required to give jurisdiction, and the mortgage was also for a larger amount, it was claimed that he had a right to appeal from the decree of the circuit court because he might lose the whole benefit of his mortgage by a forced sale under the execution. It was held that the only matter in controversy between the parties was the amount claimed under the execution. *Ross v. Prentiss*, 3 How. 771, 11 L. ed. 824. The court said: "The dispute is whether the property in question is liable to be charged with it or not. The jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them; and, as that amount is in this case below \$2,000, the appeal must be dismissed."

This case was cited with approval, and quoted, in *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066, in which case the question was whether, in a suit in equity brought in the circuit court by two or more persons on distinct demands, the defendant could have appealed as to these plaintiffs only, to each of whom more than \$5,000 was decreed. The *Ross Case* was also cited with approval in *Carne v. Russ*, 152 U. S. 250, 38 L. ed. 428, 14 Sup. Ct. Rep. 578, which was a bill in equity to redeem land worth more than \$5,000 from encumbrances less than that

person is seized, and the value of the property exceeds the limits of the jurisdiction of the seizure court, as prescribed by the Constitution. In such a case the only question that can be raised is that of the ownership of the property seized; and the value of the property tests the jurisdiction of the court, and the claimant must go into the court having jurisdiction according to amount. *Cross v. Parent*, 26 La. Ann. 591; *Munday v. Lyons*, 35 La. Ann. 990; *Bruneau v. Houghton*, 16 La. Ann. 47; *Gayarre v. Hays*, 21 La. Ann. 307; *Testart v. Belot*, 31 La. Ann. 795. Even as to the defendant in execution an exception is admitted in cases where the execution comes from another parish. *Laves v. Chinn*, 4 Mart. N. S. 388. The defendant may in such cases apply for relief to the courts of his own parish. This exception had its origin early in our jurisprudence, at a time when the means of communication were so imperfect and slow that to confine the defendant to the court of the execution for relief would have operated a denial of justice in many cases, as he would not have had time to reach that court. Founded in necessity, or supposed necessity, the exception has persisted in these days of rapid communication, when the necessity has long ago ceased. *Police Jury v. Michel*, 4 La. Ann. 84; *Hobgood v. Brown*, 2 La. Ann. 323; *Arthurs v. Villere*, 43 La. Ann. 414, 9 So. 126. The rule against one court enjoining the process of another is not, then, without exceptions; and the present inquiry is whether another exception should not be recognized in the case of a homesteader seeking to rescue from

the clutches of a seizure his homestead, of a value either going above or falling below the limits of the jurisdiction of the seizure court. The solution of the question depends upon the ascertainment of what is, in such a case, the matter in litigation. The matter in dispute being ascertained, the question solves itself; for no court can entertain jurisdiction of a matter whose value either falls below or goes above the limits of its jurisdiction as prescribed by the Constitution. To say otherwise would be to say that a mere rule of general jurisprudence, or an article of the Code of Practice, can stay the operation of the provisions of the Constitution prescribing the limits of the jurisdiction of the several courts of the state. Where, then, a person enjoins the seizure and sale of property as being his homestead, what is the matter in dispute? To put the question more pointedly, In such a case is the matter in dispute the amount of the judgment sought to be executed, or is it the value of the property claimed as homestead? In the case of an ordinary debtor the amount in dispute and the test of the jurisdiction is the amount of the judgment. The reason is that all the property of a debtor must go to pay his debts, and therefore he cannot raise any issue in connection with the property separately and independently of the judgment; but he can litigate, if at all, only in connection with the judgment, to contest, either its validity, or the regularity of the proceedings had for its execution. No issue, therefore, can possibly be raised by him that will not be merely incidental to the judgment and its execution. Hence in the case

amount. In *New England Mortg. Secur. Co. v. Gay*, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815, the court said: "A similar ruling was made in *Ross v. Prentiss*, 3 How. 771, 11 L. ed. 824, where a bill was filed to enjoin the marshal from levying an execution of less than \$2,000 upon certain property, the value of which was more than \$2,000. In this case, as in the other, the argument was made that the defendant might lose the whole benefit of his property by the forced sale under the execution, but the court held that it did not depend upon the amount of any contingent loss, and dismissed the bill." In *Linehan R. Transfer Co. v. Pendergrass*, 16 C. C. A. 585, 36 U. S. App. 48, 70 Fed. 1, in a suit to enjoin the collection of a tax, the court said: "The amount in controversy was the amount of the tax, and not the value of the property upon which the tax was assessed. The amount in controversy therefore was not sufficient to give the circuit court jurisdiction;" Citing *Ross v. Prentiss*, 3 How. 771, 11 L. ed. 824.

In *Snoddy v. Haskins*, 12 Gratt. 363, a distributee received a slave of the value of \$650, on which an execution for less than \$500 was levied. An injunction was denied in the trial court on the ground that the conveyance of the slave to the intestate was fraudulent as to creditors of the defendant in the execution. On appeal it was contended that the supreme court had no jurisdiction on account of the amount in controversy. The court was equally divided on this question.

In *Tertrou v. Comeau*, 28 La. Ann. 633, a mortgagee sought an injunction against a sale by an administrator under an order for the sale of her estate belonging to the succession. The 61 L. R. A.

plaintiff claimed that the order of sale was null for want of reasonable notice if the estate was solvent, and, if the succession was insolvent, the first duty of the administrator was to the creditors, and the order of the proposed sale, being *ex parte*, was contrary to the will of the creditors. It was held that the value of the property to be sold was the test of the amount in dispute, and that the appellate court had jurisdiction.

III. Uniting interests of several parties.

An act of Congress of May 20th, 1870 (16 Stat. at L. 124, chap. 108), provided for an auction of market stalls for a specific term, subject to an annual rent. At the expiration of the term a number of bidders occupying stalls filed a bill claiming the right to occupy the stalls as long as they chose on payment of the rent, and asked for a decree establishing the right of each to the continued occupancy of his stall so long as he might choose to occupy it for his business, and for an injunction against the sale by auction. It was held that the value of the right to sell, which the market company claimed and the trial court denied, determined the jurisdiction of the Supreme Court of the United States, and that, where a sale would have produced more than \$2,500, and was enjoined, the company was entitled to appeal. *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. ed. 782. In this case the court said: "While it may be true that, if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal, either by him or the company, the case is one of two hundred and six complainants suing

of an ordinary defendant in execution the amount of the judgment is always and inevitably the amount in dispute, and the test of the jurisdiction, no matter in what shape the litigation may frame itself. But this reason does not hold in the case of the homesteader. While he owes the debt, his homestead property is not liable for it, and every dollar of the property taken away from him by the seizure would be that much property of which he would have been deprived in violation of the rights secured to him by the Constitution and laws of the state. His homestead is a right additional to and independent of his ordinary right of ownership. It is an additional tenure by which he holds the property, and, in a litigation involving the question of homestead *vel non*, it is not his ordinary tenure of ownership that he is vindicating, but this special separate constitution-conferred tenure. In vindicating this tenure he stands towards the seizure in precisely the same attitude as the third person whose property has been seized. The property seized is not more liable to the seizure in his case than in the case of the third person. He, as much as the third person, raises an issue not touching the validity of the judgment or the regularity of the execution, but confined strictly to the liability of the property to the seizure. In his case, then, precisely as in the case of the third person, the value of the property ought to be the test of the jurisdiction. Because more than an amount sufficient to satisfy the execution could not be taken out of the proceeds of the sale of the property is not a reason why the amount of the judgment

sought to be executed should be the test of the jurisdiction. No greater amount could be taken out in the case of the third person, and yet it is recognized that in his case the amount of the judgment is not the test of the jurisdiction, but that the value of the property is. Then, again, what if the property adjudged not to be homestead be sold for less than its real value,—say for two thirds of its appraisement at a first offering, or for whatever it will bring on twelve months' credit at a second offering; will not the homesteader actually have lost the difference between the real value of the homestead and the price of the sale? If the property is worth in the neighborhood of \$2,000, as in this case, and it is adjudged by the justice of the peace not to be homestead, and is sent to sale, and brings only \$1,000, will not the homesteader have been deprived of \$1,000 of his property, even though not one cent is taken out of the price of the sale, towards satisfying the execution? What if the execution is for more than \$100? This is quite possible. The judgment itself might be for \$100, and, with the interest and costs, the debt might easily be increased to \$150. What if a part of the homestead sufficient in amount is seized to satisfy this debt? Will not the homesteader lose this \$150 if the judgment goes against him, and his property is sold? It would seem, then, that the amount really involved in the seizure of the homestead is not that of the judgment to satisfy which the seizure is made, but the value of the property seized, and that the value of this property ought to be the test of the jurisdiction of the court, precisely

jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable. It is averred under oath in the pleadings that the sale which the company proposed to make, and the court below enjoined, would have realized to the company more than \$60,000. Of this benefit the decree deprives them. It is very plain, therefore, that the appeal is one within our jurisdiction."

This case, although not citing the case of *Ross v. Prentiss*, 3 How. 771, 11 L. ed. 824, does not seem materially to differ from it in the rule laid down,—that it is the amount to be produced by the sale that determines the jurisdiction.

In *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1060, it was said: "In *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. ed. 782, in which, upon the bill of a number of occupiers of stalls in a market, a perpetual injunction was granted to restrain the market company from selling the stalls by auction, the reason assigned by this court for entertaining the appeal of the company was that 'the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable.' But in equity, as in admiralty, when several persons join in one suit to assert several and distinct interests, and those interests alone are in dispute, the amount of the bill L. R. A.

Interest of each is the limit of the appellate jurisdiction."

IV. Summary.

It seems that in cases of injunctions against the sale of exempt property the value of the property, and not the amount of the execution, fixes the jurisdiction of the court called upon to pass upon the question of the injunction. Where an injunction is sought by a debtor in other cases against the execution sale of his property the amount of the judgment or execution sought to be enjoined, and not the value of the property, controls the jurisdiction of the court. Where an injunction is sought by third parties, to prevent the sale of their property on process against other parties it seems that the weight of authority holds that the value of the property, and not the amount of the execution, determines the jurisdiction of the court granting the injunction. But where such third party merely asserts a lien on property which is sought to be taken on process against another, and an injunction is asked against such process, the amount of the execution enjoined, and not the value of the property, determines the jurisdiction of the court. On this latter question there are but few cases. In some of the decisions determining the question whether the jurisdiction is affected by the value of the property seized or the amount of the execution enjoined, the jurisdiction of the trial court was involved, and in other cases the jurisdiction of the court on appeal.

Cases involving the question of injunctions against the collection of taxes are not intended to be included in this note.

I. T.

as in a case where the property of a third person is seized. This court held differently in the case of *McInty v. Richmond*, 27 La. Ann. 606, but the reasons on which that decision is founded do not commend themselves to us. These reasons are comprised within four lines, as follows: "The value of the property sought to be sold is not to be considered. If the parish court had the jurisdiction necessary to authorize it to render a judgment, it had jurisdiction to prevent that judgment from being satisfied by the sale of property not subject to the seizure." The first reason, namely, "that the value of the property seized is not to be considered," is not a reason, but a decision of the case. Whether such value is to be considered is the very question up for decision, and we have endeavored above to demonstrate the affirmative of that question. The second reason, namely, that, "if the parish court had the jurisdiction necessary to authorize it to render a judgment, it had jurisdiction to prevent that judgment from being satisfied by the sale of property not subject to seizure,"—has, as an argument, the defect of proving too much. It proves that in the case of the seizure of a third person's property the seizure court has jurisdiction to enjoin the sale, regardless of the value of the property. This reason would overthrow a settled jurisprudence. Because of this decision we have gone into the matter perhaps more elaborately than was necessary. The matter is, after all, a very simple one. This justice of the peace clearly had no jurisdiction to adjudge that this \$2,000 of property was not homestead, and upon the strength of such adjudication to send the property to sale. The learned judge *a quo* was right in overruling this exception.

The movables claimed as homestead were properly included in the injunction in the district court. They and the land constituted together the homestead. Besides, they were included in the one seizure, and were therefore property included in the on injunction.

Justices of the peace have no jurisdiction of suits involving title to real estate; and it is said by plaintiff that this homestead right is a real right, and that, the title to it being involved, the case involves title to real estate, and that for this reason the justice of the peace was without jurisdiction. We prefer not to pass on this point, as our doing so is not necessary to the decision of the case.

What we have here said, however, with regard to jurisdiction, has no application to the movables alleged to belong to the children. As to these the justice of the peace had jurisdiction, and as to them the plaintiff should have addressed himself to him.

2. The next question is as to the sufficiency of the affidavit. It was in these words: "I swear that all the facts contained in the foregoing petition are true." This was sufficient. *Hennen's Digest*, p. 671, No. 14.

3. Next as to the bond. There was left in the order for the bond a blank space, to 61 L. R. A.

be filled in with the amount to be fixed by the judge. This space was never filled, so that the amount in which the bond should have been given was never determined by the judge. This omission was fatal. The Code of Practice expressly requires as a prerequisite to the issuance of an injunction that bond shall be furnished in an amount fixed by the judge. Article 307. See also *Rev. Stat. § 1753*. The courts cannot dispense with what the law has expressly prescribed as a prerequisite. This is a plain proposition. In the case of *Lemann v. Trueillo*, 32 La. Ann. 65, this court held that the fixing of the amount in which bond is to be given is a prerequisite, and that an omission in that regard could not be supplied or remedied by an order made after the issuance of the writ. True, that was a case of sequestration, but the principle is the same. See also *Egan v. Fush*, 46 La. Ann. 474, 15 So. 539. Time and again have injunctions been dissolved because issued without bond, or on a defective bond. If the bond given by the plaintiff were a legal bond, susceptible of enforcement against the surety thereon, perhaps there might be some ground for urging that the omission of the judge had been supplied and remedied by the giving of bond in an amount sufficient to protect defendant; but the bond in question could not be enforced. Bonds given in a judicial proceeding in obedience to or in pursuance of particular provisions of law are not ordinary bonds, and are not governed by ordinary rules. The bondsman on such a bond is held not accordingly as he has bound himself, but accordingly as the law under which the bond was given requires that he should be held. This is well settled in our jurisprudence. If it is a forthcoming bond given by an intervener in a case in which such intervention and release on bond were not authorized by law, the bond is null, and the surety is not bound. *Alexander v. Silbernagel*, 27 La. Ann. 557. See also *Le Blanc v. Massieu*, 27 La. Ann. 324. If there was no seal on the writ of *fi. fa.* under which the property was seized, the seizure is null, and the forthcoming bond given by an intervener is also null, and cannot be enforced. *King v. Baker*, 7 La. Ann. 570. A forthcoming bond given under an order of court authorizing the release of the property upon Boss and Andrews giving bond is null if signed by Andrews alone, and cannot be enforced against Andrews and the sureties. *Benham v. Collins*, 23 La. Ann. 222. An appeal bond given without a legal order of appeal is null. "It has been repeatedly held," says the court, "that the liability of sureties on judicial bonds is fixed by the law which authorizes the taking of the bonds; and, as no law authorized the taking of the bond without a previous order of appeal being obtained, it must remain inoperative." *Scars v. Bearsh*, 7 La. Ann. 539. These are but illustrative cases. They show, we believe, that, in the absence of an order fixing the amount in which bond shall be given, there cannot be given a valid injunction bond, such as can be enforced against

the sureties. In the instant case the bond and the order under which it was given must be read together, and, so reading them, the bond becomes a bond for a blank amount; that is, no bond at all. The same article of the Code of Practice which requires bond to be given requires also that the plaintiff shall "state under oath the facts which render an injunction necessary." Enforcing the same article in the matter of the affidavit, as we are now enforcing it in the matter of the bond, both of which are prerequisites to the injunction, this court has time and again dissolved injunctions because of the insufficiency of the affidavit. The following are some of the cases in which this has been done: *Hebert v. Joly*, 5 La. 52; *Reboul v. Behrens*, 5 La. 79; *Ricard v. Hiriart*, 5 La. 244; *Callett v. McDonald*, 13 La. 46; *Le Blanc v. Dashiell*, 14 La. 274; *Sauvinet v. Poupono*, 14 La. 87; *Jewell v. Jewell*, 1 Rob. (La.) 316; *Rice v. Walsh*, 4 La. Ann. 346; *Robertson v. Travis*, 4 La. Ann. 151; *Harmenos v. Duvigneaud*, 10 La. Ann. 114; *Beatty v. Dufief*, 10 La. Ann. 266; *New Orleans Canal & Bkg. Co. v. Carriel*, 3 La. Ann. 225; *Carroll v. Miller*, 3 La. Ann. 555; *Boatner v. Walker*, 17 La. 46; *Woodruff v. Payne*, 9 Rob. (La.) 163; *Taylor v. Clark*, 11 La. Ann. 550; *McRac v. Brown*, 12 La. Ann. 181; *Elder v. New Orleans*, 31 La. Ann. 500.—though the court has theretofore allowed somewhat more latitude in the matter of the affidavit than in that of the bond. The following are some of the cases in which injunctions have been dissolved because of some defect in the bond or of insufficiency of the bond. *Gauthier v. Gardinal*, 44 La. Ann. 884, 11 So. 463; *Bank of Louisiana v. Wilson*, 19 La. Ann. 3; *Lafon v. Gravier*, 1 Mart. N. S. 243; *Peterson v. Stewart*, 6 La. Ann. 808; *Dashiell v. Lasassier*, 15 La. 101. The affidavit and the bond are unquestionably required by the Code to be furnished as prerequisites to the issuance of an injunction, and we fail to see whence the court would derive authority to dispense with both or either of them in any case.

But the plaintiff contends that an injunction will not be dissolved where from the face of the record or from the evidence it appears that another writ would have to be granted immediately. In order to make sure of the scope of that doctrine, which is a familiar one, we have taken the trouble to examine every case we could find where the doctrine had been either applied or referred to. Our research in the matter has revealed the following: In *Ecnicios v. Weiss*, 3 Mart. N. S. 480, property was seized under executory process to satisfy the unpaid purchase price, and the seizure was enjoined by the vendee on the ground that he was in danger of eviction, and could not be forced to pay the debt. On the trial it developed that the vendee had not yet been disturbed, but that he probably would be, because in another suit between other parties his vendor's title to the property had been adversely passed on. The defendant in injunction urged that this danger of eviction had developed since the bringing of the injunction, and could not, 61 L. R. A.

therefore, justify it. The court said: "We are of opinion that wherever a party who has an injunction shows that he ought not to pay, and that, if the injunction be dissolved, another must be granted at once, the former injunction ought not to be dissolved." In *Bushnell v. Brown*, 4 Mart. N. S. 499, where the facts were practically the same as in *Ecnicios v. Weiss*, the court said: "Proceedings on injunctions are not carried on in the formal manner in which ordinary ones are conducted but summarily. The strict rules of pleadings are disregarded by the court. *Semper ad eventum festinat*. It will take care that neither party be surprised or entrapped, but it disregards many obstacles to the attainment of justice. It will receive, as a ground of sustaining an injunction, that which would be sufficient to demand its instant restoration. It will not demolish to rebuild." In *Crane v. Baillio*, 7 Mart. N. S. 273, a writ of seizure and sale was enjoined on the ground that it had been obtained on insufficient evidence. The court dissolved the injunction because from the evidence on the trial it appeared that the plaintiff in an executory process would be entitled to take out a new writ at once. In *Louisiana State Ins. Co. v. Morgan*, 8 Mart. N. S. 680, the court dissolved an injunction sued out against "a treasury execution for arrearages of taxes," remarking as follows: "If the injunction was sustained on the technical objection, justice would require us to save the right of the state to another execution. As we do not dissolve injunctions which must necessarily be immediately issued *de novo*, we cannot perpetually enjoin a remedy which every circumstance in the case demands that the party should be immediately permitted to resort to." In *Hudson v. Dangerfield*, 2 La. 63, 20 Am. Dec. 297, the court held that two executions on the same judgment could not issue simultaneously, but that in such case only the second writ was illegal; and the court took occasion to remark as follows: "We have said we would not dissolve an injunction irregularly obtained if it appeared from the circumstances of the case the party, on an immediate application, must have a new one. Why should you perpetuate an injunction to the execution of a writ of *fi. fa.* when it is clear the party thus enjoined has a right to proceed to a new levy by taking out an alias or a pluries?" In *Campbell v. His Creditors*, 8 La. 75, the court refused to dissolve an injunction obtained on the affidavit of an attorney in fact whose authority to make the affidavit was not shown. Said the court: "Admitting that the facts necessary to support the application for an injunction were not legally established at the judge's chambers, they were evident to the court on the motion to dissolve from the inspection of the record, and from the acts and conduct of the syndics. It was evident that if the court had been of opinion, on very technical grounds, indeed, that the injunction was not properly granted, the applicant had an undoubted right to a new one on the dissolution of the former." In *Woodward v. Das-*

hiell, 15 La. 184, the court said: "The injunction was dissolved although the party who had obtained it was, perhaps, entitled to have it sustained because we were of opinion the remedy was worse than the evil, as a new seizure must have been immediately issued. For this purpose, and for this purpose alone, the injunction was not sustained. We have often refused to dissolve injunctions when we thought the party was immediately entitled to a new one on the dissolution of the former, and in order to avoid expense, delay, and trouble. In the present case the injunction was dissolved although it was properly obtained. In such cases the party should not be mulcted in damages because the dissolution takes place for the sole purpose of avoiding unnecessary costs and delay in bringing the suit to a conclusion, and the party benefited thereby cannot expect us to give damages; for, if we were compelled to do so, we would sustain the injunction and require him to begin anew." In *Chambless v. Atchison*, 2 La. Ann. 488, the injunction was against an executory process, and was maintained on grounds not set out in the petition, but which would have been available on an appeal from the order for the seizure and sale. Said the court: "The rule laid down in *L'Eglise's Case*, 3 La. 220, if understood in the broad sense that the court can in no case whatever travel out of the matters set forth in the petition, would come in direct conflict with another rule of practice, which has received the uniform assent of the bench and the bar. That rule is that injunctions, although improvidently sued out, are never dissolved when the facts of the case show that on the dissolution the party will immediately be entitled to that form of remedy on other grounds." In *Dorsey v. Hills*, 4 La. Ann. 106, the injunction was against a writ of *fi. fa.* and the question was whether irregularities other than those set forth in the petition for injunction could be considered for the purpose of sustaining the injunction. Decided in the negative, the court saying: "It is true that courts will not dissolve injunctions when the facts show that the party would be immediately entitled to resort to the same remedy. But such facts must appear upon the face of the proceedings, or from evidence legally admitted under the pleadings, or received without objection." In *Lafleur v. Mouton*, 8 La. Ann. 489, execution issued under a judgment rendered on a forfeited recognizance, and was enjoined on the ground that the recognizance did not state the cause for which it had been taken. On trial it developed that since the suing out of the injunction the accused had surrendered, and been tried and acquitted, which, under the law, vacated the forfeiture. Proof of this vacation was resisted on the ground that the pleadings did not authorize the admission of the evidence. Said the court: "This is strictly true, but as we have no reason to doubt the truth of the facts alleged, and they are sufficient to authorize the injunction of the judgment, we feel bound to adhere to the rule not to dismiss an injunc-

tion when we believe that the plaintiff would be immediately entitled to the same remedy." In *Adams v. Leicis*, 7 Mart. N. S. 406,—a case of sequestration, where the objection was that the two demands of plaintiff were inconsistent,—the court applied the same doctrine, saying: "It has been more than once decided in this court that writs of this description would not be set aside if the case showed sufficient grounds for immediately reinstating them." In *Citizens' Bank v. Crooks* 21 La. Ann. 324, and in *Porter v. Morere*, 30 La. Ann. 233, the court held that, when it is manifest that the plaintiff in injunction will be entitled to a new writ if the first is dissolved, the case will be remanded to enable him to supply evidence which he has omitted to introduce. In *Ward v. Douglass*, 22 La. Ann. 463, the court said: "On the merits, the view we have taken renders it unnecessary for us to notice either the exception based on the inartificial and confused pleadings of the plaintiff, the bills of exception, or the various points made in argument. It is now well settled that an injunction will not be dissolved if it appears from the record that there exists good cause for an injunction." What were the faults attributed to the injunction, the report of the case does not make known. In *Leicis v. Daniels*, 23 La. Ann. 170, the court said: "On the second ground, that the bond is insufficient, we are not satisfied that the objections to it are tenable, but it is manifest that the plaintiffs would be entitled to renew their injunction if the present writ were dissolved. We deem it proper to follow in this case the well-established usage and reject the motion." In *Dupre v. Sicauford*, 25 La. Ann. 222, a natural tutrix sued out an injunction before having qualified. She qualified in time, however, to give the bond. Motion was made to dissolve on the ground "that the said Maria J. Dupre is not tutrix. If she is at present, she was not at the time the injunction was sued out." The court said: "It is a sufficient answer to state that an injunction will not be set aside for irregularities when it appears from the face of the papers that another would be issued." In *Savoie v. Thibodeaux*, 28 La. Ann. 109, where the bond was given for a less amount than that required by law, and where the judge *a quo* had declined to dissolve the injunction, the court said: "But in conformity with the jurisprudence of the state, he ruled that, although an injunction may have been imprudently granted, it will not be dissolved when it is plain from the record that the party would be entitled to the writ immediately." In *Howard v. Simmons*, 25 La. Ann. 670, the court said: "While it is a general rule that petitions in injunction suits are not allowed to be amended, still, when events have occurred since the institution of the suit which would warrant a new injunction, there can be no good reason to refuse them to be stated in a supplemental petition. Courts abhor a multiplicity of suits, and they will not dissolve an injunction when it is apparent from

the record that the party would be entitled to another. Code Pr. art. 748." In *Woolfolk v. Woolfolk*, 22 La. Ann. 207, the court said: "The judge *a quo*, believing the cause for injunction to be good and sufficient, did not err in permitting additional security to be given, as another writ could have been immediately granted." Thus it is seen that, while the court has repeatedly stated the doctrine in question in terms broad enough to justify the maintenance of an injunction without bond, yet it has thus far never applied the doctrine to a case where bond had not been given. We think that in the case of *Savoie v. Thibodeaux*, 28 La. Ann. 169, where a bond insufficient in amount was sustained, the doctrine was carried to the utmost verge,—in fact, too far,—and we are not disposed to carry it any further. Whether the case of *Campbell v. His Creditors*, 8 La. 75, where an affidavit made by an attorney in fact whose authority was not shown must not be considered to have been overruled by the long list of subsequent decisions holding strictly to the necessity of the affidavit,—*quære?* The case is distinguished in *Catlett v. McDonald*, 13 La. 44, on the authority of *Reboul v. Behrens*, 5 La. 79.

4. As to misjoinder of defendants. The injunction is against three separate seizures, under separate executions, in satisfaction of separate judgments in favor of three different creditors, between whom there was no privity. It is doubtful whether, under these circumstances, the exception of misjoinder of parties was not good. The law abhors a multiplicity of suits, but so it does an incongruous assemblage of litigants, possibly discordant. The practice of joining in one injunction several seizures made by different creditors is not to be encouraged, and could be tolerated only in exceptional cases. But probably the present case is of that character. The three seizures were from the same court, by the same officer, at the same time, of the same property, and were consoli-

dated for advertisement. All the defendants are represented by the same attorney, and the issues as to all the defendants were necessarily the same, so that no possible complication could arise. At all events, this defect, if such, was of those which could be cured under the doctrine invoked above in connection with the bond.

5. The objection that the bond is a joint one, and does not name the obligation of the plaintiff and his surety towards each of the three defendants, is well taken. Under the law and under the order of the judge the plaintiff had to give a bond in favor of each of the defendants, and, as a matter of course, he could not satisfy this obligation by giving one bond in favor of the defendants jointly. The proposition will not admit of discussion, though here, again, the doctrine against dissolving injunctions would probably come into play.

6. We conclude that the injunction must be dissolved for want of a bond as required by law.

Not having considered the case on the merits, and therefore not having considered whether there has been or not, an abuse of the equitable remedy of injunction, we cannot grant the prayer for statutory damages, and can allow only the \$50 claimed as attorneys' fees.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that the injunction herein be dissolved, without prejudice, however, and that the plaintiff be condemned to pay to the defendants \$50 as damages, and be further condemned to pay costs in both courts.

Blanchard, J., concurs in the decree and so much of the opinion as relates to the injunction bond and holds the same insufficient, but dissents from that part of the opinion which holds that the seized debtor may arrest the execution, as relates to the immovable claimed as a homestead, by injunction in the district court.

NEW YORK COURT OF APPEALS.

Hannah LAHEY, *Appt.*,

v.

Margaret LAHEY, Impleaded, etc., *Respt.*

(174 N. Y. 146.)

1. A finding of facts affirmed by the appellate division is binding on the court of appeals.
2. Failure to effect a change of beneficiary in a mutual benefit certificate,

NOTE.—As to power of member of benefit society to change beneficiary where original beneficiary refuses to surrender certificate, see also, in this series, *Clark v. Hirschl* (Iowa) 9 L. R. A. 841.

On the general question of changing designation in benefit certificate otherwise than in the prescribed method, see *Grand Lodge, A. O. U. W. v. Noll* (Mich.) 15 L. R. A. 350, and *note*. 61 L. R. A.

because of refusal of the one in whose favor it was issued to surrender the old one, gives him no right to the proceeds as against the claim of the one in whose favor the new certificate was to be issued, where there is, by statute and the rules of the society, an absolute right to make the change, and everything required by the rules is done except the surrender of the old certificate.

(March 17, 1903.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Erie County in favor of defendant in an action brought to establish a claim to the proceeds of a mutual benefit certificate. *Affirmed.*

The facts are stated in the opinion.

Mr. William L. Rumsey, with **Mr. Daniel V. Murphy**, for appellant:

The insured failed to comply with the constitution, by-laws, and regulations of the order governing a change of beneficiary, and there has been no waiver by the order of his noncompliance.

When a society makes rules and regulations governing the change of a beneficiary, such rules and regulations must be strictly complied with.

Luhrs v. Luhrs, 123 N. Y. 367, 9 L. R. A. 534, 25 N. E. 388; *Fink v. Fink*, 171 N. Y. 624, 64 N. E. 506; *Thomas v. Thomas*, 131 N. Y. 205, 30 N. E. 61; *Gladding v. Gladding*, 29 N. Y. S. R. 485, 8 N. Y. Supp. 880.

A court of equity will not enforce an attempt to change a beneficiary which is subsequently abandoned by the insured, and when the evidence shows that the member's intention to change was not continuous to the time of his death.

Coyne v. Bowe, 23 App. Div. 261, 48 N. Y. Supp. 937.

The promise made by the insured to reimburse his mother for his care during his sickness does not establish a lien upon the insurance fund.

19 Am. & Eng. Enc. Law, 2d ed. p. 6; *Conrow v. Little*, 115 N. Y. 387, 5 L. R. A. 693, 22 N. E. 346.

Messrs. King, Leggett, & Brown, for respondent:

In so far as the insured had the power to comply with the constitution, by-laws, and regulations of the order governing a change of beneficiary, he did comply with them, and a further compliance with said by-laws was prevented by the fraud of the plaintiff.

Wilson v. Bryce, 43 App. Div. 494, 60 N. Y. Supp. 132; *Jory v. Supreme Council A. L. of H.* 105 Cal. 20, 26 L. R. A. 733, 38 Pac. 524; *Grand Lodge, A. O. U. W. v. Noll*, 90 Mich. 37, 15 L. R. A. 350, 51 N. W. 268; *Marsh v. Supreme Council A. L. of H.* 149 Mass. 512, 4 L. R. A. 382, 21 N. E. 1070.

Equity will consider that done which ought to have been done.

Grand Lodge, A. O. U. W. v. Child, 70 Mich. 163, 38 N. W. 1.

A change or substitution of beneficiary may be valid without compliance with the prescribed mode, if it be beyond the power of the insured to comply literally.

3 Am. & Eng. Enc. Law, 2d ed. pp. 998, 999; *Supreme Conclave, R. A. v. Cappella*, 41 Fed. 1; *Bailey v. Bailey*, 45 Hun, 278; *Grand Lodge, A. O. U. W. v. Noll*, 90 Mich. 37, 15 L. R. A. 350, 51 N. W. 268.

The declarations or acts of the grantor subsequent to his grant will never be permitted to be shown in disparagement, or to the prejudice, of the grantee's right.

Williams v. Williams, 142 N. Y. 159, 36 N. E. 1053; *Kain v. Larkin*, 131 N. Y. 302, 30 N. E. 105.

The right to change the beneficiary in the certificate or policy given by the co-operative insurance law, like every other val-

uable right, may be sold and transferred, and, when once legally transferred for a valuable consideration the insured loses the right to thereafter transfer it to others, just the same as any other right or thing which he has legally transferred.

Webster v. Welch, 57 App. Div. 561, 68 N. Y. Supp. 55; *Smith v. National Ben. Soc.* 123 N. Y. 87, 9 L. R. A. 616, 25 N. E. 197; *Conselyea v. Supreme Council, A. L. of H.* 3 App. Div. 464, 38 N. Y. Supp. 248, affirmed in 157 N. Y. 719, 53 N. E. 1124.

The method of designation laid down in the policy and by-laws must be followed, subject to three exceptions: (1) The society may waive the rules; (2) if it is beyond the power of the assured to comply with the rules equity will relieve; (3) if the assured has pursued the rules, and done all in his power to change the beneficiary, but dies before the new certificate is issued, equity will treat the certificate as issued.

2 May, Ins. 4th ed. § 390; *Supreme Conclave, R. A. v. Cappella*, 41 Fed. 1; *Nally v. Nally*, 74 Ga. 670, 58 Am. Rep. 458; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657; *Isgrigg v. Schooley*, 125 Ind. 95, 25 N. E. 151; *Marsh v. Supreme Council A. L. of H.* 149 Mass. 512, 4 L. R. A. 382, 21 N. E. 1070.

Martin, J., delivered the opinion of the court:

The Catholic Mutual Benefit Association is a domestic co-operative insurance company. Prior to the 7th of February, 1884, William Lahey became a member of a branch of the association located at Niagara Falls, which issued to him a beneficiary certificate entitling him to participate in its beneficiary fund to the amount of \$2,000. The plaintiff, his wife, was designated as payee or beneficiary therein. During his life he or his wife complied with all the laws and regulations of the association, and at the time of his death, which occurred December 1, 1899, he was a member in good standing.

In June, 1898, the plaintiff separated from her husband, and refused to live with him. When she left him she took with her the certificate of insurance, and retained it until the month of November, 1899. A considerable time after their separation, her husband became ill, and went to live with his mother. He promised her if she would take care of him he would reimburse her by changing the policy for her benefit. She took care of him until the 12th of November, 1899. During that time he was afflicted with an illness which ultimately resulted in his death.

In September, 1899, the local lodge or association, learning of his condition, appointed a committee to look after him, sent a doctor, and left money to procure such articles as were necessary during his illness. On the 30th of October he made and executed the following instrument:

I, William Lahey, hereby certify that I am a member in good standing of Branch 2, C. M. B. A., located at Niagara Falls; was initiated therein on the 14th day of November, 1877, that the beneficiary certificate heretofore issued to me by said association, which was payable to my wife, and no [now] revoke my former payment and want it payable; \$1,000.00 payable to my wife, Hannah Lahey; \$500.00 payable to my mother, Margaret Lahey; \$500.00 payable to Ignatz Reiss, Treas. of Branch 2, C. M. B. A., for to pay doctor and funeral expenses, and the balance that is left to be turned over to my mother, Margaret Lahey.

Dated Niagara Falls this 30th day of October, 1899.

William Lahey.

Witness, John J. Daw,

Recording Secretary Branch No. 2.

[Branch Seal.]

By this instrument he sought to change the beneficiary in said certificate, making his wife a beneficiary to the extent of \$1,000; his mother, \$500; and Ignatius Reiss, treasurer of Branch No. 2, in the sum of \$500, to pay his doctor's bills and funeral expenses, and any sum remaining to be turned over to his mother. This paper was attested by the recording secretary of that branch. Its seal was affixed pursuant to the constitution and by-laws. It was delivered to Edward Ryan, the grand secretary, and by him delivered to, received by, and filed in the office of, Joseph Cameron, the supreme recorder, with a request that a new beneficiary certificate in compliance with such paper should be issued. The association failed and neglected to issue such certificate, delaying the same upon the ground that the original certificate should be surrendered with the application for the change.

William Lahey thereupon demanded the certificate of the plaintiff, who refused to surrender it, but withheld the same, and prevented him from having or obtaining possession thereof, of which fact the secretary and supreme recorder had due notice, and therefore that he was unable to surrender it. The association thereupon notified him that it was powerless to issue a new certificate while the original was outstanding and not lost or destroyed, that the by-laws and constitution of the association provided no method by which a beneficiary in a certificate could be changed where the original certificate was wrongfully withheld by the original beneficiary, and on that account he was unable to procure the possession thereof. The application of October 30th was made and delivered for the purpose and with the intention of changing the beneficiary in the original certificate. The member did all he was able, under the circumstances, to effectuate that purpose, and such new designation remained and was in full force and effect at the death of said Lahey.

On the 12th of November the plaintiff, against the protest of the defendant, in-
61 L. R. A.

duced her husband to go with her to her home, in the city of Buffalo, where he remained until his death. On the 27th of November, 1899, he made an affidavit, prepared by the plaintiff's attorney, in which he denied that he made or intended to make any change of his beneficiary, and stated that his mind for some weeks was defective. He also stated to certain persons while staying with the plaintiff that he had not changed the beneficiary in said certificate, and wanted his wife to have the benefit thereof. After his death, due proofs were furnished the association. The plaintiff claimed the whole of the fund by virtue of the original certificate issued to her husband, and the defendant Margaret Lahey made claim for her interest in said fund and for the interest of Ignatius Reiss under such second designation. The plaintiff then brought this action against the association to recover \$2,000 on the certificate, and in March, 1900, the association obtained an order of interpleader, paid \$1,000 to the plaintiff, and paid the remaining \$1,000 into court to await the result of this action between the plaintiff and the defendant Margaret Lahey. The foregoing is a brief synopsis of the facts as found by the trial judge.

Upon these facts the court, as conclusions of law, held that William Lahey changed the beneficiaries in said insurance as provided in the instrument of October 30th, so that \$1,000 thereof was payable to the plaintiff, \$500 to Margaret Lahey, and \$500 to Ignatius Reiss to pay expenses, and the balance to be turned over to his mother; that he did all the acts which were necessary under the law to effectuate such purpose; and that the defendant was entitled to a judgment providing that \$500 should be paid to her, and \$500 to Reiss, to be disposed of in the manner stated. This judgment was unanimously affirmed by the appellate division. 66 App. Div. 623, 73 N. Y. Supp. 1138.

The insurance law relating to fraternal beneficiary societies, orders, or associations provides: "Membership in any such society, order, or association shall give to the member the right at any time, upon the consent of such society, order, or association, in the manner and form prescribed by its by-laws, to make a change in its payee or payees, beneficiary or beneficiaries, without requiring the consent of such payees or beneficiaries." Laws 1892, p. 2025, chap. 690, § 238. The by-laws of the Catholic Mutual Benefit Association, in force from 1887 to October, 1900, provide: "A member may at any time change, alter, or amend the designation of person or persons to whom the beneficiary named in his certificate is payable, by surrendering said certificate, after having filled or caused to be filled, the blank which shall be provided for that purpose on the back of the same, providing for a new designation, and attach his signature to it. The secretary of his branch shall attach his signature to it as witness, and the seal of his branch, and for-

ward it to the grand secretary, if in his immediate jurisdiction. Upon the receipt of the same by the supreme recorder, he shall issue a new certificate in accordance with such change of designation." "A member whose certificate has been lost or destroyed may have a new certificate issued to him by filing an affidavit with the supreme recorder that the beneficiary certificate heretofore issued to him has been lost or destroyed, and that he applies for a duplicate of the same; the price to be charged for such new certificate to be fixed by the supreme trustees."

The proof disclosed that there was in the constitution or by-laws of the association nothing relating to the issuing of a certificate where it had been withheld, and that there were no other provisions relating to the subject of changing designations on certificates lost or withheld. The officers of the association refused to make the change requested, upon the ground that before such change could be made the certificate must be surrendered; and they refused to issue a new certificate for the reason that there was no provision, either by statute or by-law, by which they were authorized to do so unless the original certificate was lost or destroyed. The dues of the assured were paid by the plaintiff for the last nine or ten years of Lahey's life. Indeed, there is proof tending to show that he, as well as his mother and other members of his family, was surprised when they found that the insurance had been kept alive by payments made by her. In determining the rights of the parties in this case, the statute, the constitution, and by-laws of the association, with the policy or certificate, taken together, constitute the contract between them, and the standard by which their rights and liabilities are to be determined. *Re Equitable Reserve Fund Life Assn.* 131 N. Y. 354, 369, 30 N. E. 114; *People ex rel. Atty. Gen. v. Life & Reserve Assn.* 150 N. Y. 94, 108, 45 N. E. 8.

This court has recently held that a member of such an association, who has the absolute power to change the beneficiary designated in his certificate by complying with a by-law which is exclusive upon the subject, and provides that a new certificate shall be issued if a member asks for one, but upon condition that he pay the sum of 25 cents, can appoint another beneficiary only by a strict compliance with such by-law. In that case Judge Vann said: "The change of the beneficiary is an important matter, for it transfers the right to receive the death benefit, amounting in this case to \$1,000, from one person to another. The right of the member to make the change is absolute, and the beneficiary can neither prevent it by objecting, nor promote it by consenting. Obviously, such a transaction requires some formalities for the protection of the company, the member, and the beneficiary. The formalities required by the association before us, through its by-laws, were very simple; but, unless they were substantially complied with, the change could

not be made. Mere intention to make a change is not enough, for the acts prescribed to carry the intention into effect are forms imposed upon the execution of a power, and they must be observed, or the change cannot be effected." *Fink v. Fink*, 171 N. Y. 616, 622, 64 N. E. 506, 507. In that case the certificate holder died before a request for a change reached the company,—it having been sent by mail,—and the court held that there was no change in the beneficiary.

In *Luhrs v. Luhrs*, 123 N. Y. 367, 9 L. R. A. 534, 25 N. E. 388, where a similar question arose, the facts were essentially different from the case at bar, as in that case the certificate was surrendered, with directions that a new certificate should be issued to the substituted beneficiary. It was mailed to the lodge, but the certificate holder died before the change was made, or the certificate reached the home office. In that case it was held that the old certificate was to be regarded as canceled when surrendered to the lodge, and that the death of the member did not operate to prevent the consummation of the surrender or the issuing of a new certificate. In this case, however, there was never any surrender of the certificate, so that, if it is to be determined strictly according to the provisions of the contract between the parties, there never was any legal change of beneficiary. Therefore the plaintiff was entitled to recover the full amount of the certificate, unless the respondent can sustain her rights upon some other or different ground. She, however, contends that the right to change the beneficiary in a certificate, like every other valuable right, may be sold or transferred, and, when transferred for a valuable consideration, the insured loses the right to transfer it to others. Citing *Webster v. Welch*, 57 App. Div. 561, 68 N. Y. Supp. 55; *Smith v. National Ben. Soc.* 123 N. Y. 87, 9 L. R. A. 616, 25 N. E. 197; *Conselyea v. Supreme Council A. L. of H.* 3 App. Div. 464, 38 N. Y. Supp. 248. Affirmed, without opinion, 157 N. Y. 719, 53 N. E. 1124. In those cases it was held that the statute which gives to a member the right to make a change in the beneficiary without the consent of the latter applies only when the original designation is in the nature of an inchoate or an unexecuted gift, and does not prevent a contract between the member and his beneficiary by which a vested right passes to the latter; and in such case, without his consent, the beneficiary may not be changed.

The cases cited are clearly distinguishable from the case at bar, in that in the former the beneficiary became such for a valuable consideration, and the association issued a certificate to such beneficiary, while in this case, although the court has found that the mother paid a valuable consideration for a transfer of the certificate or a portion of its benefits, still no certificate was ever issued to her, nor was the certificate which was issued and made payable to the plaintiff ever canceled, so that she ceased to be a beneficiary under it. Besides,

assured, before his death, made an affidavit to the effect that he was a member of the association; that his wife was designated as the beneficiary in the original certificate; that he had never, to his knowledge, made a request for any change of beneficiary, and never knowingly signed any application for such change; that members of the association and some of his relatives tried to persuade him to change, but that he always declined to do so; and that it was his desire that the policy should stand and be payable to his wife. There was also proof that he repeatedly declared he had no desire to change the beneficiary, but was desirous that his wife should have the benefit under his certificate.

Although, under the proof in the record, the trial court might very well have found in favor of the plaintiff, yet it having found for the defendant, and its decision having been unanimously affirmed by the appellate division, we are concluded as to the facts or the sufficiency of the evidence, and have no jurisdiction to review the question whether the decision of the court below was sustained by the weight of evidence, or whether there was any evidence whatever to sustain it. Thus the question arises whether, under the facts as found, the court was authorized to change the beneficiary, or to award to the defendant a portion of the fund in the hands of the court. In other words, assuming, as we must, that the plaintiff withheld the certificate after the assured had requested its surrender, did that enable him to change his beneficiary without its surrender, and to effect an actual change in a manner not provided for by the by-laws of the association? If the question had arisen between the defendant and the association, it is quite possible that she could not have recovered. But that is not this case. Here the question of the liability of the association to the defendant is not involved. It has discharged its liability upon the certificate by payment into court, so that the question involved in this case arises between two alleged beneficiaries, and the point presented is whether the non-surrender of the certificate was a bar, and prevented the defendant from recovering, in equity, in view of the fact that the plaintiff refused to surrender the certificate upon her husband's demand, and thus prevented a change in the manner required by the by-laws of the association.

As this precise question may not have been settled by any previous decision of this court, in proceeding with the discussion it is deemed proper to here consider some of the authorities bearing upon this phase of the case. In *Supreme Conclave, R. A. v. Cappella*, 41 Fed. 1, it was held that the general rule that the insured is bound to make such change of beneficiary in the manner pointed out by the policy and by-laws of the association is subject to three exceptions: (1) If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new

certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued; (2) that, if it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made; (3) if the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will treat such certificate as having been issued. The doctrine of that case was followed in *McLaughlin v. McLaughlin*, 104 Cal. 171, 37 Pac. 865, and the same exceptions are stated in 2 May, Ins. § 399-O.

In *Marsh v. Supreme Council A. L. of H.* 149 Mass. 512, 4 L. R. A. 382, 21 N. E. 1070, where a member of a beneficiary association took all the necessary steps, so far as he was able, to designate his mother as his beneficiary, instead of his wife, and the association was ready to make the change, but, in consequence of his wife's acting in collusion with a subordinate officer of the association, the change of designation was not formally effected before his death, it was held that the mother was entitled to the fund.

In *Wilson v. Bryce*, 43 App. Div. 491, 494, 60 N. Y. Supp. 132, 133, Hatch, J., in discussing this question, said: "If it had appeared that the certificate was lost, or that the insured was unable to obtain possession of it, or that its possession was forcibly or fraudulently withheld from him, and he had made his application to the legion for the issuance of a new certificate or a change of beneficiaries, then we would have a case similar to that of *Grand Lodge, A. O. U. W. v. Child*, 70 Mich. 163, 38 N. W. 1, and under such or similar conditions equity might lay hold of the case and direct judgment in accordance with the equities of the parties."

In the *Child Case* it was held that the law never requires impossibilities, and the rule of a benefit association which requires a certificate of insurance to be surrendered upon change of beneficiary, to the end that it might be indorsed upon such certificate, can only be construed as so requiring it when the certificate is in existence and can be thus surrendered.

In *Isgrigg v. Schooley*, 125 Ind. 95, 25 N. E. 151, S. was the holder of a beneficiary certificate in a mutual benefit society. The by-laws of the order provided that, when a member desired to change the beneficiary named in the certificate, he must, among other things, surrender the old certificate. The beneficiary originally named had been the wife of the deceased. She abandoned him, however, and refused to live with him, and, without his consent, took the certificate away with her. Upon a demand for its return, she stated that it was lost. The deceased, being desirous of changing the beneficiary, complied with all the requirements of the by-laws in respect thereto, save the surrender of the old cer-

tificate, assigning its alleged loss for his failure to do so. It was charged that the officers of the subordinate lodge conspired with the wife to prevent the change, and refused to certify said application, and no new certificate was issued. In that case it was held that the acts of the decedent constituted an equitable change of beneficiary, and that the person in whose favor the decedent desired a new certificate to issue was entitled to the fund; that the beneficiary in such a certificate of insurance does not, during the life of the member, have an indefeasible right in the contract or fund, but has an interest which can only be defeated by a change effected in the manner provided by the by-laws, but that there are exceptions to this general doctrine; and that equity will aid imperfect changes of beneficiaries, and consider that done which ought to have been done, as it never requires impossibilities. The same principle is stated in *Kepler v. Supreme Lodge, K. of H.* 45 Hun. 274, 278. See also *Martin v. Stubbings*, 128 Ill. 387, 18 N. E. 657.

In *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458, an unmarried man took out a policy of insurance on his life, one condition of which was that the policy was issued and accepted upon the express condition that the assured might, with the consent of the company, at any time, assign it, or, before assignment, change the beneficiaries, or make any other change. The person named as the beneficiary was the sister of the assured, and to her he delivered the policy, and paid the premiums to that time. Subsequently he married, and, as an inducement thereto, he agreed that, if the woman would marry him, she should be made the beneficiary of the policy. After the marriage, and when the next semiannual premium fell due, the assured paid it, on condition that the beneficiary should be changed from his sister to his wife. The sister had the policy and would not give it up. The agent was uncertain whether the change could be made without the policy, but promised to notify the company, and have the change made if possible. The officers agreed to attend to the matter, but overlooked it. After the death of the assured, the company filed a bill to require the wife and sister to interplead, and have the question determined as to who was entitled to the money. It was held that the gift to the sister was not perfected, so as to be absolute and irrevocable, and the assured had the right to change the beneficiary of the policy, and whether such change was to be effected by parol or in writing was a matter entirely between the assured and the company.

In *Wilcox v. Equitable Life Assur. Soc.* 173 N. Y. 50, 65 N. E. 857, where a policy of life insurance contained a clause that if, after the payment of the premiums for three years, the policy should become void in consequence of a default in the payment of subsequent premiums, the company would issue in lieu of such policy a new paid-up policy for a certain proportion of the original

amount assured, "provided that the said policy shall be surrendered duly receipted within six months of the date of default in payment of premium on said policy," it was held that the insured, who defaulted in the payment of premiums after seven annual premiums had been paid, and from whom the policy had been stolen, might maintain an equitable action for a decree directing the company to issue a new paid-up policy upon proof that the policy was stolen without his fault.

We are of the opinion that the principle of these cases should be followed; that under the findings of fact, which are conclusive upon us, it should be held that the plaintiff wrongfully retained the certificate from the possession of her husband, and that by reason thereof a proper transfer was prevented; that she should not be permitted to profit by her own wrong, but that, although the attempted change of beneficiary was imperfect, equity should aid the defendant, and consider that as done which ought to have been done.

It follows that the judgment appealed from should be affirmed, with costs.

Parker, Ch. J., and Bartlett, Cullen, and Werner, J.J., concur. Gray, J., absent. O'Brien, J., not voting.

Cecelia L. SLATER *et al.*, Exrs., etc., of
John Slater, Deceased,
v.

James SLATER *et al.*

(.....N. Y.....)

1. As between a surviving partner and the executor of the deceased one, the firm name is an asset of the partnership which the executor has a right to have sold for the settlement of the partnership affairs, and it does not become the property of the surviving partner.
2. A purchaser at a sale of the assets of a partnership for settlement of its affairs, at which the firm name is sold as an asset, has a right to use it upon compliance with the law governing the use of assumed business names, although he is not the surviving partner.

(May 12, 1903.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme

NOTE.—As to rights in name of partnership upon dissolution thereof or death of one of the partners, see also, in this series, *Williams v. Farrand* (Mich.) 14 L. R. A. 161; *Brass & I. Works Co. v. Payne* (Ohio) 19 L. R. A. 82; and *Bagby & R. Co. v. Rivers* (Md.) 40 L. R. A. 632.

For firm name as part of good will of business, see *note to Vonderbank v. Schmitt* (La.) 15 L. R. A. 462; also *Fish Bros. Wagon Co. v. Fish* (Wis.) 16 L. R. A. 453; *Le Page Co. v. Russia Cement Co.* (C. C. App. 1st C.) 17 L. R. A. 354; *Knoedler v. Glaenger* (C. C. App. 2d C.) 20 L. R. A. 733; *Chas. S. Higgins Co. v. Higgins Soap Co.* (N. Y.) 27 L. R. A. 42; and *Snyder Mfg. Co. v. Snyder* (Ohio) 31 L. R. A. 657.

Court, First Department, modifying a decree of a Special Term for New York County in a proceeding to settle the affairs of a partnership; the plaintiffs appealing from so much as refused to recognize the partnership name as an asset to be sold generally to increase the partnership fund to be divided, and defendant appealing from so much as refused him compensation for conducting the partnership affairs after the death of his copartner. *Modified on plaintiff's appeal.*

The facts are stated in the opinion.

Mr. John A. Garver, with **Messrs. Shearman & Sterling**, for plaintiffs:

The firm name constitutes part of the good will.

Pollock, Partn. art. 39; George, Partn. 412; 2 Lindley, Partn. *445; Allan, Good Will, p. 81; 2 Bates, Partn. § 672; 1 Collyer, Partn. 572; Ludlow, Trademarks, 69; Sebastian, Trademarks, 337; Churton v. Douglas, Johns. V. C. (Eng.) 174; Levy v. Walker, L. R. 10 Ch. Div. 436; Banks v. Gibson, 34 Beav. 566; Rogers v. Taintor, 97 Mass. 291; Myers v. Kalamazoo Buggy Co. 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 31 L. R. A. 657, 43 N. E. 325; Drake v. Dodsworth, 4 Kan. 159; Lane v. Smythe, 46 N. J. Eq. 443, 19 Atl. 199; Adams v. Adams, 7 Abb. N. C. 292; Hegeman v. Hegeman, 8 Daly, 1; Brown v. Dennison, 15 App. Div. 525, 44 N. Y. Supp. 535; Caswell v. Hazard, 121 N. Y. 484, 24 N. E. 707; Re Jones, 69 App. Div. 237, 74 N. Y. Supp. 702; Congress & E. Spring Co. v. High Rock Congress Spring Co. 45 N. Y. 291, 6 Am. Rep. 82; People ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70, 45 L. R. A. 126, 53 N. E. 685.

The same principle has been applied to the sale of the business of a newspaper or hotel, or other business carried on under a particular trade name.

Bradbury v. Dickens, 27 Beav. 53; Hudson v. Osborne, 39 L. J. Ch. N. S. 79; Moscov v. Mason, 18 Grant Ch. (U. C.) 453.

The right to use the firm name does not pass to the surviving partner.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42, 39 N. E. 490; Pom. Eq. Jur. § 408; Hammond v. Douglas, 5 Ves. Jr. 539; Re David [1899] 1 Ch. 378; 2 Lindley, Partn. Am. ed. 444; Sebastian, Trademarks, 4th ed. 323; Parsons, Partn. 4th ed. 243, note; Mechem, Partn. §§ 86, 89; Turner, Partn. Agreements, 65; Fenn v. Bolles, 7 Abb. Pr. 202.

Defendant cannot so use his own name as to impair the value of the good will.

Hopkins, Unfair Trade, 1900, §§ 44, 45, 51; American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141; American Waltham Watch Co. v. Sandman, 96 Fed. 330; Devlin v. Derlin, 69 N. Y. 212, 25 Am. Rep. 173; Menecy v. Menecy, 62 N. Y. 427, 20 Am. Rep. 489; Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42, 39 N. E. 490.

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Mr. James W. Hawes, for defendant:

Under the common law there is no property in a name.

People v. Ferguson, 8 Cow. 102; Snook's Petition, 2 Hilt. 566; Doe ex dem. Luscombe v. Yates, 5 Barn. & Ald. 544; Davies v. Loundes, 1 Bing. N. C. 597; England v. New York Pub. Co. 8 Daly, 375; Schofield v. Jennings, 68 Ind. 232; David v. Williamsburgh City F. Ins. Co. 83 N. Y. 265, 38 Am. Rep. 418; Preiss v. Le Poidevin, 19 Abb. N. C. 123; Rich v. Mayer, 26 N. Y. S. R. 107, 7 N. Y. Supp. 69; Mechem, Partn. § 83; Bank of Rochester v. Monteath, 1 Denio, 402, 43 Am. Dec. 681; Clark v. Freeman, 11 Beav. 112; Maxwell v. Hogg, L. R. 2 Ch. 307; M'Andrew v. Bassett, 4 De G. J. & S. 380; Du Boulay v. Du Boulay, L. R. 2 P. C. 430; Day v. Brownrigg, L. R. 10 Ch. Div. 294; Street v. Union Bank, 55 L. J. Ch. N. S. 31; Beazley v. Soars, 52 L. J. Ch. N. S. 201; Koehler v. Sanders, 122 N. Y. 65, 9 L. R. A. 576, 25 N. E. 235; Royal Baking Powder Co. v. Raymond, 70 Fed. 376; Hodecker v. Stricker, 39 N. Y. Supp. 515; Dockrell v. Dougall, 78 L. T. N. S. 840; Atkinson v. John E. Doherty & Co. 121 Mich. 372, 46 L. R. A. 219, 80 N. W. 285; Colonial Dames of America v. Colonial Dames of New York, 29 Misc. 10, 60 N. Y. Supp. 302; Roberson v. Rochester Folding Box Co. 171 N. Y. 538, 59 L. R. A. 478, 64 N. E. 442; Macdonald v. Trojan Button-Fastener Co. 29 N. Y. S. R. 867, 9 N. Y. Supp. 383.

A partnership may adopt as its firm name the name of one of the partners, or the name of an agent.

Crawford v. Collins, 45 Barb. 269; Bell v. Sun Printing & Pub. Co. 10 Jones & S. 567; Linton v. First Nat. Bank, 10 Fed. 894; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994; The Law of Names, 20 Can. Law Times, 319.

The right to a name cannot be assigned in gross, but only in connection with a business to which it is applied.

Pinto v. Badman, 7 Times L. R. 317; Baldwin v. Von Micheroux, 5 Misc. 386, 25 N. Y. Supp. 857; Thorneycroft v. Hill, 63 L. J. Ch. N. S. 331; Kerly, Trademarks, 2d ed. p. 461.

Upon the death of a partner, the right to the continued use of the firm name belongs to the survivor, and is not an asset of the firm in which the estate of the deceased has an interest.

Staats v. Howlett, 4 Denio, 559; Caswell v. Hazard, 121 N. Y. 484, 24 N. E. 707; Hammond v. Douglas, 5 Ves. Jr. 539; Lewis v. Langdon, 7 Sim. 421; Robertson v. Quidington, 28 Beav. 529; Hall v. Barrows, 32 L. J. Ch. N. S. 548; Craicshay v. Collins, 15 Ves. Jr. 218; Blake v. Barnes, 26 Abb. N. C. 208, 12 N. Y. Supp. 69; Campbell v. Campbell, 40 N. Y. S. R. 817, 16 N. Y. Supp. 165; Mason v. Dawson, 15 Misc. 595, 37 N. Y. Supp. 90; Kirkman v. Kirkman, 20 Misc. 211, 45 N. Y. Supp. 373; Leake v. Union Trust Co. (1898) N. Y. L. J. 948; Fisk v. Fisk, 37 Misc. 737, 76 N. Y. Supp. 482; De Grauw v. Schmid, 38 App. Div. 189, 56 N.

Y. Supp. 593; *Collender v. Phelan*, 79 N. Y. 366; *Re Randell*, 2 Connoly, 8 N. Y. Supp. 652.

Good will does not, *ex vi termini*, include the firm name.

Parsons, Partn. 4th ed. § 181; Mechem, Partn. § 87; Story, Partn. 7th ed. § 99; *Rauson v. Pratt*, 91 Ind. 9; 2 Lindley, Partn. 2d Am. ed. *439, *440; *Lobeck v. Lee-Clarke-Andresen Hardware Co.* 37 Neb. 158. 23 L. R. A. 795, 55 N. W. 650; *Helmbold v. Henry T. Helmbold Mfg. Co.* 53 How. Pr. 453; *Pinto v. Badman*, 7 Times L. R. 317; *Levy v. Walker*, L. R. 10 Ch. Div. 449; *Banks v. Gibson*, 34 Beav. 566; *Caswell v. Hazard*, 50 Hun, 230, 2 N. Y. Supp. 783; *Scheer v. American Ice Co.* 32 Misc. 351, 66 N. Y. Supp. 3; *Reeves v. Denicke*, 12 Abb. Pr. N. S. 92; *Morgan v. Schuyler*, 79 N. Y. 490, 35 Am. Rep. 543; *Blumenthal v. Strauss*, 53 Hun, 501, 6 N. Y. Supp. 393; *Hegeman v. Hegeman*, 8 Daly, 1; *Howe v. Scaring*, 10 Abb. Pr. 264; *Meneely v. Meneely*, 1 Hun, 367; *Re Randell*, 2 Connoly, 8 N. Y. Supp. 652; *Mason v. Mason*, 15 Misc. 595, 37 N. Y. Supp. 90; *Knoedler v. Boussod*, 47 Fed. 465; *Knoedler v. Glaenzer*, 20 L. R. A. 733, 5 C. C. A. 305, 14 U. S. App. 336, 55 Fed. 895; *Hopkins, Unfair Trade*, p. 141; *Williams v. Farrand*, 88 Mich. 473, 14 L. R. A. 161, 50 N. W. 446; *Iouca Seed Co. v. Dorr*, 70 Iowa, 481, 59 Am. Rep. 446, 30 N. W. 866; *Cottrell v. Babcock Printing Press Mfg. Co.* 54 Conn. 122, 6 Atl. 791; *Vonderbank v. Schmidt*, 44 La. Ann. 264, 15 L. R. A. 462, 10 So. 616; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339; *Re Jones*, 69 App. Div. 237, 74 N. Y. Supp. 702; *Adams v. Adams*, 7 Abb. N. C. 292; *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82; *Bininger v. Clark*, 60 Barb. 113, 10 Abb. Pr. N. S. 264; *Brown v. Dennison*, 15 App. Div. 525, 44 N. Y. Supp. 535; *Rogers v. Taintor*, 97 Mass. 291; *Drake v. Dodsworth*, 4 Kan. 159; *Lane v. Smythe*, 46 N. J. Eq. 443, 19 Atl. 199; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; *Snyder Mfg. Co. v. Snyder*, 54 Ohio St. 86, 31 L. R. A. 657, 43 N. E. 325.

If the sale of a good will is an involuntary one, the right to the name does not pass, whatever may be the case in a sale *inter partes*. The person whose good will is sold may solicit the old customers.

Walker v. Mottram, 51 L. J. Ch. N. S. 108; *Dawson v. Becson*, L. R. 22 Ch. Div. 504; *Jennings v. Jennings*, 67 L. J. Ch. N. S. 190; *Helmbold v. Henry T. Helmbold Mfg. Co.* 53 How. Pr. 453; *Re Adams*, 24 Misc. 293, 53 N. Y. Supp. 666; *Bellows v. Bellows*, 24 Misc. 482, 53 N. Y. Supp. 853.

Even if the sale of a good will in general carries the trade name, the latter cannot be used by the purchaser when it might subject the vendor to liability.

Routh v. Webster, 10 Beav. 561; *Scott v. Rowland*, 26 L. T. N. S. 391; *Levy v. Walker*, L. R. 10 Ch. Div. 436; *Gray v. Smith*, 59 L. J. Ch. N. S. 145; *Thynne v.* 61 L. R. A.

Shove, 59 L. J. Ch. N. S. 509; *Jennings v. Jennings*, 67 L. J. Ch. N. S. 190; *Walter v. Ashton*, 71 L. J. Ch. N. S. 839; *Burchell v. Wilde*, 69 L. J. Ch. N. S. 314; *Peterson v. Humphrey*, 4 Abb. Pr. 394; 2 Lindley, Partn. 4th ed. *863.

Even if the defendant, James Slater, were not entitled, as survivor, to the use of the firm name, he might carry on the same kind of business in his own name, and with the defendant, John Slater, he might use the firm name of J. & J. Slater; and the purchasers at the sale would have to be notified of these rights.

Hildreth v. McCaul, 70 App. Div. 162, 74 N. Y. Supp. 1072; *Sebastian, Trademarks*, 4th ed. pp. 324, 325; *White v. Jones*, 1 Abb. Pr. N. S. 328, 1 Robt. 321; *Knoedler v. Glaenzer*, 20 L. R. A. 733, 5 C. C. A. 305, 14 U. S. App. 336, 55 Fed. 895; *Devlin v. Devlin*, 69 N. Y. 212, 25 Am. Rep. 173; *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 53 N. E. 141; *Hopkins, Unfair Trade*, § 50; *Burgess v. Burgess*, 3 De G. M. & G. 896; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 604, 32 L. ed. 535, 537, 9 Sup. Ct. Rep. 166; *Re David* [1899] 1 Ch. 378; *Gilman v. Hunnewell*, 122 Mass. 139; *Hallett v. Cumston*, 110 Mass. 29; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Mellersh v. Keen*, 27 Beav. 236; *Holloway v. Holloway*, 13 Beav. 209; *Turton v. Turton*, L. R. 42 Ch. Div. 128; *Tussaud v. Tussaud*, L. R. 44 Ch. Div. 678; *Jamieson & Co. v. Jamieson*, 15 Patent Cas. 169; *Comstock v. White*, 10 Abb. Pr. 264, note; *Faber v. Faber*, 49 Barb. 357; *Wolfe v. Burke*, 7 Lans. 151; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 39 N. E. 490; *Cutter v. Gudebrod Bros. Co.* 36 App. Div. 362, 55 N. Y. Supp. 298; *Elgin Butter Co. v. Elgin Creamery Co.* 155 Ill. 127, 40 N. E. 616; *Duryea v. National Starch-Mfg. Co.* 25 C. C. A. 139, 45 U. S. App. 649, 79 Fed. 651, 41 C. C. A. 244, 101 Fed. 117; *Bingham School v. Gray*, 122 N. C. 699, 41 L. R. A. 243, 30 S. E. 304.

Either partner on dissolution may use the firm name in the absence of agreement to the contrary, and so, upon the death of one, the survivors may, at common law, continue its use.

Levy v. Walker, L. R. 10 Ch. Div. 436; *Chappell v. Griffith*, 53 L. T. N. S. 459; *Burchell v. Wilde*, 69 L. J. Ch. N. S. 314; *Huwer v. Dammehoffer*, 82 N. Y. 499; *Baldwin v. Von Micheroux*, 5 Misc. 386, 25 N. Y. Supp. 857; *Webster v. Webster*, 3 Swanst. 490 note; 2 Bates, Partn. § 673; *Story, Partn.* pp. 43, 49, 87.

O'Brien, J., delivered the opinion of the court:

This appeal presents a question of some novelty and considerable importance. It does not seem to have been passed upon directly by this court, at least in the form in which it is now presented. Counsel upon both sides have bestowed upon the question a very thorough examination, and it is

quite apparent from the briefs that they have found a wide field in which industrious research has discovered a wealth of learning that has more or less application. It is quite clear that the numerous authorities cited are not all in harmony, and it would be an endless task to collate them so as to exhibit their true bearing upon this case. The work of reviewing, explaining, and distinguishing these authorities has been done by the learned court below with as much success as it is reasonable to expect from the nature of the question, the condition of the cases, and the views of the text-writers upon the subject. It would not be profitable for us to attempt to add anything to the discussion in this respect, and so we must be content to express our own views of the law and its application to this case, derived from a somewhat diligent study of what has been said and decided in the very numerous precedents to which we have been referred by counsel.

The question is whether, in an action for an accounting between the widow and executrix of a deceased partner and the surviving partner, the firm name of the partnership, under which the business was transacted for more than forty years, is a part of the good will and partnership assets, subject to sale and purchase under the decree in the same way and with like effect as all the other assets of the firm directed to be sold and conveyed. This question arises in the case upon a state of facts, found at the trial court, as to which there is no dispute or controversy. The firm of J. & J. Slater, composed of two brothers, was formed in 1859, to manufacture and deal in boots and shoes under that firm name, each partner sharing the profits and losses equally. The business was carried on continuously from that time until the year 1901, when the elder brother, John, died, leaving the defendant James, the other partner, sole survivor. The deceased left a will in which the plaintiff, his widow, and James, the brother, were appointed executrix and executor. The surviving partner has continued the business under the same firm name, at the same place, and in the same manner, since his brother's death, with the view of closing out the business as a going concern, and this was the situation when the action was commenced for an accounting and distribution of the assets. Besides the bills receivable, merchandise, and fixtures on hand, the firm had leases terminating in 1907 of the store and premises in the city of New York where the business had been conducted. The trial court directed that the entire assets of the firm be sold at auction under the direction of a referee, including the leases and all other firm property, as one parcel. The court decided that the right to continue the use of the firm name was not a firm asset, nor a part of the good will, and that the estate of the deceased partner had no interest therein, but that it belonged to the survivor, and should not be included in the sale of the firm assets, and to this part of the decision the plaintiff excepted. On ap-
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peal to the appellate division, that court modified the judgment in this respect, namely: That the firm name is a firm asset and part of the good will; that the estate of the deceased had an equal right and interest therein; and that the good will to be sold under the decree includes the exclusive right of the purchaser to hold himself out as the successor of the firm and its business, but that such good will does not include the right to continue the business in the old firm name, unless such purchaser be the surviving partner; and with this modification the judgment was affirmed. Both parties have appealed to this court from the judgment as thus modified, and the learned court below has certified to us the following questions of law involved in the case: (1) Whether or not, upon the facts found in the decision of this case, the firm name of J. & J. Slater, or the right to continue its use, is a firm asset; or Did the right to continue such use inure to the surviving partner? (2) Whether or not, upon the facts found in the decision of this case, a purchaser at a sale provided for in the judgment herein, not being the surviving partner (the defendant, James Slater), will acquire the right to continue the business under the firm name of J. & J. Slater, upon complying with the provisions of §§ 20 and 21 of the partnership law (Laws 1897, p. 561, chap. 420).

We think that the learned court below was correct in so far as it decided that the firm name was inseparable from the good will, and hence just as much a part of the assets of the firm as the good will itself. This proposition seems to be supported by the great weight of authority. *Pollock*, Partn. art. 39; 2 *Lindley*, Partn. *445; *Allan*, Good Will, 81; 2 *Bates*, Partn. § 672; 1 *Collyer*, Partn. 572; *Churton v. Douglas*, *Johns. V. C.* (Eng.) 174; *Levy v. Walker*, L. R. 10 Ch. Div. 436, 449; *Banks v. Gibson*, 34 Beav. 566; *Rogers v. Taintor*, 97 Mass. 291; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; *Snyder Mfg. Co. v. Snyder*, 54 Ohio St. 86, 31 L. R. A. 657, 43 N. E. 325; *Lane v. Smythe*, 46 N. J. Eq. 443, 19 Atl. 199; *Fenn v. Bolles*, 7 Abb. Pr. 202.

The learned counsel for the defendant has cited some authorities that seem to point in the other direction. They are mostly cases where the question in the form now presented was not involved. Many of them are cases in the English courts, where it was held in a general way that a property right could not be acquired in a name pure and simple. That may be true in its application to individuals and individual names, but, with respect to the name and style under which business has been conducted by a partnership firm for a long series of years, the firm name necessarily becomes attached to and part of the good will, and inseparable from it. Of course, the partners may, by agreement between themselves, express or implied, change this rule. The cases in which the courts have dealt with the claim-

or right to assume some individual name or title have no application to the case of a partnership accounting, where it is conceded that the good will is a part of the assets.

The learned court below, while holding that the firm name was a part of the good will, and hence partnership assets, placed a restriction, or limitation upon its use to the purchaser, and the right to sell it that may materially affect its value, and go far to impair the property which it is conceded the plaintiff has in the good will as a part of her husband's estate. Conceding that the firm name is a part of the good will, and is partnership assets, it follows that it should be sold without any restriction or limitation upon its use by the purchaser, and in the same way and with like effect as in the case of all the other assets of the firm. If the firm name is partnership property in any sense, the estate of the deceased partner is entitled to the benefits in the same sense that it is entitled to share in the distribution of the other property. But the modification of the judgment is substantially to the effect that, although it is subject to sale under the decree, yet no one can buy it for absolute use except the surviving partner himself. This conclusion seems to be based upon the effect which the learned court gave to the several statutes which from time to time have been enacted in this state since 1833, and which are now embodied in the partnership law. Laws 1833, p. 404, chap. 281; Laws 1854, p. 1084, chap. 400; Partnership Law, Laws 1897, p. 561, chap. 420, §§ 20, 21. We think that these statutes have no bearing upon the question presented by this appeal. They were intended to protect the public against the use of a name or names in a business firm that did not represent an actual partner. *Gay v. Seibold*, 97 N. Y. 472, 49 Am. Rep. 533. These statutes made no change in the law concerning the right and interest of the deceased partner's estate in the firm name. They did not change the nature or character of the good will in a case like this. If the right to the use of the firm name was a part of the partnership assets in which the estate of the deceased partner was entitled to share before the passage of these statutes, the plaintiff's right in this case to so share remains unaffected by the legislation. Nor do we think there is any difficulty or embarrassment in selling the firm name as part of the good will, so far as the surviving partner is concerned. All the assets of the firm are by the terms of the decree to be sold as one parcel, and the firm name should pass with the establishment. It is true that the purchaser, whoever he may be, will, upon this view, be entitled to assume a business name while a member of the old firm is still living, but this cannot occasion any embarrassment or difficulty to the survivor. The purchaser is required to make the real facts a matter of public record, from which it will appear who the members of the firm really are. No legal liability can attach to the survivor from any dealings between the purchaser of the firm name

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and third parties or the public. The survivor cannot be made liable in any sense for the debts or obligations of the parties who transact business under the firm name acquired under the decree. The principal purpose of the statutes above referred to was to render such a result impossible.

It follows, therefore, that the questions certified should be answered substantially in the affirmative in the following form, that is to say: (1) On the facts of this case the right to continue the use of the firm name is a firm asset, and does not inure to the benefit of the surviving partner. (2) The purchaser at the sale provided for in the decree, whether surviving partner or otherwise, will acquire the right to continue the business under the firm name, upon complying with the provisions of the statute.

The judgment should be modified on the plaintiff's appeal, so as to direct the sale of the good will with the other assets, including the right to use the firm name, without conditions, restriction, or limitations, upon the purchaser, and as so modified affirmed, with costs to both parties payable out of the partnership fund.

Parker, Ch. J., and Gray, Vann, Cullen, and Werner, JJ., concur. Bartlett, J., absent.

Judgment accordingly.

Mary W. LIVINGSTON, *Respt.*,
v.

William S. LIVINGSTON, *Appt.*

(173 N. Y. 377.)

1. An order reversing an order modifying the direction as to alimony contained in a judgment which dissolved the marriage of the parties is appealable.
2. A provision for alimony in a judgment granting a divorce, which cannot be changed under existing laws, is a vested right which cannot be impaired by a subsequent statute conferring power upon the courts to modify it.
3. A judgment is not a contract within the meaning of the Federal Constitution forbidding the passage of laws impairing the obligation of contracts.

(*O'Brien, Haight, and Vann, JJ., dissent.*)

(February 10, 1903.)

NOTE.—As to impairment of obligation of judgments, see also, in this series, *Rockwell v. Butler* (Colo.) 17 L. R. A. 611 and *note*; *Sherman v. Langham* (Tex.) 39 L. R. A. 258; *Bettman v. Cowley* (Wash.) 40 L. R. A. 815; and *Evans-Snyder-Buel Co. v. McFadden* (C. C. App. 8th C.) 58 L. R. A. 900.

As to power of court over subject of alimony after divorce decree has become final, see *Sampson v. Sampson* (R. I.) 3 L. R. A. 349; *Kempster v. Evans* (Wis.) 15 L. R. A. 391; *Cole v. Cole* (Ill.) 19 L. R. A. 811; *McKay v. San Francisco City & County Super. Ct.* (Cal.) 40 L. R. A. 585; *Alexander v. Alexander* (App. D. C.) 45 L. R. A. 806; and *Wetmore v. Wetmore* (N. Y.) 48 L. R. A. 668.

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term for New York County granting a motion to reduce alimony. *Affirmed.*

The facts are stated in the opinions.

Mr. J. Van Vechten Olcott, for appellant:

A provision in a decree of divorce requiring the husband to pay the wife alimony does not constitute a vested right belonging to the wife.

Cooley, Const. Law, p. 332; 2 Am. & Eng. Enc. Law, 2d ed. p. 93; *Burr v. Burr*, 7 Hill, 207; *Wallingsford v. Wallingsford*, 6 Harr. & J. 485; *Wetmore v. Wetmore*, 162 N. Y. 503, 48 L. R. A. 666, 56 N. E. 997; *Romaine v. Chauncey*, 129 N. Y. 566, 14 L. R. A. 712, 29 N. E. 826; *Sargent v. Sargent*, 3 N. B. N. Rep. 516; *Re Smith*, 1 N. B. N. 471; *Re Shufeldt*, 2 N. B. N. Rep. 517; *Maisner v. Maisner*, 62 App. Div. 286, 70 N. Y. Supp. 1107.

The right to alimony is analogous to the inchoate right of dower.

Moore v. New York, 8 N. Y. 110, 59 Am. Dec. 473.

This inchoate right to dower which the wife has while her husband lives is not a vested right.

Barbour v. Barbour, 46 Me. 9; *Talbot v. Talbot*, 14 R. I. 57; *Moore v. New York*, 4 Sandf. 456, 8 N. Y. 110, 59 Am. Dec. 473; *Pratt v. Tefft*, 14 Mich. 191; *Hammond v. Pennock*, 61 N. Y. 145.

A judgment is not a "contract" within the meaning of the prohibition of the United States Constitution forbidding any state to pass a law impairing the obligations of contracts.

O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Prouty v. Lake Shore & M. S. R. Co.* 95 N. Y. 667; *Anglo-American Provision Co. v. Davis Provision Co.* 169 N. Y. 506, 62 N. E. 587.

The constitutionality of the statute cannot be attacked on the ground that in the amendment thereof the legislature has exercised judicial functions.

Lynde v. Lynde, 162 N. Y. 407, 48 L. R. A. 679, 56 N. E. 979.

The unconstitutionality of a statute must be clear and manifest before a court should declare it: so that, where any reasonable doubt exists as to its constitutionality, it should be upheld.

Ex parte M'Collum, 1 Cow. 550; *Coutant v. People*, 11 Wend. 511; *Clark v. People*, 26 Wend. 590; *Morris v. People*, 3 Denio, 381; *New York & O. Midland R. Co. v. Van Horn*, 57 N. Y. 473; *Sweet v. Syracuse*, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289.

Mr. Benjamin Steinhart, with **Messrs. Howe & Hummel**, for respondent:

Chapter 742 of the Laws of 1900, so far as it amends § 1759 of the Code of Civil Procedure, in permitting the court to annul, vary, or modify a judgment previously rendered, is unconstitutional.

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Walker v. Walker, 155 N. Y. 77, 49 N. E. 663; 2 Am. & Eng. Enc. Law, 2d ed. pp. 95, 96; *Kamp v. Kamp*, 59 N. Y. 212; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Johns v. Johns*, 44 App. Div. 533, 60 N. Y. Supp. 865.

The amount of alimony provided in a judgment as fixed at the time of its entry refers to the condition of the parties at the time it was rendered, and, therefore, the subsequent change in the circumstances of the parties, or either of them, can in no way be used to affect that judgment.

Hauscheld v. Hauscheld, 33 App. Div. 296, 53 N. Y. Supp. 831; *Kamp v. Kamp*, 59 N. Y. 212; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Johns v. Johns*, 44 App. Div. 533, 60 N. Y. Supp. 865.

If no alimony had been awarded in the judgment, even under this amendment, none could afterwards be ordered.

Noble v. Noble, 20 App. Div. 395, 46 N. Y. Supp. 820; *Park v. Park*, 18 Hun. 466.

The alimony awarded is a debt to become due. The plaintiff has simply to make affidavit of the amount unpaid, and upon that affidavit judgment may be entered for such sum, with costs.

Miller v. Miller, 7 Hun, 208; *Lansing v. Lansing*, 4 Ians. 377; *Bucki v. Bucki*, 28 Misc. 69, 56 N. Y. Supp. 439.

The legislature has undertaken, by the act of 1900, to take away from this plaintiff her property in the judgment rendered years before, on the faith of the statute as it then read.

Burch v. Newbury, 10 N. Y. 374; *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 304, 28 N. E. 1040.

Gray, J., delivered the opinion of the court:

This was an application by the defendant for an order modifying and varying the direction as to alimony contained in a judgment which had dissolved the marriage of the parties. The application was granted, and an order was made changing the provisions of the judgment of divorce by reducing the amount of alimony ordered to be paid by the defendant to the plaintiff from \$4,000 to \$3,000 a year. This order was reversed by the appellate division, and the motion for the modification of the judgment was denied, whereupon the defendant appealed to this court.

Within the authority of *Wetmore v. Wetmore*, 162 N. Y. 503, 48 L. R. A. 666, 56 N. E. 997, the order is appealable, and this court has jurisdiction to review the determination of the appellate division. The appeal presents a question of law as to the validity of chapter 742 of the Laws of 1900 in so far as it has amended § 1759 of the Code of Civil Procedure by permitting the court, upon the application of either party to an action in which a final judgment has been granted, dissolving the marriage of the parties and requiring "the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, . . . at any time after final judgment, whether hereto-

fore or hereafter rendered, to annul, vary, or modify such a direction." The amendment was in making the statute apply to judgments theretofore rendered. It was decided below that such legislation violated the constitutional provision that no person shall be deprived of property without due process of law (Const. art. 1, § 6), in the attempt to confer a power upon the court to annul or vary valid and final judgments theretofore rendered.

The judgment divorcing these parties was rendered in 1892. It decreed the custody of their children to the wife, who was plaintiff in the action, and it ordered the defendant to pay to her during her lifetime the sum of \$4,000 a year, in equal monthly payments in advance, for her support and that of the children. No appeal from the decree was prosecuted by the defendant, and it contained no provision reserving to the court the right thereafter to alter it; nor did the statute then in force confer any such power, although it existed where the action was for a separation. Code Civ. Proc. § 1771. What jurisdiction the courts of this state acquired to entertain actions of divorce was conferred wholly by statute, and their powers are confined to such as are expressed, or as may be incidental to the exercise of the jurisdiction conferred. *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663. Concededly, prior to this amendment the jurisdiction of the court terminated with the final judgment in divorce actions, and there was neither inherent power in, nor authority conferred by the Code upon, the court to modify the judgment. *Kamp v. Kamp*, 59 N. Y. 220; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. In *Walker v. Walker* the order increased the amount of alimony awarded by a final judgment of divorce, which was lacking in any provision reserving the power to change it; and the discussion in this court related to the effect of the section of the Code, at that time (1897), in permitting the court, after a final judgment, to annul, vary, or modify it in its direction for the payment of alimony. The argument was that the statute was remedial and therefore should be given a liberal and retroactive effect; and, while the denial of the contention was placed upon the ground that nothing indicated a legislative intent to affect judgments already entered, Judge Martin, in his opinion, added the significant remark that, "if the doctrine contended for was sustained, it would apply to the reduction of alimony in judgments existing when the amendments were adopted, as well as to its increase. If such an effect was given to them, their constitutionality might well be doubted, as they might affect the vested rights of a party."

The argument now made is that the provision for alimony "does not constitute a vested right belonging to the wife," because, as I understand the contention, alimony, being incidental to the granting of a divorce, is within the discretionary power of the court to vary according to the altered circumstances of the parties, and is but the wife's "mere potential expectant right" to the par-

ticular payments as they become due. It seems to me that, in such an argument, sight is utterly lost of the nature of a decree awarding alimony, or of the right which accrues to the wife as the result of an adjudication by the court, when, in divorcing the parties from their respective marital obligations, it fixes the alimony to be paid by the husband. The marriage relation has been terminated by the decree. The wife has no future rights, and the husband is under no future obligations, such as are founded upon or spring out of the marriage relation. Judge Finch observed in *Re Ensign*, 103 N. Y. 284, 57 Am. Rep. 717, 8 N. E. 544, that "the court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife, which the divorce cuts off and forbids in the future." By the decree in this action the obligation before resting upon the husband for the support and education of the children and for the support of his wife was changed. It thereafter was made to rest upon the wife, and the decree adjudged that the husband should pay to her a certain fixed sum of money, in a certain manner, in lieu of his previous obligation. The judgment defined and created a new obligation on his part, and, as the amendment of the statute necessarily affected the wife's right to compel exact performance, and bore upon the obligation, to her possible injury, it was obnoxious to the constitutional prohibition. It would be absurd to call it remedial, as affecting merely a remedy upon the decree. Even then it would violate a substantial right of the plaintiff. It was, however, in fact, the impairment of or interference with a vested right conferred by a final judgment. The plaintiff's protection in the enjoyment of her right under the decree is not necessarily referable to the prohibition in the Federal Constitution against the impairment of the obligations of contracts. It is not at all necessary for the plaintiff's purposes that the judgment of divorce should be deemed a contract. A judgment is not a contract, in the ordinary sense of an agreement reached between persons to whose terms their mutual assent has been given, and it is in that sense that the word is used in the Federal Constitution. *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211. A judgment creates an obligation of the highest nature known to the law, and it is enforceable against the judgment debtor as upon his promise to perform it, but that promise is only implied by law. The obligation is imposed. It is not assumed voluntarily. But a final judgment creates and vests substantial rights, and, if the statute were allowed this retroactive effect, a new stipulation would be imported into it, in effect, that the defendant's obligation might be changed upon showing subsequently occurring facts.

In *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211, where it was held that a judgment of damages recovered for a tort was not a contract, in the

constitutional sense, Mr. Justice Bradley, in his opinion, takes occasion to say of it that it "is founded upon an absolute right, and is as much an article of property as anything else that a party owns, and the legislature can no more violate it, without due process of law, than it can any other property." In *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 304, 28 N. E. 1040, Chief Justice Ruger, delivering the opinion of this court, said: "We must bear in mind that a judgment has here been rendered, and the rights flowing from it have passed beyond the legislative power, either directly, or indirectly, to reach or destroy. After adjudication the fruits of the judgment become rights of property. These rights became vested by the action of the court, and were thereby placed beyond the reach of legislative power to affect." So fixed and so inviolate are the rights secured by a judgment that any legislation which attempts to deprive a party of their absolute enjoyment must be condemned. It has been quite recently held, in accordance with a line of authorities, that legislation conferring a right to appeal from a judgment which, according to existing law, had become final, was violative of § 6 of article 1 of the state Constitution, as depriving a party of his property in a vested right conferred by the judgment. *Germania Sav. Bank v. Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33. And see *Burch v. Newbury*, 10 N. Y. 374. It is the peculiar privilege enjoyed by the citizens of this country that the legislative body is not above the law, and that its powers are prescribed and limited by a written constitution. Their lawful contracts are beyond legislative interference, and they may not be deprived of their vested rights without due process of law. They are secure against an arbitrary exercise of governmental power which is unrestrained by the established principles of private rights. The judgment in this case, in determining that, for cause, the marriage should be dissolved, also determined with equal finality that the defendant, while released from the general duty or liability which he had been under, should pay a fixed sum during the plaintiff's life. Can it reasonably be doubted that a right was vested in the plaintiff to the receipt of the annual sums which the judgment adjudged the defendant should pay? As Judge Cullen well expressed it in his dissenting opinion at the appellate division in *Walker v. Walker*, 21 App. Div. 226, 47 N. Y. Supp. 518: "The plaintiff prior to the decree had a right of support. By her divorce she lost that right, and, in substitution of it, acquired a new right,—a judgment requiring the payment to her of a specific sum of money." That right, as a vested interest, is property, which the legislature is powerless to divest her of. If the interest is, as it is claimed, an expectant one, in the sense that the obligation of the defendant was a continuing one to pay alimony in the future, nevertheless the interest was one fixed by the judgment, and was not a mere contingency. It was not a capacity to acquire a right to the payment of money. It was a 61 L. R. A.

right fixed by the judgment, and hence vested in the plaintiff.

I think enough has been said, in connection with the careful and elaborate opinion of Mr. Justice Ingraham at the Appellate Division, to warrant me in advising the affirmance of the order appealed from, with costs.

Parker, Ch. J., and Martin and Cullen, JJ., concur.

O'Brien, J., dissenting:

The plaintiff in the month of April, 1892, obtained a judgment against the defendant dissolving their marriage, and decreeing alimony to the plaintiff in the sum of \$4,000 per year. In April, 1901, the defendant applied to the court to reduce the alimony, upon proofs which disclosed the fact that his pecuniary circumstances and conditions had so changed since the judgment was entered that he was unable to pay that sum annually. The motion was opposed by the plaintiff, and the issues referred to a referee, to inquire and report upon the defendant's circumstances and financial condition as they then existed. The referee took proofs and made full inquiry, and reported that the defendant's income for that year was a trifle more than \$4,000 per year, and that there was no prospect or probability that it would be any more in the future. He also reported that at the time the judgment was entered the defendant's annual net income was \$12,000, and advised the court that the alimony should be reduced to \$3,000, and the court confirmed the report, and so ordered. The learned court below upon appeal has reversed the order and denied the application, but not upon the facts, nor upon any question of discretion, but upon the law; holding that the court had no power to make the reduction, since the statute under which it acted was void as in conflict with the Constitution. That presents the only question in the case. The statute which is thus annulled, in so far as it applies to this case, is § 1759 of the Code, as amended by chapter 742 of the Laws of 1900, and reads as follows: "The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties; and may, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, whether heretofore or hereafter rendered, annul, vary, or modify such a direction. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained." The

precise question is whether the legislature has the power to authorize the courts to review and readjust provisions in a judgment for divorce entered prior to the amendment, concerning the amount of alimony, when it appears that the circumstances and financial condition of the parties have changed so that the wants of the wife are less, and the ability of the husband to pay has been reduced from \$12,000 to a little over \$4,000. The plaintiff has remarried, and has a husband able and willing to support her; and the defendant remarried in another state, and now has his second wife and four children to support in the city of New York.

The general power of the legislature with respect to marriage, divorce, and alimony is not, and cannot be, questioned. It may prescribe how the marriage contract may be made, how established, and how and for what cause it may be abrogated or dissolved. We have before us the case of a woman who is entitled to be supported by two husbands, and a man who is bound to support two wives; and it has been solemnly decided that there is no power in any department of the government under which the parties live, nor in all of its departments together, to change, mitigate, or modify this situation in the slightest particular. This is a somewhat striking statement, but it is nothing more than a plain, logical deduction from the record in this case. The mind does not readily accept the assertion, without some inquiry with respect to the arguments and reasons upon which the proposition is founded. When it is said that there is one thing, at least, which the legislature, in the plenitude of its power over all subjects connected with marriage, divorce, and alimony, cannot touch, namely, the amount of the alimony, when once fixed in the decree, some conclusive reason should be given in support of the assertion, and vague generalizations will not throw much light on the question. If the plaintiff had not been allowed any alimony at all, and the defendant was now worth a million or five millions, we are told that there is no power in the state to mitigate the situation, since it is so nominated in the judgment, and that is a thing that cannot be changed by any power on earth. The argument that leads to such astonishing results must be based upon, or infected at some point with, error. It is not, I think, very difficult to point it out. It consists entirely in the assumption that the legislature violated the Constitution in the enactment of the statute. After reading the briefs of counsel, and the discussion in the learned court below, it is rather difficult to perceive the precise provision of the Constitution which is claimed to have been violated. No one has, so to speak, put his finger on the precise provision. But there are only two provisions that can possibly have any application to this case. The first is not a part of the state Constitution at all, but is a part of the Federal Constitution, and it forbids the enactment of any law impairing the obligation of contracts. The contention is that

the section of Code quoted above is such a law.

The mind is at once set upon the inquiry to find out what contract had been impaired in this case, who the parties are that made it, and how it is evidenced. Of course, there can be no contract without parties, and, if any contract was made at all, it must have been made between the plaintiff and the defendant; and the only evidence of it is the provision in the decree of divorce whereby it is said the defendant contracted to pay to the plaintiff \$4,000 annually during her life. That, of course, is nothing but a pure fiction. The parties certainly did enter into a contract of marriage with each other, and, while that is admitted to be the most important and binding of all contracts, no one ever claimed that the legislature or the court violated any provision of the Constitution in dissolving it. The contention is that the court, in dissolving the marriage with one breath, in the next created a new contract, which is indissoluble, and that is the obligation of the defendant to pay to the plaintiff a reasonable sum out of his estate, and that sum was found to be at that time \$4,000 a year. Alimony is the support which the court decrees in favor of the wife as a substitute for the common-law right of marital support. No one denies the power to deprive the wife of that common-law right for any fault on her part that the legislature may judge to be sufficient, but it seems that the substitute under the decree is more sacred and unchangeable than the original right which she acquired by the marriage, since the latter may be affected by legislation, while the former cannot be.

An unsound or fallacious argument is often exposed by following it up to all of its natural or logical sequences, but it is not necessary to pursue that form of reasoning any farther in this case, since it is as well settled by authority as any question can be that the provision for alimony in the judgment in this case is not a contract, within the meaning of the Constitution. It has been so decided by this court and by the Supreme Court of the United States, which is the court of last resort upon all questions of this character. In *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64, it was held that even an ordinary money judgment was not a contract. The question arose upon the act of the legislature in reducing interest from 7 to 6 per cent. Laws 1879, chap. 538. The act, in terms, excluded from its operation "any contract or obligation made before the passage of this act." The judgment was rendered before the law was passed, and the contention was that it came within the exception; but this court held, after very full discussion, that the judgment was not a contract, and that the legislature had power to reduce the interest 1 per cent, and, of course, if it could so reduce the interest on a 7 per cent judgment, it could reduce it to 2 per cent. It was subsequently decided that a judgment was not an express or implied contract, within the meaning of § 635 of the Code, which authorized an attachment

in actions upon such contracts. *Remington Paper Co. v. O'Dougherty*, 32 Hun, 255, Affirmed in 96 N. Y. 666. But this view seems to have been subsequently modified, at least so far as to allow the provisional remedy in such an action. *Gutta Percha & R. Mfg. Co. v. Houston*, 108 N. Y. 276, 15 N. E. 402. But the cases in the Federal court are so clear and conclusive that they leave no room for doubt or distinctions. In *Chase v. Curtis*, 113 U. S. 464, 28 L. ed. 1038, 5 Sup. Ct. Rep. 559, that court stated the rule in the following terms: "And it was decided by this court in the case of *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211, that a liability for a tort, created by statute, although reduced to a judgment by a recovery for the damages suffered, did not thereby become a debt by contract, in the sense of the Constitution of the United States, forbidding state legislation impairing its obligation, for the reason that 'the term "contract" is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence.'" In the case cited above by the learned court the following is the language of the opinion: "A judgment for damages, estimated in money, is sometimes called by text-writers a 'specialty' or 'contract of record,' because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. . . . But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority, against his will and protest. The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition." A marriage contract may be dissolved by a direct or special act of the legislature, and such a law does not impair the obligation of a contract. Marriage is something more than a mere contract. It is a status or institution of society founded upon the consent of the parties, and the subject of regulation by law. It is not embraced within the terms or meaning of the Constitution which forbids the states from enacting laws impairing the obligation of contracts. *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; *Hunt v. Hunt*, 131 U. S. clxv, Appx. and 24 L. ed. 1109. The contention that the provision for alimony in this judgment is a contract may therefore be dismissed from further consideration.

The only other conceivable ground that 61 L. R. A.

the statute in question can be assailed as violative of the Constitution must be that it deprives the plaintiff of her property without due process of law. That contention implies that this incidental provision in a judgment of divorce which the law and the courts might grant or deny at pleasure is property. It cannot be sold or transferred or bequeathed by will, or pass to next of kin in case of intestacy. It has no more of the attributes of property than the common-law right to marital support, for which it is an imperfect substitute. It must be apparent that, from the general nature and character of alimony and its limitations, it is taken out of the general law of property. It is a creation of equity, and a statute that empowers courts of equity to administer it, or reduce or modify it as to amount or otherwise, as changed conditions and circumstances may require, in order to do equity between the parties, violates none of the guaranties of the Constitution for the protection of property. Will it be contended for a moment that a woman who has procured a divorce, with a large allowance of alimony, and who thereafter conducts herself morally so as to become a public scandal, has secured such a property right in the allowance that no power on earth can modify it, simply because the decree was entered prior to the enactment of the statute in question? Has she acquired such an absolute right to the allowance that the husband must keep on paying it, although he has lost all his property, and the judgment virtually sends him to the poorhouse? To argue that there is no human power capable of mitigating or modifying such a situation is to my mind a most astonishing proposition, and yet it is the logical result of the plaintiff's contention in this case. It is true that no one charges the plaintiff with even the slightest impropriety, but it is quite conceivable that such a case may arise, and it is mentioned here only to test an argument that seems to me to be infected with a fundamental error. The truth is that neither a marriage nor a judgment of divorce, or any of its incidents, is property, within the meaning of the Constitution. *Bishop, Marr. Div. & Sep. §§ 1430, 1434*. Nothing would seem to be more reasonable than the proposition that the state, which once exercised the power to grant divorces with or without alimony, by special acts,—a power which it could again resume,—has still power enough left to enact the section of the Code referred to as it now stands. It may take the property of the citizen by the taxing power to any extent. It may surround him with police regulations by day and by night that restrict his liberty and affect his property. But it seems, from the argument of the learned counsel for the plaintiff, that there is one thing that the state cannot touch, even to promote justice, and that is a woman's alimony, when the judgment is more than three years old. It has been often held that the courts have inherent power to open judgments and grant new trials for newly discovered evidence, and

this is done long after the judgment has been entered, and even after it has been affirmed in this court, and become final. The limit of time within which this may be done is a matter that rests in the discretion of the court. It has never been held or seriously suggested that the exercise of this power invaded any constitutional immunity or disturbed any vested right, and yet it is a much broader power than that expressly conferred upon the court by the statute in question, since the latter permits the court only to modify the judgment with respect to the alimony, and then only upon new facts and conditions arising subsequent to the entry of the judgment. It is, I think, quite safe to say that it has never been held that a provision in a judgment of divorce granting alimony was either a contract or property, within the meaning of the Constitution. It may be that detached *diota* and remarks in text-books and cases, and hasty and superficial views, may be picked out here and there that would seem to give some color to the contention, but they will not bear much examination. A good many crude things may be found in the books on the subject of alimony, its nature and limitations. A learned author, who has written exhaustively on the subject, overwhelmed and confused with the numerous and conflicting views, was constrained to make some remarks which, although they may savor somewhat of egotism, may very well be adopted and acted upon both by the bar and the bench: "In spite of the fact that the law consists of reason, and that reason is constantly detecting and pointing out judicial blunders, by means whereof cases wrongly decided and false doctrines are overruled, it is no novel thing for a bench of judges to accept some thoughtless utterance of a predecessor as though it were reason, without a particle of examination to see whether it is just or false. Indeed, through this sort of abnegation of the office of thinking our law has been made to linger, and it now remains, in the shadows of the dark ages, instead of walking onward with the other sciences toward the light of a better future." 1 Bishop, Marr. Div. & Sep. § 1393. We are now dealing only with the question whether there is power enough in this sovereign state to readjust alimony, and modify the allowance as to past judgments, where it appears to be grossly inequitable by reason of the changed condition of the parties.

We have just held, what has often been held before, that this court never will pronounce an act of the legislature void until it is compelled to. This was in a case where there was little else but constitutional questions involved or argued. *People ex rel. Devery v. Coler*, 173 N. Y. 103, 65 N. E. 956. But if we were to content ourselves with a mere superficial glance at the numerous cases cited in the progress of the discussion below and here, one would be led to suppose that this court, at various times within the last thirty years, has been deciding a constitutional question that could not possibly arise until less than three years ago. These 61 L. R. A.

cases are all sound law, but they have no bearing on the question whether the legislature violated the Constitution in amending the Code. A brief review of these cases most prominently put forth will show that they have nothing to do with the question now before us. The case of *Kamp v. Kamp*, 59 N. Y. 212, was decided nearly thirty years ago. All that it decided was that the jurisdiction of the court in divorce cases terminated with the final judgment. It was also held that there was then no inherent or statutory power to modify the judgment upon proof of circumstances arising after its entry, and where the financial condition of the parties had changed. That case decides what the law was prior to any legislation on the subject. The case of *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, was decided over eighteen years ago, and it simply held that the courts of this state have no common-law jurisdiction over the subject of divorce, and had no powers in that respect except such as were expressly conferred by statute or were incidental to powers conferred. It was also held that the court had no power, after the entry of a judgment for divorce, to order an additional allowance for the support of the wife, but could make an additional allowance for the care, custody, and education of the children. The case of *Romaine v. Chauncy*, 129 N. Y. 566, 14 L. R. A. 712, 29 N. E. 826, was decided over ten years ago. It was held in that case that alimony, by reason of its nature and express limitations, was taken out of the general law of property, and, as it was created by equity, it should have the protection of equity, so that it may not be perverted to a purpose for which it was not intended: that alimony is something incidental to a decree of divorce in favor of the wife, and is simply the allowance for her support, and not a debt due to her from her husband, but a substitute for the marital obligation of support, from which the husband, because of his misconduct, is not relieved by the decree; the marital obligation is by the judgment made specific, and measured by the court; and hence that a general duty of marital support, over which the husband had a discretionary control, had been changed into a specific duty. It is difficult to see how the doctrine of that case helps the plaintiff's contention. The case of *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663, was decided two years before the Code, as it now exists, had been amended. There was no question involved or decided in the case except the construction of the Code under the amendment of 1894, to the effect that the court might, after final judgment, vary the direction as to alimony. As there were then no retroactive words in the statute, it was decided that it applied only to judgments rendered after its passage, and not to those entered before. All that the appeal in this case involved, or the court decided, was the construction of the statute then existing: and the general rule was followed that it would be deemed to operate upon future judgments only, and was not retroactive in the absence of express words to

that effect. It is very plain that none of these cases involved any question with respect to the power of the legislature to enact the section of the Code on this subject as it now stands. They decided what the law then was, but did not attempt to decide anything in regard to the power of the legislature to change the law from time to time, and make it what it now is. The Code now has supplied what was found to be wanting in these cases. It has conferred power to modify an allowance of alimony in all cases, and it has not yet been decided that such an act violated the Constitution.

The legislature cannot exercise any judicial power. It cannot decide controversies, vacate or annul judgments, or grant new trials. While there is no express provision of the Constitution to that effect, it is plainly implied and forbidden from the division of the different powers of government between the three departments, and neither can usurp the functions of the other. *Re Greene*, 166 N. Y. 485, 60 N. E. 183. The cases on that subject have no application here, for the plain reason that by the statute in question the legislature did not attempt to exercise any judicial power whatever. It simply conferred upon the courts judicial powers that they did not possess before. That it had the right to do, and it is done at nearly every session, by Code amendments or otherwise. The power of the courts over judgments for alimony in divorce cases may be enlarged and made retroactive, even to the extent of abolishing an existing right of appeal. *Re Palmer*, 40 N. Y. 561.

It will be seen that the discussion has been closely confined to the only question that is presented by this appeal. The parties or their conduct are of very little consequence, so far as the real question is concerned. This remark is suggested by the fact that some things have been made quite prominent in the discussion of the question that are foreign to it, and can serve no purpose but to prejudice and mislead the mind. For instance, it is said that the defendant contracted a second marriage in defiance of the judgment of the court. If he has done anything wrong in that respect, he ought to be punished for it, but his conduct does not effect the power of the legislature to pass the law in question. Both parties have contracted a second marriage,—the plaintiff in this state, and the defendant in another state. If the defendant's second marriage was valid at the place where it was contracted, it is generally valid everywhere. Neither the judgment nor the statute of this state has any extraterritorial operation, and, so far as we can know from the record, the marriage of the one party is as good in the eye of the law as that of the other. I assume that such marriages are quite common among divorced people, and there is nothing before us to show that either one was illegal. If, however, there was anything in the defendant's moral conduct that ought to deprive him of the benefit of the amendment, the learned court below had the power in the exercise of its discretion, to reverse up-
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on the facts; but, since it did not, we have no right to consider anything but the question of law. *Wetmore v. Wetmore*, 162 N. Y. 503, 48 L. R. A. 666, 56 N. E. 997.

I think the section of the Code is not open to any constitutional objection, and that the order of the appellate division should be reversed, and that of the special term affirmed.

Haight and Vann, JJ., concur with **O'Brien, J.**

William T. GILBERT, Receiver of Commercial Alliance Life Insurance Company, *Respt.*,

v.

Edward L. FINCH *et al.*, *Appts.*

(173 N. Y. 455.)

1. The application of the funds of an insurance company, by its directors, to the purchase of the interest of the incorporators of another company, with a view of transferring its business to their own, is a waste of funds which will render the directors personally liable in damages to a subsequently appointed receiver of their company, when the other company has no stock, and therefore nothing to transfer, so that all that is accomplished is a substitution of the purchasing directors as officers in the other company.
2. The officers of an insurance company which has no stock are wrongdoers in accepting money which they appropriate to their own use to substitute the officers of another company in their places, with a view of transferring the business of the company to the other one.
3. The principle of subrogation does not apply in favor of directors of an insurance company who applied its funds to procure their substitution in place of the officers of another company, with a view to transfer its business to their own company, so as to entitle them to have the remedy against those who received the money preserved in case they are compelled to make good money so appropriated.
4. Where a settlement with part of several joint tortfeasors expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue; and the others are not thereby discharged from liability for their tort.

(February 10, 1903.)

A PPEAL by defendants from an order of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Trial Term for New York County in their favor in an action brought to hold them liable as directors of the Commercial Alliance Insurance Company for a waste of funds. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to effect of release of one joint tortfeasor upon liability of another, see also, in this series, *Abb v. Northern P. R. Co.* (Wash.) 58 L. R. A. 293, and *note*, and *McBride v. Scott* (Mich.) *ante*, 445.

Messrs. Michael H. Cardozo and George Wilcox, for appellants:

The defendants, having acted in good faith, with the utmost care, without personal advantage, having no object except to increase the legitimate business of their company, are not liable in this action.

Symmes v. Union Trust Co. 60 Fed. 830; *Morawetz, Priv. Corp.* § 553; *Leslie v. Lorrillard*, 110 N. Y. 522, 1 L. R. A. 456, 18 N. E. 363; *Cook, Stock & Stockholders*, § 648; *Hiscock v. Lacy*, 9 Misc. 578, 30 N. Y. Supp. 860; *Thompson, Liability of Officers*, pp. 233, 241; 2 *Cook, Corp.* 4th ed. §§ 623, 702, 703; 3 *Thomp. Corp.* §§ 4106, 4109; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Holmes v. Willard*, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083.

There being no evidence of any damage or loss to the defendants' company by reason of the transaction in question, there can be no recovery in this action.

Van Dyck v. McQuade, 86 N. Y. 38; *Holmes v. Willard*, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083; *O'Brien v. Fitzgerald*, 143 N. Y. 377, 38 N. E. 371; *Knapp v. Roche*, 94 N. Y. 329; *Dykman v. Keeney*, 154 N. Y. 483, 48 N. E. 894.

The transaction in question was not illegal on the part of the Commercial Alliance Life Insurance Company.

Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co. 90 N. Y. 607; *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. 75; *Koehler v. Reinheimer*, 26 App. Div. 1, 49 N. Y. Supp. 755; *Steinway v. Steinway*, 17 Misc. 47, 40 N. Y. Supp. 718; *City Trust, S. D. & Surety Co. v. Wilson Mfg. Co.* 58 App. Div. 273, 68 N. Y. Supp. 1004; *Vought v. Eastern Bldg. & L. Assn.* 172 N. Y. 508, 65 N. E. 496.

The transaction in question was not illegal on the part of the Maine company.

Weymouth v. Penobscot Log Driving Co. 71 Me. 29; *Fitch v. Lewiston Steam Mill Co.* 80 Me. 37, 12 Atl. 732; *Woodruff v. Erie R. Co.* 93 N. Y. 618.

The stockholders of a company have entire control of the property of their company, and can dispose of it as they see fit.

Holmes v. Willard, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083; *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 252, 27 N. E. 831; *Little v. Garabrant*, 90 Hun, 404, 35 N. Y. Supp. 689; *Denike v. New York & R. Lime & Cement Co.* 80 N. Y. 599; *Castner v. Twitchell-Champlin Co.* 91 Me. 524, 40 Atl. 558; *Mayo v. Knowlton*, 134 N. Y. 250, 31 N. E. 985.

The transfer of business by life insurance companies has frequently been recognized as legitimate in English cases.

Re International Life Assur. Soc. L. R. 9 Eq. 316; *Re Medical, Invalid & G. Life Assur. Soc.* L. R. 6 Ch. 374; *Re Albert Life Assur. Co.* L. R. 6 Ch. 381; *Re National Provincial Life Assur. Soc.* L. R. 6 Ch. 393, L. R. 9 Eq. 306; *Re Times Life Assur. & Guarantee Co.* L. R. 5 Ch. 381; *Re Anchor Assur. Co.* L. R. 5 Ch. 632; *Re Family Endowment Soc.* L. R. 5 Ch. 118.

The retention by the commercial company

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of the benefits of the transaction, with its omission to demand or offer rescission, bars the receiver from raising the question of *ultra vires*.

Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co. 90 N. Y. 607; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; *Veeder v. Mudgett*, 95 N. Y. 295; *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. 75; *Moss v. Cohen*, 158 N. Y. 240, 53 N. E. 8.

If any liability ever existed, as claimed in the complaint, the defendants were released and discharged therefrom by reason of the settlement of the action brought by the plaintiff against the members of the Maine & New Brunswick Insurance Company, and the release given to them.

Knapp v. Roche, 94 N. Y. 329; *Woods v. Pangburn*, 75 N. Y. 498; *Mitchell v. Allen*, 25 Hun, 543; *Delong v. Curtis*, 35 Hun, 94; *Breslin v. Peck*, 38 Hun, 623; *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1006; *Addison, Torts*, Wood's 6th ed. p. 94; *Cooley, Torts*, p. 145, § 127; *Hale, Torts*, p. 120; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 506; *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911; *Colegrove v. New York & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418; *Barrett v. Third Ave. R. Co.* 45 N. Y. 628.

Assuming the payment to have been illegal, these defendants had the right to insist that this claim be enforced against the Maine parties for its full amount, or that, if they were obliged to pay any part of it, they be subrogated to the rights of the plaintiff or his company.

Wetmore v. Porter, 92 N. Y. 77; *Warren v. Union Bank*, 157 N. Y. 268, 43 L. R. A. 256, 51 N. E. 1036; *Hood v. Hayward*, 124 N. Y. 24, 26 N. E. 331; *Zimmerman v. Kinke*, 108 N. Y. 287, 15 N. E. 407; *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1; *Pease v. Egan*, 131 N. Y. 272, 30 N. E. 102; *Cole v. Malcolm*, 66 N. Y. 363.

Mr. Henry D. Hotchkiss, for respondent:

The transaction was illegal *per se*, both as involving mortal turpitude and as a violation of statute. It was in every sense void as *ultra vires* both corporations.

McClure v. Wilson, 70 App. Div. 152, 75 N. Y. Supp. 212; *McClure v. Levy*, 147 N. Y. 215, 41 N. E. 492; *McClure v. Law*, 161 N. Y. 78, 55 N. E. 388; *Huntington v. National Sav. Bank*, 90 U. S. 388, 24 L. ed. 777; *Pierson v. Cronk*, 26 Abb. N. C. 25, 13 N. Y. Supp. 845; *Mason v. Henry*, 83 Hun, 546, 31 N. Y. Supp. 1068, 152 N. Y. 529, 46 N. E. 837; *Pierson v. McCurdy*, 33 Hun, 520.

Neither good faith nor due care on the part of defendants could defeat a recovery.

People v. Ballard, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54; *Holmes v. Willard*, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083; *Laverty v. Snetten*, 68 N. Y. 522, 23 Am. Rep. 184; *Metropolitan Elev. R. Co. v. Manhattan R. Co.* 14 Abb. N. C. 211; *Pickering v. Stephenson*, L. R. 14 Eq. 322.

The transaction could not be ratified.

Seventeenth Ward Bank v. Smith, 51 App. Div. 259, 64 N. Y. Supp. 888; *Morawetz, Priv. Corp.* 2d ed. § 620.

As against the creditors, neither the directors nor the stockholders could ratify a waste of corporate funds.

Halpin v. Mutual Brewing Co. 20 App. Div. 583, 47 N. Y. Supp. 412; *Wilson v. Aolian Co.* 64 App. Div. 337, 72 N. Y. Supp. 150; *Seventeenth Ward Bank v. Smith*, 51 App. Div. 259, 64 N. Y. Supp. 888; *Little v. Garabrant*, 90 Hun, 404, 35 N. Y. Supp. 689.

A single objecting stockholder could insist upon the corporation pursuing its rights against the delinquent directors.

People v. Ballard, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54; *Broadway Theatre Co. v. Dessau Co.* 45 App. Div. 475, 61 N. Y. Supp. 335; *Hartford & N. H. R. Co. v. Crosswell*, 5 Hill, 383, 40 Am. Dec. 354; *Foss v. Harbottle*, 2 Hare, 461; *Livingston v. Lynch*, 4 Johns. Ch. 573; *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 553.

Haight, J., delivered the opinion of the court:

This action was brought by the plaintiff, as receiver of the Commercial Alliance Insurance Company, against the defendants, as directors of that company, to recover the sum of \$10,000 and interest. The Commercial Alliance Insurance Company was incorporated under the laws of this state, and continued in business until October, 1894, when the plaintiff was appointed receiver in an action brought for that purpose by the attorney general of the state. The evidence taken upon the trial tends to show that, prior to the bringing of the action by the attorney general, the defendants, and other persons beyond the jurisdiction of the court, were acting as directors of the company, and that they entered into negotiations with the ten surviving incorporators of the Maine & New Brunswick Insurance Company, a corporation organized under the laws of the state of Maine, for the purchase and control of that company; that such negotiations were finally consummated on the 3d day of May, 1893, by the president of the Commercial Alliance Company, who, acting in pursuance of the direction of the defendants and their associates, took from the funds of the company \$35,000, and paid the same to the ten surviving incorporators of the Maine & New Brunswick Company, giving to each the sum of \$3,500, and taking from them a paper in which they purported to transfer and assign "all their right, title, and interest, as corporators, associates, or otherwise, in said Maine and New Brunswick Insurance Company." Simultaneously with the execution and delivery of this paper, and in pursuance of that agreement, all of the officers and directors of the Maine Company resigned their places, and the same were filled by the defendants, or persons acting for or on their behalf. Shortly thereafter, and on the 22d day of July, 1893, the Maine & New Brunswick Company was judicially declared by the supreme judicial court of Maine to be insolvent, and a receiver

was appointed to wind up its affairs. After the plaintiff was appointed receiver of the Commercial Alliance Company, he brought an action against the ten surviving incorporators of the Maine & New Brunswick Company in the United States circuit court for the district of Maine to recover back the \$35,000 which had been paid to them under the direction of the defendants. Subsequently this action was compromised under the direction of the court, the plaintiff receiving from such surviving incorporators the sum of \$25,000; and he thereupon executed and delivered to them an instrument in which he released and discharged all of the defendants in that action "from all claims or demands arising from said suit, or the subject-matter thereof, and also from all claims, demands, actions, and causes of action whatsoever in favor of said Commercial Alliance Insurance Company, or of myself as receiver of said company, to date. The execution of this instrument shall not affect any cause of action of the receiver against any person not named herein." It also appeared upon the trial that the defendant Miller had brought an action against the Commercial Alliance Company prior to the appointment of the plaintiff as receiver, in which he claimed that a large sum of money was due and owing to him from the company. This action was settled upon the payment to him of the sum of \$8,000, and thereupon mutual releases were exchanged between him and the company upon the consideration expressed therein of \$1.

We fully concur in the conclusions reached by the appellate division, to the effect that the transaction by which \$35,000 were taken from the treasury of the Commercial Alliance Company and paid over to the incorporators of the Maine & New Brunswick Company was *ultra vires*, and constituted a waste of the funds of the Commercial company, and that the defendants, who authorized such appropriation of the moneys, became liable to respond to the plaintiff in damages. We also are of opinion that the appellate division properly disposed of the claim of the defendant Miller under his release.

There is but one question upon which we deem further discussion necessary. That arises out of the release given by the plaintiff to the Maine incorporators upon the settlement of the action against them for \$25,000. It is contended by the defendants, in the first place, that, if they are required to return to the plaintiff the \$35,000 which they paid, or caused to be paid, to the Maine incorporators, they would become, in equity, entitled to subrogation to the rights of the plaintiff and entitled to recover the money which they had paid to the Maine incorporators, and that the release would operate to deprive them of this right. In the second place, they contend that the release was a settlement of the entire claim, and that its effect was to discharge them, upon the theory that they were joint tortfeasors.

It is not our purpose to question the char-

acter or the motive of the defendants in carrying out the transaction. We may readily concede that they thought they were acting for the best interests of the company which they represented. They doubtless thought that by getting control of the Maine Company, and getting themselves installed as officers, they could get the policy holders in that company to transfer their insurance into the Commercial Alliance Company; but good motives and good intentions do not render the transaction valid, or relieve them from liability for the wrong which they have committed. The Maine incorporation was not a stock company. Its officers had no stock in the company which they could sell or transfer, and consequently there was nothing that the Commercial Alliance Company could purchase. The thing accomplished by the transaction was the resignation of the officers of the Maine Company, and the substitution of the defendants or their representatives. It was therefore a misappropriation of the moneys of the Commercial Alliance Company by the defendants and their associates, which operated to waste the funds of the company; and they thereby became wrongdoers, and, among themselves, joint tortfeasors. We are also of the opinion that the officers of the Maine Company also committed a wrong. If they, as officers of the Maine Company, could transfer any of the property of that company to the Commercial Alliance Company, they had no right, as such officers, to divide up the \$35,000 among themselves, and put it into their own pockets. If they had no property rights which they could transfer to the Commercial Alliance Company, then they had no right to take the money of that company and convert it to their own use, so that, as among themselves, they were joint tortfeasors. As to whether they were joint tortfeasors with the defendants, we do not deem it necessary to now determine, for it is our purpose to consider the question in both aspects.

If the defendants had paid the Maine incorporators \$35,000 of their own money to resign their position in that company, and have the defendants substituted in their places, we are aware of no equitable or legal principle upon which they could recover the money. They got what they purchased. They understood fully what the Maine officers had to transfer. In using the money of the Commercial Alliance Company, they committed, as we have seen, a wrong upon that company; and our attention has been called to no case in which equity has enforced the right of subrogation in such a case. Indeed, we had supposed the policy of the law to be to leave wrongdoers without aid in equity from the burdens of the position in which they have placed themselves. The rule is well settled that, as among themselves, equity would not compel contribution or enforce subrogation. *Peck v. Ellis*, 2 Johns. Ch. 131; *Miller v. Fenton*, 11 Paige, 18; *Thorp v. Amos*, 1 Sandf. Ch. 26, 34; *Pierson v. Thompson*, 1 Edw. Ch. 212, 218; *Whele v. Haviland*, 42 How. Pr. 61 L. R. A.

399, 410; *North v. Sergeant*, 33 Barb. 350, 354; *Weidman v. Sibley*, 16 App. Div. 616, 619, 44 N. Y. Supp. 1057. We consequently conclude that the principles of subrogation do not apply to the defendants in this case.

In considering the effect of the release, we shall assume that the defendants were joint tortfeasors with the Maine incorporators, and that the release, under seal, of a claim given to one joint tortfeasor, operates as a release of all. *Barrett v. Third Ave. R. Co.* 45 N. Y. 628, 635, and cases there cited. This rule is founded upon the theory that a party is entitled to but one satisfaction for the injury sustained by him. The claim of the plaintiff, as we have seen, was for \$35,000. The settlement was for \$25,000, leaving \$10,000 of the original claim unpaid and unsatisfied. The instrument given to the Maine incorporators upon the settlement of the plaintiff's suit against them released and discharged them from all further claims or demands, so far as the plaintiff was concerned, but it was expressly provided in the instrument that it should not affect any cause of action on behalf of the receiver against any other person. The purpose of this reservation is very evident. The receiver, doubtless, intended to pursue the defendants for the balance of the claim. The instrument, therefore, does not purport—neither was it intended—to be a full and complete settlement of the plaintiff's entire claim. Reservations of this character in releases are not uncommon, and their effect has been the subject of frequent adjudication by the courts. It is quite true that the courts of our sister states have reached different conclusions upon the question, and that a sharp conflict exists in the courts of our own state,—as, for instance, *Mattheus v. Chicopee Mfg. Co.* 3 Robt. 712, and *Commercial Nat. Bank v. Taylor*, 64 Hun, 499, 19 N. Y. Supp. 533, on one side, and *Mitchell v. Allen*, 25 Hun, 543; *Delong v. Curtis*, 35 Hun, 94, and *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1066, upon the other side. In England the modern authorities appear to be quite uniform upon the question. They are to the effect that, as between joint debtors and joint tortfeasors, a release given to one releases all; but if the instrument contains a reservation of a right to sue the other joint debtors or tortfeasors, it is not a release, but, in effect, is a covenant not to sue the person released, and a covenant not to sue does not release a joint debtor or a joint tortfeasor. In the case of *Duck v. Mayeu* [1892] 2 Q. B. 511, the question was as to whether the plaintiff had released a joint tortfeasor. He had accepted from one a sum of money, but without prejudice to his claim against the other. *Smith, L. J.*, in delivering the opinion of the court, said with reference thereto: "In determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out; and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to

be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In the case of *Bateson v. Gosling*, at nisi prius, the same canon of construction was applied, and it was held that the release being, as it was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release; and this ruling was unanimously upheld by the court of common pleas, as reported in L. R. 7 C. P. 9." In *Price v. Barker*, 4 El. & Bl. 760, Coleridge, J., says: "With regard to the first question, two modes of construction are for consideration: One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the intention to release and destroy the debt evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt. The other, that, according to the modern authorities, we are to mould and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving the rights against parties jointly liable. We quite agree with the doctrine laid down by Lord Denman in *Nicholson v. Revill*, 4 Ad. & El. 675, as explained by Baron Parke in *Kearsley v. Cole*, 16 Mees. & W. 136, that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved; and we think that we are bound by modern authorities (see *Solly v. Forbes*, 2 Brod. & B. 38; *Thompson v. Lack*, 3 C. B. 540; and *Payler v. Homersham*, 4 Maule & S. 423) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release." See also *Currey v. Armitage*, 6 Week. Rep. 516. In the case of *McCrillis v. Hawes*, 38 Me. 563, one Lewis and the defendant were charged as joint trespassers upon the plaintiff's premises. They had taken 100 sticks of pine timber. The plaintiff settled with Lewis for one half of the property taken, and brought action against the defendant for the other half. It was held that the action could be maintained, and that the settlement was not a release as to the whole claim. In the case of *Ellis v. Esson*, 50 Wis. 138. 36 Am. Rep. 830, 6 N. W. 518, it was held that the instrument given to one of several joint wrongdoers is not a technical release if it appears from the paper that it was not the intention of the injured person to release his cause of action against all the wrongdoers, and that the sum received was not in fact a full compensation for his injury, nor intended to be such by the parties to the agreement. In *Sloan v. Herrick*, 49 Vt. 327, it was held that the release of one joint tortfeasor on payment of part satisfaction, when it is expressed in the release that the sum paid is received only in

part satisfaction, will not operate to bar the injured party from pursuing the other joint tortfeasor for so much of the tort as remains unsatisfied.

We have thus called attention to the English authorities and those of some of our sister states. We have also referred to some of the conflicting cases in our own courts. The question appears to have first received attention here in *Kirby v. Taylor*, 6 Johns. Ch. 250, 253, in which it was held that a release is to be construed according to the clear intention of the parties, and, where it contains a reservation, the other obligee was not discharged. In the case of *Irvine v. Millbank*, 56 N. Y. 635, more fully reported in 15 Abb. Pr. N. S. 378, the release was, by its terms, to be without prejudice to the rights of the plaintiff as against the other defendants. Folger, J., in delivering the opinion of the court, said that this instrument was not a technical release, which it must be to operate as a discharge of a joint tortfeasor. And finally, in the case of *Whittemore v. Judd Linseed & Sperm Oil Co.* 124 N. Y. 565, 27 N. E. 244, the question was examined by Brown, J., and the conclusion reached that, where a release of one of two joint debtors contains an express provision that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged. It thus appears that the decisions of this court are in accord with the English rule, and in harmony with our statute in reference to joint debtors. Code Civ. Proc. §§ 1942, 1944. They give force and effect to the intention of the parties to the instrument which, we think, is more just, and the wiser and safer rule. Where the release contains no reservation, it operates to discharge all the joint tortfeasors; but, where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged. It follows that the release, so called, did not operate to discharge the defendants.

The order of the Appellate Division should be affirmed, and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs.

Parker, Ch. J., and Gray, Bartlett, Cullen, and Werner, JJ., concur. O'Brien, J., absent.

Vito MARINO, by Guardian *ad Litem*,
Respt.,

v.

Louis A. LEHMAIER, Appt.

(173 N. Y. 530.)

1. A child whose employment in a factory is forbidden by statute because of his immature age is not, as matter of law,

NOTE.—As to assumption of risks of employment by minor, see *Brazil Block Coal Co. v. Gaffney* (Ind.) 4 L. R. A. 850; *Davis v. St. Louis, I. M. & S. R. Co.* (Ark.) 7 L. R. A. 283; *Hinckley*

chargeable with contributory negligence, or with having assumed the risk of employment, in case he is injured while so employed.

2. Violation of a statute forbidding the employment in factories of children of a certain age may be found to be negligence which will support a civil action for injuries resulting therefrom, although it is punishable under the statute as a misdemeanor.

(Gray and O'Brien, JJ., dissent.)

(February 24, 1903.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, reversing a judgment of nonsuit entered by a Trial Term for New York County in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinions.

Messrs. Vennio & Sichel, for appellant:

The violation by the defendant of the factory law in employing the plaintiff, without any other evidence of negligence, is insufficient to support a verdict or a judgment for the plaintiff.

The statute imposes no affirmative duty.

Knisley v. Pratt, 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986; *Graves v. Brewer*, 4 App. Div. 327, 38 N. Y. Supp. 566; *E. S. Higgins Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; *Thompson v. Cury Mfg. Co.* 62 App. Div. 279, 70 N. Y. Supp. 1086; *Monzi v. Friedline*, 33 App. Div. 217, 53 N. Y. Supp. 482; *Freeman v. Glens Falls Paper Mill Co.* 70 Hun, 530, 24 N. Y. Supp. 403; *De Young v. Irving*, 5 App. Div. 499, 38 N. Y. Supp. 1089; *O'Connell v. Clark*, 22 App. Div. 466, 48 N. Y. Supp. 74; *White v. Witterman Lithographic Co.* 131 N. Y. 631, 30 N. E. 236.

Plaintiff's case is defective in that it fails to show that he was free from contributory negligence.

Freeman v. Glens Falls Paper Mill Co. 70 Hun, 530, 24 N. Y. Supp. 403.

The plaintiff, by accepting the employment, assumed the obvious risks incident thereto.

Buckley v. Gutta Percha & Rubber Mfg. Co. 113 N. Y. 540, 21 N. E. 717; *Hayes v. Bush & D. Mfg. Co.* 102 N. Y. 648, 5 N. E. 784; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Ogley v. Miles*, 139 N. Y. 458, 34 N. E. 1059; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Burns v. Nichols Chemical Co.* 65 App. Div. 424, 72 N. Y. Supp. 919.

The plaintiff was *sui juris*, and the burden of proving the contrary rests upon him.

Stone v. Dry Dock. E. B. & B. R. Co. 115 N. Y. 104, 21 N. E. 712.

v. Horazdowski (Ill.) 8 L. R. A. 490; *Davis v. Forbes* (Mass.) 47 L. R. A. 170; and *Cudahy Packing Co. v. Marcan* (C. C. App. 8th C.) 54 L. R. A. 238.

As to failure to comply with statute or ordinance as negligence, see also, in this series, *Pauley v. Steam Gauge & Lantern Co.* (N. Y.) 15 L. R. A. 194; *Clements v. Louisiana Electric* 61 L. R. A.

Messrs. William McArthur and George Lawyer, for respondent:

A person violating a public ordinance is a wrongdoer, and is necessarily negligent; and an innocent person injured by the illegal act is entitled to a civil remedy therefor.

Jetter v. New York & H. R. Co. 2 Abb. App. Dec. 458; *Beisegel v. New York C. R. Co.* 14 Abb. Pr. N. S. 29.

The principle *res ipsa loquitur* applies.

Sciolina v. Erie Preserving Co. 7 App. Div. 417, 39 N. Y. Supp. 916; *Gates v. State*, 128 N. Y. 222, 28 N. E. 373; *O'Brien v. Buffalo Furnace Co.* 68 App. Div. 451, 73 N. Y. Supp. 830; *Thompson v. Cury Mfg. Co.* 62 App. Div. 281, 70 N. Y. Supp. 1086; *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662; *Pitcher v. Lennon*, 12 App. Div. 356, 42 N. Y. Supp. 156; *Knuffle v. Knickerbocker Ice Co.* 84 N. Y. 488; *Willy v. Mulledy*, 78 N. Y. 314, 34 Am. Rep. 536.

There was no assumption of risks.

Kain v. Smith, 89 N. Y. 375.

The plaintiff was *non sui juris*.

Tucker v. New York C. & H. R. R. Co. 124 N. Y. 308, 26 N. E. 916; *Zwack v. New York, L. E. & W. R. Co.* 160 N. Y. 362, 54 N. E. 785; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812; *Finkelstein v. Brooklyn Heights R. Co.* 51 App. Div. 287, 64 N. Y. Supp. 915; *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 326.

Haight, J., delivered the opinion of the court:

This action was brought to recover damages for a personal injury. The defendant was engaged in conducting a printing establishment in the city of New York. The plaintiff was first employed by him as an errand boy. He served in that capacity for the period of about three months, and was then set at work in the factory as a feeder of a printing press, which he was required to clean every night. On the 15th of September, 1900, while he was engaged in cleaning the press, his fingers were caught between the cogwheels and cut off. The machine was not in motion at the time he commenced to clean it, and the evidence is not clear as to the precise manner in which the machine was started. On receiving the injury the boy fainted, and was unable to state whether he had previously taken hold of the fly wheel, and in so doing started the motion of the machine. He entered the employ of the defendant when he was twelve years and ten months of age, and at the time of the accident he was thirteen years and three months old. The labor law (§ 70) provides: "A child under the age of fourteen years shall not be employed in any factory in this state. A child between the

Light Co. (La.) 16 L. R. A. 48; *Sowles v. Moore* (Vt.) 21 L. R. A. 723; *Brember v. Jones* (N. H.) 26 L. R. A. 408; *Relpo v. Elting* (Iowa) 26 L. R. A. 769; *Cincinnati Street R. Co. v. Murray* (Ohio) 30 L. R. A. 508; and *Tobey v. Burlington, C. R. & N. R. Co.* (Iowa) 33 L. R. A. 496.

ages of fourteen and sixteen years shall not be so employed, unless a certificate executed by a health officer be filed in the office of the employer." Laws 1897, chap. 415. It will be observed that the first provision of this section is an absolute prohibition, without any qualification, of the employment in a factory of any child under fourteen years of age. This statute was, undoubtedly, passed as a police regulation, designed to protect children of tender age from injuries liable to result from their employment in dangerous avocations, such as the operation of machines or presses usually found in factories. Prior to the adoption of this statute, the rule of liability of an employer is well stated by Peckham, J., in the case of *Hickey v. Taaffe*, 105 N. Y. 26, 36, 12 N. E. 286, 289. He says: "There is no doubt that in putting a person of immature years at work upon machinery which in some aspects may be termed dangerous an employer is bound to give the employee such instructions as will cause him to fully understand and appreciate the difficulties and dangers of his position and the necessity there is for the exercise of care and caution. Merely going through the form of giving instructions, even if such form included everything requisite to a proper discharge of his duties by such employee if understood, would not be sufficient. In placing a person of this description at work upon dangerous machinery, such person must understand in fact its dangerous character, and be able to appreciate such dangers, and the consequences of a want of care, before the master will have discharged his whole duty to such an employee. . . . If a person is so young that, even after full instructions, he wholly fails to understand them, and does not appreciate the dangers arising from a want of care, then he is too young for such employment, and the employer puts or keeps him at such work at his own risk." In the case of *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812, the action was prosecuted to recover damages for injuries resulting to an infant thirteen years of age while employed in a factory. The rule, as laid down in that case, was to the effect that, so far as the danger is known and obvious to him, a person of immature years may be legally as responsible for his own protection as an adult; but where judgment and reflection are required to enable a person to appreciate the consequences which might result from the defective character of machinery, the question of contributory negligence of the infant is for the jury. See also 1 Shearm. & Redf. Neg. § 218, and authorities there cited; *Sullivan v. India Mfg. Co.* 113 Mass. 396; *Finnerty v. Prentice*, 75 N. Y. 615, reported in 8 N. Y. Week. Dig. 206. It is thus apparent that the knowledge and capacity of the infant, his judgment, discretion, care, and caution, and his ability to know and appreciate the dangers that surrounded him, even prior to the adoption of the labor law, were questions of fact for the jury. We do not regard the case of *Knisley v. Pratt*, 148 N. Y. 372, 32 L. R. A. 367, 42

N. E. 986, as controlling upon the question. In that case the plaintiff was upwards of twenty-one years of age, and her faculties had fully matured. She consequently was held to have assumed the risks of the employment. In this case the plaintiff was under the age required by the statute, and he had not arrived at that period in life in which the judgment, discretion, and caution of persons ordinarily become mature.

It has been said of the last century that it was the age of invention. Machines had been devised and constructed with which very many of the articles used by mankind were manufactured. Numerous factories had been established throughout the country, filled with machines, many of which were easily operated, and the practice of employing boys and girls in their operation had become extensive, with the result that injuries to them were of frequent occurrence. We think it is very evident that these reasons induced the legislature to establish definitely an age limit under which children shall not be employed in factories; and, to our minds, the statute, in effect, declares that a child under the age specified presumably does not possess the judgment, discretion, care, and caution necessary for the engagement in such a dangerous avocation, and is, therefore, not, as a matter of law, chargeable with contributory negligence, or with having assumed the risks of the employment in such occupation.

It is now claimed that a violation of this statute by the proprietor of a factory does not subject him to civil liability for injuries sustained by his employees. There are, doubtless, numerous statutes which prohibit the doing of certain acts, the violation of which is punishable by penalties or as a misdemeanor, in which the wrongdoer may not be civilly liable for damages. We shall not here attempt an enumeration of those statutes, or to point out the reasons why civil liability does not attach. Our attention, however, has been called to no statute prohibiting the doing of an act which is dangerous to the life or health of others in which it has been held that the jury may not find negligence, and a liability for damages resulting from the doing of the prohibited act. Passing the consideration of all the cases arising under the statutes and ordinances of cities regulating the signals of approaching trains and their speed, under which it has been held that the jury may find negligence, we come directly to the consideration of the cases that have arisen under the statute in question. In the case of *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536, the action was brought by the plaintiff, as administrator, to recover damages for the death of his wife. They occupied apartments in a tenement house in the city of Brooklyn, which they had rented of the defendant, the owner. A fire took place in one of the lower stories of the house, and the plaintiff's wife and child were smothered to death. The charter of the city of Brooklyn at that time required owners of tenement houses to have places of egress to the roofs, and also

fire escapes upon the houses, which had not been complied with. It was held that the defendant was civilly liable, and the plaintiff was permitted to recover. Earl, J., in delivering the opinion of the court, after referring to the statute, says: "Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in the case of a fire. For a breach of this duty causing damage it cannot be doubted that the tenants have a remedy. It is a general rule that whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative, and where a duty is imposed there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage; and the same is true of a duty imposed by statute upon any citizen." The provisions of the Brooklyn charter have, in substance, been incorporated into § 82 of the labor law, and are now a part of the statute under consideration. In the case of *Stewart v. Ferguson*, 104 N. Y. 553, 58 N. E. 662, the action was for the negligently causing the death of plaintiff's intestate by reason of the fall of a scaffold on which he was at work. Section 18 of the labor law prohibited persons employing laborers to work upon a scaffold from furnishing unsafe, unsuitable, or improper scaffolding which is not "so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed or engaged." It was held that the plaintiff could recover. Landon J., writing in the case, says: "We think §§ 18 and 19 of the labor law enlarge the duty of the master or employer, and extend it to responsibility for the safety of the scaffold itself, and thus for the want of care in the details of its construction." In the case of *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 96, 15 L. R. A. 194, 29 N. E. 999, 1000, Finch, J., after referring to the statute requiring fire escapes, says with reference thereto that it imposed "a duty upon the owners or occupants of the prescribed class of factories, for an omission to perform which the operatives injured by the omission might recover damages." He proceeds, however, to show that in that case the owners had supplied two fire escapes upon their factory, thus complying with the statute. In *Huda v. American Glucose Co.* 154 N. Y. 474, 481, 40 L. R. A. 411, 48 N. E. 897, 899, Gray, J., says, referring to this same statute: It "created the absolute duty, and its effect was to give a cause of action for its breach in favor of anyone entitled to its observance and injured by a breach." In Comyn's Digest, under head of *Actions on Statutes* (F), p. 453, it is said: "So in every case where a statute enacts or prohibits a thing for the benefit of a person, he

shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." See also *Pitcher v. Lennon*, 12 App. Div. 356, 42 N. Y. Supp. 156; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153, and *Hover v. Barkhoof*, 44 N. Y. 113. We therefore conclude that under the evidence and the principle of these authorities, at least, a question of fact was presented for the determination of the jury, and, in case it should be found that the defendant was negligent, and the plaintiff, under the circumstances, was not chargeable with contributory negligence, the defendant was civilly liable.

The order of the Appellate Division should be affirmed, and judgment ordered in favor of the plaintiff upon the stipulation, with costs.

Martin, Vann, and Cullen, JJ., concur.

Parker, Ch. J., concurring:

The legislature might have provided that an employer should respond in damages for all injuries sustained by a child under fourteen years of age employed by him in violation of § 70 of the labor law; but instead it provided that the violator should be guilty of a misdemeanor. It would seem, therefore, that the minority of the court is right in so far as it holds that defendant was not chargeable as matter of law with all injuries that might have resulted to plaintiff while in his employ. But, while the violation of the statute cannot, as matter of law, charge the offender in damages for all injuries that may come to one whom the statute forbids him to employ, may not the violation of the statute in the case of injuries which could not have happened but for its violation constitute evidence of negligence to be considered by the triers of fact? This statute was the outcome of lessons taught by experience and emphasized by recent statistics, and its purpose is to save the life and keep the body whole of children of such tender years as not to be able to exercise good judgment in their own protection, and not to be trusted to take the same precautions to save themselves from harm that adults would. The statute amounts to a declaration by the state that the employment of children under fourteen years of age in a factory is so far neglectful of their lives and limbs as to make it the duty of the state, in the exercise of its police power, to forbid such employment, and enforce its command by penalties. Now, while the offense against the state is only punishable by it as a misdemeanor, the violation of the statute is, as against the child whom the state deems incompetent to contract for such forbidden service, a wrongful and negligent act, which of itself furnishes some evidence of negligence in cases where the accident could not have happened but for an employment to work in a factory. Now, in this case, the boy hired out to defendant as an errand boy. When he asked

for an increase of wages, he was set to work on the press where he received the injury. His testimony on that subject is in part as follows: "How I came to work there is, I was with another friend of mine, looking for a job, and as we went around Beekman street there were some other boys who got out of a place, and told us there was a boy wanted at Lehmaier & Brother. So we went there, and we asked if we could not work. So Ernest, the shipping clerk, engaged me there. It was engaged to run errands outside. I was to get \$3 a week. I ceased to work for Mr. Lehmaier September 15, 1900. Ernest, the shipping clerk, set me to work there when I first went. First to run errands. I worked two and a half or three months at errands. Then I asked for an increase in my wages, and they said they needed me upstairs, the printing machine, and they asked me if I would like to go up there; and the foreman put me up there. They put me on a Gordon machine. I worked that machine three months, or two and a half." Then this accident happened, and the work stopped because of the accident and the injury. Against such an accident the state attempted to guard this boy, among others. But the defendant disregarded the law, and employed and gave directions to one of the subjects of the state in violation of the state's policy, and the outcome of it was an injury to the child, which could not have happened had the law been observed. In such a case it would seem that the necessary and logical practice would be that the jury should be permitted to consider the violation of the statute, in connection with the other facts, as evidence tending to show negligence on the part of defendant.

There is much authority in support of this view. In *McGrath v. New York O. & H. R. R. Co.* 63 N. Y. 522, it was held that a violation of an ordinance of a municipality regulating the speed of trains through it is some evidence upon the question of negligence, and must be submitted to the jury. And that rule has been followed since in a long line of railroad cases. In *Knupfle v. Knickerbocker Ice Co.* 84 N. Y. 488, an ordinance of the city of Brooklyn prohibited the leaving of horses attached to vehicles in any street, unless there were a person in charge, or the horses were secured to a tying post. The violation of that ordinance by the driver of a wagon of defendant resulted in a runaway, and the killing of a child, for which recovery was had and sustained. This court held that, while the disregard of the ordinance was not conclusive evidence of negligence, yet it was some evidence for the consideration of the jury. In *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153, the owner of a building neglected to comply with a statutory requirement that an elevator shaft should be protected by a railing and trapdoors approved by the superintendent of buildings, and that such trapdoors should be closed except when the elevator was in actual use. In an action for injuries, which would not

have occurred if the statute had been complied with, it was held that violation of the statute, while not conclusive, constituted some evidence of negligence, and was properly submitted to the jury. In *Graham v. Manhattan R. Co.* 149 N. Y. 336, 43 N. E. 917, it appeared that a statute required that there should be gates on elevated trains, and that they should be kept closed while the car was in motion; and it was held that a failure on the part of defendant to obey this statute constituted evidence of negligence toward a passenger who was injured while trying to save himself from being pushed from the platform by a movement of the crowd. *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194, 29 N. E. 999; *Huda v. American Glucose Co.* 154 N. Y. 474, 40 L. R. A. 411, 48 N. E. 897, and *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662,—referred to by Judge Haight,—tend in the same direction.

I concur with Judge Haight for affirmance.

O'Brien, J., dissenting:

This case presents but a single question, and it is quite important to keep that question clearly in view, and avoid confusing it with other questions. The question is whether the employment of a boy thirteen years and nine months of age is in and of itself proof of negligence in an action against the master. No one denies the proposition that the employment of a boy of tender years to work upon a dangerous machine, without giving him proper instructions, constitutes some proof of negligence, without any statute on the subject. But that principle has no application to this case, for the reason that no one claims, or can claim, that a printing press with the power cut off is a dangerous machine, or that the plaintiff needed any instructions as to how it could be cleaned; for he had, at the time of the accident, been engaged in doing that very thing for a month. The plaintiff was nonsuited at the trial, but the learned appellate division reversed the judgment, and the ground upon which it was reversed is very clearly and concisely stated in the opinion as follows: "We agree with the court below that there was no evidence to show that the injury to the plaintiff was caused by the negligence of the defendant, unless the evidence that the plaintiff was employed in a factory in violation of § 70 of the labor law (Laws 1897, chap. 415), justified a finding that the defendant was guilty of negligence." Here we have the precise question in this case stated in such a manner that it is impossible to confuse it. I do not think that the mere employment of the plaintiff, although in violation of the labor law, was any proof of actionable negligence. The rule on that subject is well stated in a recent work on the law of negligence, in which the learned author has exhaustively considered the subject in all its aspects and various distinctions, and the rule with respect to the question involved in this case is

stated in the following terms: "There are many statutes and municipal ordinances which forbid the doing of acts the violation of which does not necessarily give any right of action in favor of private individuals; the offense being against the public, to be redressed in the one case in a criminal prosecution or in an action brought on behalf of the state by the attorney general, and in the other by a prosecution in a municipal court. And it may be stated as a general proposition, though there may be difficulty in some cases in applying it, that the violation of a statute or municipal ordinance is not of itself a cause of action grounded upon negligence in favor of an individual, unless the statute or ordinance was designed to prevent such injuries as were suffered by the individual claiming the damages, and often not then, the question depending upon judicial theories and surmises." 1 Thomp. Neg. § 12. In *Knisley v. Pratt*, 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986, a young woman lost her arm while working upon a punching machine in a hardware factory. The factory act required the cogwheels of such machines to be guarded, and the injury occurred through the lack of such guard, in cleaning the machine while in motion. There was in that case a clear omission to observe the provisions of the factory act, and yet it was held that the master was not liable. It is no answer to the decision in that case to say that the injured girl was over twenty-one years of age, since the statute was as clearly violated as to a person of that age as of any other. The matter of age did not enter into the question at all. The sole question was whether the statute created a cause of action in favor of the injured party, and it was held that it did not.

So, in this case, the judgment must stand or fall upon the undisputed fact that at the time when the plaintiff was put to work in the printing establishment of the defendant he was under the age of fourteen years. He was over thirteen, but lacked a few months of fourteen. It does not appear that the defendant knew anything about the age of the boy, or that he made any inquiries on that subject. The statute which is known as the "factory" or "labor" law enacts that "a child under the age of fourteen years shall not be employed in any factory of this state." Laws 1897, chap. 415, § 70. It is assumed for all the purposes of this case that the violation of this provision of the statute subjects the employer to some penalty, civil or criminal. The real question, however, is whether it subjects the employer to a civil liability under the general law of negligence. There is nothing in the statute from which it can be inferred that the legislature intended to repeal or change any of the rules of law which, prior to its enactment, were settled in actions of negligence. There is nothing in the statute to indicate that the legislature intended to create any new cause of action or any new ground of civil liability. It sought to regulate the employment of labor in factories, and otherwise to a considerable extent, but it left ac-

tions for personal injuries on the ground of negligence just where they were before. Now, what has been decided in this case is that the mere fact of the employment of the plaintiff upon a printing press before he had arrived at the age of fourteen years was such proof of negligence on the part of the defendant as would authorize a jury to render a verdict against him for the damages that the plaintiff sustained in consequence of the injury. That is the proposition which this appeal presents. It is quite obvious that the employment of a lad between thirteen and fourteen years of age to work around a printing press is not an act which at common law was any proof of negligence. The employment of boys under that age at some suitable work did not ordinarily subject the employer to civil liability for accidents that might happen to them in the performance of their work. It is true that, if a boy of tender years was put upon work at dangerous machinery, not being apprised of the danger or instructed in the manner of using the machine, the master could be held liable for negligence in that respect, but this case does not involve any question of that kind. It is not claimed that the work itself was dangerous, or unsuitable for a boy of plaintiff's age. It is not claimed that the machine itself was dangerous, when in operation or otherwise; and certainly it is not claimed that when the power was shut off, and the machine was completely stopped, that it was dangerous to employ the plaintiff in cleaning it; so the defendant's liability, if he is liable at all, must rest upon the fact that he disobeyed the statute.

Thus the question arises here whether every act which is forbidden by law with a penalty, civil or criminal, attached, subjects the doer of the act to civil damages at the suit of another party claiming to be injured by the act. There are numerous statutes that prohibit the doing of certain acts, with civil or criminal penalties attached, which are not in their nature or character negligent acts. For instance, a witness who signs a will without attaching his place of residence to his signature is subjected to a penalty; but no one, I think, would suppose that his omission was of such a character as would subject him to an action of negligence at the suit of some one claiming to be injured. There are a multitude of police regulations, revenue laws, and game laws that forbid the doing of certain things, and penalties, civil or criminal, or both, are prescribed for a violation; but it would be difficult to show that negligence could be predicated of the act in addition to the penalties. They are generally acts that are *mala prohibita*, and not *mala in se*. It is, doubtless, within the power of the legislature to change the law of evidence as applicable to negligence, and to prescribe that the violation of a statute shall be followed by civil liability at the suit of the person injured, but nothing of that kind is to be found in the statute in question. A negligent act must be determined from its real

character and nature with reference to the duties imposed upon the actor by law, and is not to be predicated upon the mere violation of some statute, unless the prohibition is of an act which was negligent before the statute was passed, or was some proof of negligence. For instance, it has been held that the violation of a municipal ordinance prohibiting a party from allowing horses to stand untied in the street was proof of negligence; but that would be so if the ordinance never had been passed. In *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536, a fire took place in one of the lower stories of a tenement house, and the plaintiff's wife and child were smothered to death. It seems that the charter of the city required owners of tenement houses to have places of egress to the roofs and also fire escapes, which had not been complied with, and it was held that the defendant was civilly liable, and the plaintiff was permitted to recover. That was a case where the statute came in to help the common law. A person who lets a house to tenants without any means of escape from fire does not perform his duty to the tenant, and may be held liable for negligence without any statute. The case of *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 602, was one in which a person was injured by the fall of a scaffold on which he was at work. Section 18 of the labor law prohibited persons employing laborers to work upon a scaffold from furnishing unsafe, unsuitable, or improper scaffolding. It was held in that case that the plaintiff could recover, but he could recover just as well before the statute upon proof that the scaffold was unsafe, or made of unsuitable materials. That was not a case where the statute created a cause of action. So it is with respect to all the cases cited. None of them establishes the proposition which is contended for in this case, namely, that the violation of a statute forbidding the employment of persons under fourteen years of age is *per se* proof of negligence. It will not do to say that there was a question of fact, for there was none. There was no dispute about the violation of the statute, and its violation proved negligence, or it did not. If it did, then the plaintiff was entitled to recover as matter of law, and there was nothing for the jury to do except to assess the damages. If it did not prove negligence, then the action failed.

There are many statutes which prohibit the taking of fish and game at certain seasons of the year, and subject persons who violate those statutes to civil or criminal penalties; but no one, I think, would claim that, if the hunter or fisherman who was engaged in violating the law inflicted an injury upon his attendant or helper, the violation of the law would have anything to do with his liability for the injury. Smuggling, or the violation of revenue laws, is an act which is forbidden by statute; but, if a person engaged in violating the statute should inflict an injury upon another, the character of the injury, whether actionable

or otherwise, would not depend in any degree upon the fact that he was at the same time engaged in violating some law. In other words, penal or prohibitory statutes, as a general thing, are intended to regulate the conduct of individuals, and the violation of such laws may subject the individual to liability to the state, but it does not necessarily follow that, as between himself and his neighbor, it is an act of negligence, that may be made the foundation for civil liability. The legislature once made it a crime to feed a sparrow (Laws 1887, chap. 641), but no one, I think, would ever contend that a violation of that statute constituted actionable negligence in a suit by anyone. The legal consequences of the violation of a statute forbidding some act that, but for the statute, was perfectly lawful, do not extend beyond the statutory penalty.

Hence it follows that the violation by the defendant of the labor law, while it may have subjected him to the penal consequences prescribed, did not prove, or tend to prove, that he thereby incurred a liability to the plaintiff on the ground of negligence. This principle is illustrated in a great variety of cases that arose under statutes of the same character. In *Brown v. Buffalo & S. Line R. Co.* 22 N. Y. 191, 198, this court quoted a remark of the court in *People v. Stevens*, 13 Wend. 341: "Where a statute creates a new offense, by making that unlawful which was lawful before, and prescribes a particular penalty and mode of proceeding, that penalty can alone be enforced." The language of Lord Mansfield in *Rea v. Robinson*, 2 Burr. 800, was also quoted: "The rule is certain that where a statute creates a new offense, by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense (not antecedently unlawful) by a particular sanction and particular method of procedure, that particular method of proceeding must be pursued, and no other." And also the language of Chief Justice Holt in *Bartlett v. Vinor*, Carthew, 252: "A penalty implies a prohibition, though there are no prohibitory words in the statute." The court then proceeded to state that "the principle is a very ancient one, and has never been departed from. It is a most rational interpretation of the lawmaking power. On passing the act or the ordinance in a case where the thing prohibited was lawful before, the law-makers say to each member of the community, 'if you do this thing, and as often as you do it, you shall pay such a penalty.' That is the whole of it. The act of the defendant in this case of running their train faster than six miles an hour was, indeed, unlawful, but no more so than if there had been no prohibition in express terms in the ordinance. . . . The act was unlawful *sub modo*, not in an absolute sense, so as to make the defendant liable to third parties for all its consequences; but it was unlawful as being prohibited by a law, which declared the consequence of every act of violation of its provisions to be the payment of

a specific sum of money by way of penalty." A statute of this state (Penal Code, § 363) makes it a misdemeanor for a person who transacts business to use the designation "& Company" or "& Co." when no actual partner or partners are represented thereby. This court held in a recent case that an executory contract or agreement executed in such a name in violation of the statute could be enforced, and that a violation was no defense. Judge Gray said that "it simply made it a misdemeanor to do what was therein specified, and that is all. To extend its operation as far as the plaintiffs would have it would be to give a construction to it which would permit of its injurious operation upon persons whose dealings with the guilty party had been in good faith. Such a construction would be foreign to the purpose of the enactment, contrary to public policy, and without support in legal principles." *Sinnott v. German-American Bank*, 164 N. Y. 391, 58 N. E. 286. Practically the same doctrine was announced in a prior case. *Gay v. Seibold*, 97 N. Y. 472, 49 Am. Rep. 533. So it was held in the case of *Wood v. Erie R. Co.*, 72 N. Y. 196, 28 Am. Rep. 125, that it is no defense to an action against a common carrier for the loss of goods to show that the owner was doing business in violation of that statute, and shipped the goods under the fictitious name. So the conclusion is reached that in this case the defendant simply subjected himself to whatever penalty the law fixed to the prohibited act, but his violation of the statute did not create a cause of action in favor of the plaintiff for the recovery of civil damages on the ground of negligence.

The judgment of the appellate division should, therefore, be reversed, and that entered on the decision of the trial court affirmed, with costs.

Gray, J., dissenting:

I concur with the opinion of Judge O'Brien that the order of the appellate division should be reversed, and that the judgment entered upon the decision of the trial court, dismissing the complaint, should be affirmed. Briefly, my reasons are these: A breach of a statute which imposes a duty upon any person may give a cause of action for damages to one who has an interest in its observance, when he shows that the injury was the direct or necessary result of the breach. *Willy v. Mulledy*, 78 N. Y. 61 L. R. A.

310, 34 Am. Rep. 536; *Huda v. American Glucose Co.* 154 N. Y. 474, 40 L. R. A. 411, 48 N. E. 897. This is the reasonable doctrine of our decisions, and this court has not, as yet, gone so far as my Brother Haight would have it go; that is to say, to the extent of holding that the breach of a statutory duty subjects the offender to a civil liability for an injury sustained, even if, as in this case, it is not referable to the breach as a cause. The plaintiff should not have been employed by the defendant, and for a violation of the law in that respect the defendant rendered himself amenable to the punishment prescribed by the statute, and, undoubtedly, if there could have been a direct connection between the illegal employment and the injury suffered by the plaintiff, proof of the illegal employment would be proof of the defendant's negligence, to be submitted to the jury. Such was the question in the case of *Huda v. American Glucose Co.* where the windows of a factory were screwed down for the furtherance of manufacturing purposes, and the plaintiff had contended that the statute relating to fire escapes had been violated, and gave to her a cause of action. In *Willy v. Mulledy* the failure to comply with the statute relating to fire escapes was held to render the defendant liable for the damages caused by the death of the plaintiff's wife as the result of a fire in the building where they were dwelling, and with respect to which the statute had not been complied with. In those cases, as in that of *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662, the breach of the statutory obligation to provide for the safety of others, who had a special interest in its observance, had some direct relation to or bearing upon the result of the injury to them. But in the present case the plaintiff's injury was unexplained. The machine was not in motion at the time, and the power was cut off. The place was, therefore, safe enough, and no affirmative act of negligence can be chargeable to the defendant, under the circumstances disclosed by the proof, unless the mere violation of the statute is held to constitute such; and that, I think, is an unsound proposition. It is contrary to the ordinary rules of law in such cases, and, in my opinion, it is giving an unwarranted operation to the statute. The cause of the injury was not the employment of the boy.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *Respt.*,

v.

John I. MOORE, *Appt.*

(86 Minn. 422.)

*The uttering as true of a forged mortgage and a forged note, which the mortgage purports to secure, at one time and to the same party, is a single act, and constitutes only one offense. A conviction on an indictment for uttering the mortgage is a bar to a subsequent conviction for uttering the note.

(June 13, 1902.)

APPEAL by defendant from a judgment of the District Court for Blue Earth County convicting him of forgery. *Reversed.*

The facts are stated in the opinion.

*Headnote by START, Ch. J.

NOTE.—Whether the forgery of different instruments at one time constitutes but one, or more than one, crime.

- I. Uttering, 819.
- II. Possession of forged instruments, 820.
- III. Forgery, and uttering forged, instruments, 821.
- IV. Forgery, 822.

Three different offenses may arise out of the forgery of written instruments. These crimes consist of (1) the actual forgery itself, (2) having such an instrument in one's possession with intent to dispose of it as true, (3) the uttering of such an instrument knowing it to be forged. As to whether a conviction for one of these crimes bars a subsequent trial under an indictment charging one of the other of these three offenses arising out of the same instrument or transaction, does not come within the scope of this note, which relates solely to the question whether either of these three crimes may constitute more than one offense, when more than one instrument is involved.

I. Uttering.

A conviction for uttering a forged instrument is held to be a bar to another prosecution for uttering another forged instrument at the same time and as a part of the same transaction. It is also held that an indictment for uttering forged instruments may include in the same count other forged instruments which were uttered at the same time.

In *STATE V. MOORE* it was held that a person who uttered as true a forged mortgage and note to one person, at one time, as one act, could not be convicted of more than one offense, and a conviction for uttering a mortgage was held to be a bar to a subsequent prosecution for uttering the note. The court said: "It is true that the forging of a note, and a mortgage purporting to secure its payment, are separate offenses. It is also true that, if each instrument is separately uttered at a different time, and as a separate act, two offenses are committed, for which the defendant may be prosecuted by separate indictments. Such, however, is not the case here, where there is but a single act. . . . Logically, it would seem that a single, indivisible act could not constitute 61 L. R. A.

Mr. Harrold Harris, with Messrs. H. L. Schmitt and J. W. Schmitt, for appellant:

A state cannot split up one crime and prosecute it in parts.

Jackson v. State, 14 Ind. 327; *State v. Johnson*, 12 Ala. 840, 46 Am. Dec. 283; *State v. Benham*, 7 Conn. 414.

If the indictment in case No. 1 states an offense, then the conviction thereunder is and constitutes a bar to a conviction under the indictment in case No. 2.

People v. Van Keuren, 5 Park. Crim. Rep. 66; *State v. Eggesht*, 41 Iowa, 574, 20 Am. Rep. 612; *People v. Terrill*, 127 Cal. 99, 59 Pac. 836, 133 Cal. 120, 65 Pac. 303.

Messrs. W. B. Douglas, Attorney General, W. J. Donahower, and S. B. Wilson, for respondent:

Both the mortgage which was put off as true and genuine, and which purported to convey an interest in land situated in Minn-

two or more separate offenses against the same jurisdiction. There is nevertheless some conflict in the judicial decisions upon the question; but, upon reason and the weight of authority, we hold that the uttering of several forged instruments at the same time and to the same party as one act constitutes but one offense."

So, a conviction for uttering one forged check was held to be a bar to a prosecution for uttering others, where a person at the same time and by the same act passed four forged checks. *State v. Eggesht*, 41 Iowa, 574, 20 Am. Rep. 612. In this case the court said: "It is urged by the appellee that, if the state had failed to prove the forgery of the check described in the first indictment tried, there would have been an acquittal, and that it is a dangerous rule to allow such acquittal to be pleaded in bar to a subsequent prosecution for uttering another check, since it would thereby be placed in the power of the defendant to secure a trial upon the indictment under which he knows no conviction can be had, and then plead the judgment of acquittal as a bar to the other indictments. But the state can, and should, prevent the happening of any such contingency, by charging the uttering of all the checks offered at the same time, in one indictment, and as but one offense."

In *State v. Colgate*, 31 Kan. 511, 47 Am. Rep. 507, 3 Pac. 346, discussing this general question, though not in a forgery case, it was said: "Upon general principles, a single offense cannot be split into separate parts, and the supposed offender be prosecuted for each of such separate parts, although each part may of itself constitute a separate offense. If the offender be prosecuted for one part, that ends the prosecution for that offense, provided, such part of itself constitutes an offense for which a conviction can be had. And generally we would think that the commission of a single wrongful act can furnish the subject-matter or the foundation of only one criminal prosecution. Thus, in Iowa it has been held that, where a person uttered at a bank several forged checks at one time and by the same act, he committed but one offense, and that a conviction for uttering one of the checks was a bar to a conviction upon the others (*State v. Eggesht*, 41 Iowa, 574, 20 Am. Rep. 612)."

In *United States v. Snow*, 4 Utah, 295, 9 Pac.

esota, and the note itself, were forgible instruments. The putting each of them off, knowing the same to be forged, coupled with an intent to defraud, although done by a single act and as one transaction, was the commission of two separate crimes, to wit, the forgery of each of said instruments.

Barton v. State, 23 Wis. 587; *State v. Nash*, 86 N. C. 650, 41 Am. Rep. 472; *Gordon v. State*, 71 Ala. 315.

The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to prove a legal conviction in the first.

Price v. State, 19 Ohio, 423; *Roscoe*, Crim. Ev. 331; *Durham v. People*, 5 Ill. 172, 39 Am. Dec. 407; *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528; *Vaughan v. Com.* 2 Va. Cas. 273; *Com. v. Andrews*, 2 Mass. 409; *Teat v. State*, 53 Miss. 457, 24 Am. Rep. 708; *Smith v. Com.* 7 Gratt. 593.

686, where there were three indictments for the crime of unlawful cohabitation, the court said: "In the case of *State v. Eggesht*, 41 Iowa, 574, 20 Am. Rep. 612, and also cited by the appellant, was a case where the defendant delivered at the same time and by the same act to the teller of a bank four forged checks, purporting to be drawn by different persons. The court held the uttering of the four checks was one act, and constituted but one offense, and that, as a consequence, a conviction for uttering one of the checks was a bar to a conviction for uttering the others. If the indictments against the appellant were for the same year, but for different infractions of the statute, this case would be in point."

Under Mass. Rev. Stat. chap. 127, § 2, providing punishment for the offense of uttering and publishing forged and counterfeit promissory notes, knowing them to be so, an indictment charging the uttering and publishing of "sundry false, forged, and counterfeit promissory notes," but describing such promissory notes as five bank notes of the Hamilton Bank in the state of Rhode Island, was held not to charge various offenses in one count. *Com. v. Thomas*, 10 Gray, 483. In this case the court said: "The indictment, as it was competent to do, charges as one offense the having in possession and uttering and publishing of several counterfeit bank bills, and a verdict of guilty may properly be rendered upon the whole charge, or upon part, as the evidence may authorize. When set forth in one count, it is, however, to be treated as one offense."

But in *People v. Terrill*, 133 Cal. 120, 65 Pac. 303, it was held that the defendant, having procured a judgment that an indictment for uttering a forged mortgage was void, could not thereafter be heard to rely upon the former conviction and judgment in that case as a bar to another indictment for uttering a fictitious note purporting to be secured by that mortgage. This was on the ground that he had never before been in jeopardy upon a valid indictment for the same offense. In this case the evidence showed that a demurrer to the indictment in the mortgage case was sustained, and the court ordered the case "resubmitted to the present grand jury," and the defendant was convicted on the indictment so found. He had obtained a writ prohibiting the court below from pronouncing judgment in the mortgage case for the reason that the second indictment on the mortgage found by the grand jury was void.

61 L. R. A.

Start, Ch. J., delivered the opinion of the court:

On February 5, 1902, in the district court of the county of Blue Earth, two indictments were returned by the grand jury against the defendant. The first one was for forgery in the first degree, by uttering as true a forged mortgage; and the second one was for forgery in the second degree, by uttering a forged promissory note, which the mortgage purported to secure. He was convicted on the first indictment, and sentenced to imprisonment in the state prison for the term of three years and three months. He appealed from the judgment to this court, which affirmed the conviction. *State v. Moore*, 86 Minn. 418, 90 N. W. 786. Upon his trial on the second indictment he pleaded "Not guilty," and, further, that he had already been convicted of the same offense. In support of the plea of former conviction he offered the record of the proceedings on his trial on the first indictment.

In *State v. Calkins*, 73 Iowa, 128, 34 N. W. 777, the defendant was convicted of the crime of uttering a false and forged instrument. This conviction was for having in his possession, and uttering, two forged notes of one Lawrence, payable to himself, that he sold and delivered to one Robinson. There was no question made in this case as to there being more than one crime, although the conviction evidently was for uttering both instruments.

II. Possession of forged instruments.

A conviction for the crime of having in one's possession forged instruments, knowing the same to be forged, is held to be a bar to any further prosecution for having in his possession other forged instruments held at the same time and in the same manner.

A prisoner had in his possession several forged bank notes or bills of different banks, which were taken from him at one time. He had been tried and convicted for having one of them in his possession. It was held that he could not be again tried and convicted for possessing each of the other notes of the different banks which he had at that time, under Conn. Stat. 157, title 22, § 35, providing that, if any person shall have in his possession, or receive from any other person, any forged or counterfeit promissory note or bill, for the payment of money, with intent to utter or pass the same, or to permit, cause, or procure the same to be uttered or passed, with intention to defraud any person, or body politic or corporate, knowing the same to be forged or counterfeited; every such person, so offending, being thereof duly convicted, shall suffer imprisonment. *State v. Benham*, 7 Conn. 414. In this case the court said: "Until the late revision of our statutes, it was not punishable by statute to have in one's possession forged notes or counterfeited coin. The offense consisted in uttering or putting them off. Now the possession is punishable in the same manner as the offense of uttering them is. But it cannot be supposed that the legislature intended to punish the offense of possessing such bills or notes, or coin, more severely than the crime of putting them off; or that they should punish the man who barely intended to defraud, but had not yet offered to, more severely than the one who had put that intent into execution. And if Benham had put off these two notes to one person, at one time, it cannot be claimed that

The trial court instructed the jury that the evidence was not sufficient to support a finding that the plea was true, for the reason that the charge in the first indictment, of uttering a forged mortgage, was a different offense from the charge in the second indictment, of uttering a forged note. The evidence established the fact that the defendant had in his possession a forged mortgage, and a forged note, which was described therein, and which the mortgage purported to secure. Thereupon, on the day named, he sold, assigned, and delivered, at the same time, as one act, the mortgage and note to the same party, by a written assignment of the mortgage, in the usual form. The jury returned a verdict to the effect that the defendant was guilty of the crime of forgery in the second degree, as charged in the second indictment. He was then sentenced to imprisonment in the state prison for the term of two years; the term to commence on the termination, for any cause, of the term

imposed on the first indictment. He appealed from this judgment.

The record presents for our decision the question whether a person who puts off as true a forged mortgage and note to one person at one time, as one act, can be convicted of more than one offense. It is true that the forging of a note, and a mortgage purporting to secure its payment, are separate offenses. It is also true that if each instrument is separately uttered at a different time, and as a separate act, two offenses are committed, for which the defendant may be prosecuted by separate indictments. Such, however, is not the case here, where there is but a single act. Does such indivisible act constitute two independent and separate crimes? If it does, then there may be a separate prosecution for each crime; but if not, and the act constitutes a single crime, then a conviction based on any part of the act bars any further prosecution based upon the whole or a part of the same

he could be convicted of more than one offense. And yet it is claimed that, having them in his possession, although he has never offered to put them off, he may be punished for more than one offense."

III. Forging, and uttering forged, instruments.

The general doctrine is illustrated in the following case:

Several forged drafts on the same sheet of paper were uttered at the same time by the same person. It was held that, while the uttering was one act, the forging of each draft was a separate offense. *Barton v. State*, 23 Wis. 587. In this case the defendant pleaded guilty to several indictments, each based on a different draft, and each containing several counts, first, for forging the draft; second, for uttering a forged draft; third, a count for forging the indorsement of the draft; and, fourth, a count for uttering the forged indorsement. Having been sentenced on one indictment, and judgment on the others being suspended, he was pardoned to become a witness, and, being then taken into custody on the other indictments, he moved to withdraw his plea of guilty, and plead his former conviction. It was held that the motion was properly denied. The court said: "The only question arising upon these facts is, whether the forging the five drafts and uttering the same, as above mentioned, constitute but one offense in law, so that a conviction upon an indictment for forging and uttering one draft is a bar to a conviction on the other indictments. The forging of each draft was a distinct and separate offense by itself. *Rev. Stat. chap. 166, § 1*. The fact that the five drafts were each for the same amount, and upon the same sheet of paper, is entirely immaterial. They were five distinct and separate forgeries. The uttering of the five drafts, under the circumstances, would be one indivisible act. . . . But, from the nature of the case, evidence showing that the defendant forged one of these drafts, would not prove that he forged the others; for the forging of each draft was a distinct offense by itself."

In *Nichols v. State*, 39 Tex. Crim. Rep. 80, 44 S. W. 1901, where the defendant, after having been indicted under separate indictments for uttering, as well as for forging and having in possession, several forged instruments in names of different persons alleged to be fictitious, as part of one transaction, had been tried and acquitted under one of the indictments, it was

held that such acquittal did not prevent his subsequent trial on one of the other indictments. The court said: "The acquittal, as shown by the proceeding, was upon an entirely different note from that set up in this prosecution, and the court did not err in striking out the plea. The other note upon which appellant was acquitted, it is true, was deposited with the prosecutor as security in the same transaction as the note upon which this prosecution is based, and was security for the same debt. But the note itself was a distinct and different note, and the passing of said note, though at the same time and in the same transaction, was not susceptible of proof, as being the same act as the passing or uttering of the note upon which this indictment is predicated. The other note may have been a genuine note, not a forgery. His acquittal as to that transaction could not operate as a bar to a prosecution in the present case." The court made no effort to distinguish this case, on the ground that the first trial resulted in an acquittal instead of a conviction, from those cases which hold that a conviction for uttering forged paper bars a subsequent trial for uttering other forged paper as part of the same transaction. If such a distinction is without legal effect, and the case of an acquittal on the former trial is the same as that where a conviction is had, then the decision is not sustained by authority.

On a conviction for the forgery and uttering of a note and mortgage, it was held that the acknowledgment was properly treated as a part of the conveyance; and it was further held that the note and the mortgage given to secure it formed such a connected transaction that there was no impropriety in including the forgery and uttering of both in the same information. *People v. Sharp*, 53 Mich. 523, 19 N. W. 168.

An information charged the defendant in distinct counts, first, with having forged a mortgage; second, with having uttered it; third, with having forged the certificate of acknowledgment; fourth, with having uttered that also; fifth, with having forged a bond; and sixth, with having uttered that likewise. The information charged that the certificate of acknowledgment was indorsed on the forged mortgage. The description of the different instruments and the averments imported that the papers alleged to be false were prepared and adapted to be accepted by those coming to handle them as belonging to a single transaction, and as consti-

act. Logically, it would seem that a single, indivisible act could not constitute two or more separate offenses against the same jurisdiction. There is nevertheless some conflict in the judicial decisions upon the question; but, upon reason and the weight of authority, we hold that the uttering of several forged instruments at the same time and to the same party, as one act, constitutes but one offense. Such a case cannot be distinguished from one where several articles of property belonging to the same person are stolen at the same time. In the latter case there is only one crime committed, and a prosecution and conviction or acquittal for the larceny of one or more of the articles will bar a subsequent indictment for the larceny of the others, or any of them. 18 Am. & Eng. Enc. Law, 2d ed. p. 531. The case of *State v. Colgate*, 31 Kan. 511, 47 Am. Rep. 507, 3 Pac. 346, is an instructive one. In that case a mill, including books of account therein belonging to the owner of the mill, was destroyed by one fire. The defendant was prosecuted and acquitted for

setting fire to and burning the mill, and it was held that such acquittal was a bar to a subsequent prosecution for setting fire to and burning the books of account. This conclusion was based upon the principle that a single criminal act constitutes but a single offense, which cannot be split into separate parts, and the supposed offender prosecuted for each part, although, if it had been the result of a separate act, it would have constituted a separate offense. In *State v. Benham*, 7 Conn. 414, the defendant had in his possession at the same time several forged notes or bills of different banks, with intent to utter them, which were taken from him at one time. It was held that such act constituted but one offense, and that a prosecution and conviction for so having one of the notes in his possession was a bar to a subsequent prosecution for having in his possession any of the others, for, if he had put off the notes to one person at one time, it could not be claimed that he could be convicted of more than one offense. In *Barton v. State*, 23 Wis. 587, it was held

tuting a finished bond and mortgage connected together, and framed and arranged to secure one debt. A motion to require the people to elect on which count the prosecution would proceed was denied. It was held that the close connection between the mortgage and certificate of acknowledgment was sufficient to justify the court in refusing to require an election among the counts directed to those papers. In respect to the counts relating to the bond, it was held there was no error. *Van Sickle v. People*, 29 Mich. 61. The court said: "In respect to the counts relating to the bond, the point is not quite so clear. But the facts, I think, bring the question on this branch of the case within the doctrine stated in *McKinney's Case*, 10 Mich. 54, 95. At the page last mentioned the court says that, 'where the several offenses charged, though distinct in point of law, yet spring out of substantially the same transaction, or are so connected in their facts as to make substantially parts of the same transaction, or connected series of facts, the defendant cannot be prejudiced in his defense by the joinder, and the court will neither quash nor compel an election.' We cannot say, therefore, the court below erred on this subject."

A prisoner was indicted for forging, and uttering, knowing to be forged, a variety of acquittances and receipts for money. The first count charged the prisoner with uttering and publishing a forged and counterfeited acquittance and receipt for money, signed by Clark, and also a certain other false, forged, and counterfeited acquittance and receipt for money, stating in like manner twenty-two other receipts of different dates, for different sums, purporting to be signed by different persons. There was a second count for uttering one acquittance and receipt only, setting it out, and a third count for forging and counterfeiting the same acquittance and receipt. The defendant asked that the prosecutor might be put to elect on which of the several receipts stated in the first count he would proceed, and might be restrained from proceeding on more than one. This was denied on the ground that the receipts were charged to have been uttered at one and the same time, and might constitute only one offense,—of uttering many forged receipts; and it was proved that the several receipts there stated were forged, and were uttered at the same time, in one bundle, by the prisoner, by his giving them

in to the solicitor of the navy board as vouchers to verify an account of the expenditures of a deceased public accountant, for the purpose of getting such account passed at the navy board. The jury found him guilty of the whole, and the judges all agreed that the prosecutor was not bound to proceed on one receipt only. *Rex v. Thomas*, 2 East, P. C. 934.

IV. Forgery.

The forgery of several instruments at the same time is regarded generally as the commission of a separate offense for each instrument. See the cases above, especially those in III.

But forgery of a claim against a county and of an affidavit and jurat was held to constitute only one offense, as the instruments were so connected as to constitute but one transaction. On the other hand, where the crimes of forgery of a mortgage and receipt were defined by different statutes prescribing different punishments, it was held that an indictment could not charge the forgery of both in one count. And it has been held that a trial on an indictment for forgery of a certificate of deposit would not be a bar to a prosecution for an attempt to obtain money from another bank by means of a forged letter inclosing the certificate.

Where an indictment averred in the first count that defendant forged a constable's account against the county, and that he, in furtherance of his intention to defraud said county, forged an affidavit to the same and what purported to be a certificate of a justice of the peace to said affidavit; and the second count charged the forging of the account, affidavit, and certificate as one act, and that he presented the same to the board for audit,—it was held that the account, affidavit, and certificate collectively constituted but one instrument, and the act of forging them was one transaction. *Rosekrans v. People*, 5 Thomp. & C. 467. In this case the court said: "It is, however, a misapprehension of the legal effect of the document set out in the indictment, to call the account and the signatures to the affidavit and jurat three separate instruments, as they were all essential to the completion of the account before it could be presented to the board of supervisors (Laws 1847, chap. 490, § 24), and all of them, therefore, constituted but one instrument. Unless the affidavit had been at-

that the forgery of several drafts precisely alike, except as to the numbers thereon, constituted separate offenses, but if the drafts were all uttered at the same time to the same party, such uttering would be one indivisible act, and constitute a single crime. The case of *State v. Egglest*, 41 Iowa, 574, 20 Am. Rep. 612, is directly in point. In that case the defendant passed at one time to the teller of a bank four forged checks, purporting to be drawn by four different parties upon certain banks. He was prosecuted and convicted for uttering one of the checks, and afterwards placed on trial for uttering one of the other checks. He pleaded his conviction in the first case as a bar, to which the state demurred, and the court sustained the demurrer. The ruling, however, was reversed on appeal; the supreme court holding that the uttering by the defendant of the four drafts at one time to the same party was a single act, and constituted but one offense, and that a conviction for uttering one of the checks was a bar to a conviction upon the others, or any of them.

tached, the account itself would not have been a legal instrument on its face, and the crime of forgery in reference to it could not have been committed. *Vincent v. People*, 15 Abb. Pr. 234, *People v. Harrison*, 8 Barb. 560; *People v. Galloway*, 17 Wend. 540. And, as the forgery of the account, and the signatures to the affidavit and certificate, must be sustained under the same section of the statute, this disposes of the objection of duplicity as to them, if they were all made at one time and as one act or transaction. But the first count alleges each of these parts of the paper separately as different instruments, and each act of forgery as distinct and independent; and, although it fails to make a proper allegation of the forgery of the signatures to the certificate against the defendant, it must be regarded as double within the rule. The second and third counts, on the contrary, allege the forgery of the whole paper as one instrument, and as one act or transaction, and are not, therefore, obnoxious to this objection."

In *People v. Wright*, 9 Wend. 193, it was held that where, in an indictment for forgery, two distinct offenses requiring different punishments were alleged in the same count,—as where the forgery of a mortgage and a receipt indorsed thereon were both charged in the same count,—and the defendant was convicted, the judgment should be arrested. The first count averred that the defendant was lawfully possessed of a mortgage on which there was indorsed a receipt acknowledging the payment of \$78, and that he did falsely forge and alter the mortgage and the said receipt so indorsed thereon by obliterating and destroying the said receipt. It was held that this, in terms, charged the prisoner with the forging of two distinct instruments,—a mortgage and a receipt, and, if the forgery of either was an offense, the count was probably defective for duplicity. In this case the court said: "But the more serious difficulty is, that forging a mortgage comes within the 22d section of the act [2 Rev. Stat. 670], and the degree of punishment is different from that annexed to the forging of a receipt, which comes within the 33d section; for that reason it would be impossible for the court, without making an arbitrary selection, to determine the judgment to be pronounced."

In *People v. Ward*, 15 Wend. 231, the prisoner was convicted of forgery.

Our conclusion, based upon principle and authority, is that the uttering as true of a forged mortgage, and a forged note, which the mortgage purports to secure, at one time and to the same party, is a single act, and constitutes only one offense. It follows that the defendant cannot be legally convicted on the second indictment. It is possible that the evidence to sustain the plea of former conviction was technically incomplete, in that, at the time of the defendant's second trial, judgment had not been actually entered on the verdict in the first case. But very properly the state does not urge the objection, if it be one (see *State v. Benham*, 7 Conn. 414); and it would serve no practical purpose to consider it, for in some way the defendant must be relieved from the judgment in the second case. It is therefore ordered that the judgment appealed from in this case be, and it is hereby, reversed, and the case remanded to the district court, with direction to enter judgment dismissing the indictment in this case.

Judgment reversed.

er was indicted for an attempt to obtain money from the Farmers' Bank at Troy, by color of a forged letter purporting to be signed by one S. S. Shepard, in which was inclosed a certificate of deposit on the Bank of Monroe for \$1,200. Before the trial for this offense, the prisoner had been tried for the forgery of the certificate of deposit, and acquitted. It was held that the acquittal for the forgery of the certificate of deposit was not a bar to a subsequent indictment for an attempt to obtain money from another bank by color of a forged letter inclosing this certificate of deposit. In this case the court said: "The previous indictment and acquittal for the alleged forgery of the certificate of deposit is no bar to this indictment. The two offenses were distinct; the counterfeit letter and use made of it did not constitute a material ingredient in the crime of forgery. That depended upon the alteration of the certificate with the intent to defraud some person, which of itself constituted a crime. The offense alleged in this indictment was committed to carry into effect more successfully the other offense, but has no more necessary connection with it than the setting fire to a dwelling house for the purpose of the more effectually concealing the perpetration of a larceny has to the larceny itself."

The defendant was indicted for forging a lease and release, purporting to be for 300 acres, affecting the title of land owned by the prosecuting witness, but the boundary was misdescribed, and the instrument alleged to be forged called the place "Jawick Park" instead of "Jawick." The defendant was convicted. But there was no claim made that the indictment was for more than one offense, the only question being as to whether or not the crime was within the statute 5 Ellz. chap. 14, providing that, if any person forge any false deed, etc., to the intent that the state of freehold of any person to any lands, or the right or title of, in, and to the same shall or may be molested, troubled, defeated, recovered, or charged, he shall be punished, etc. A motion in arrest of judgment, on the ground that the premises supposed to be conveyed were so different from those which were really the estate of the complaining witness that it was impossible that the conveyance could molest or disturb them, was denied. *Rex v. Crooke*, 2 Strange, 901. *Fitzg.* 57.

I. T.

SOUTH CAROLINA SUPREME COURT.

Charles H. MATHIS, *Respt.*,
v.

SOUTHERN RAILWAY COMPANY, *Appt.*

(.....S. C.....)

1. The question whether or not the owner of refrigerator cars which are to be used for shipping fruit is a common carrier does not determine the liability of a railroad company for breach of its contract to furnish such cars for a particular shipment.
2. A railroad company which contracts to furnish a refrigerator car for the transportation of fruit cannot relieve itself from liability because of failure to have the car properly iced on the ground that it belongs to another company.
3. A railroad company which refuses to receive fruit for transportation because it is not in a properly iced refrigerator car cannot relieve itself from liability for breach of its duty to transport the fruit on the ground that it did not hold itself out to the public as furnishing such cars for that purpose.
4. A railroad company is liable for all damages which are the direct and proximate result of its refusing to receive fruit for transportation, and cannot limit its liability to such, only, as result from unreasonable delay in the transportation.
5. The liability of a railroad company for refusal to accept fruit for transportation does not depend upon its having made an agreement to furnish properly refrigerated cars.
6. A railroad company which contracts to furnish a refrigerator car in which to transport fruit cannot relieve itself from liability for failure to do so on the ground that such cars are only furnished by another company, and that the railroad company did not solicit the business, but an agreement for the cars was made between the shipper and the owner of the car.
7. A shipper who tenders fruit for transportation in excess of the capacity of the refrigerator cars which he has notified the carrier he will need may recover for the carrier's refusal to accept the excess, unless such refusal is excused by the circumstances of the case.
8. A railroad company cannot refuse to accept fruit for transportation because refrigerator cars are necessary therefor, which are provided and furnished only by another company.

(February 27, 1903.)

A PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Barnwell County in favor of plaintiff in an

NOTE.—As to liability of carrier for loss of perishable freight on account of lack of proper refrigeration, see also, in this series, *Beard v. Illinois C. R. Co.* (Iowa) 7 L. R. A. 280, and *New York, P. & N. R. Co. v. Cromwell* (Va.) 49 L. R. A. 402.

As to duty of railroad to furnish cars to shippers generally, see *Houston, E. & W. T. R. Co. v. Campbell* (Tex.) 43 L. R. A. 225, and *note*.

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action brought to recover damages for breach of contract to transport fruit. *Affirmed.*

Statement by **Gary, A. J.:**

This is an action for damages arising out of the defendant's alleged failure to provide suitable refrigerator cars for transporting the plaintiff's melons to Northern markets. The questions presented by the exceptions are so largely dependent upon the exact issues raised by the pleadings that we have deemed it advisable to set forth one of the causes of action alleged in the complaint, which is as follows:

"(1) That at the times hereinafter set forth the defendant above named was, and is now, a railroad corporation, duly created and existing under and by virtue of the laws of the state of Virginia, under the name and style of Southern Railway Company, and as such was at said times, and is now, engaged as a common carrier for hire of watermelons, cantaloupes, and other fruits and vegetables, from the town of Blackville, in the said county and state, and from other towns and cities in said state and county, and elsewhere, to the northern markets, including the city of Washington, in the District of Columbia, Philadelphia, in the state of Pennsylvania, and New York, in the state of New York.

"(2) That, as such common carrier, defendant, for the purpose of such transportation, provided and had divers railroad freight cars of special construction, commonly known as 'refrigerator cars,' which are provided with tanks or receptacles for ice, which is necessary to preserve such shipment from decay and deterioration during the transportation thereof to said markets; and the defendant, for the purposes above set forth, held itself out to the public who might be engaged in the production and handling of such fruits and vegetables, and continues so to do, furnishing to said public, when desired, such cars, at certain stipulated rates and charges, properly iced and refrigerated, and in proper condition to receive and transport safely and in good condition all such fruits and vegetables offered or delivered for transportation as aforesaid to and from said points and elsewhere, as required by said public so engaged.

"(3) That within a reasonable time before the 10th day of July, A. D. 1900, the plaintiff, who was engaged in the cultivation and shipping of cantaloupes and watermelons at and near the town of Blackville, in the said county of Barnwell, and also in otherwise handling the same for market, in pursuance of said business and for the purpose and intention of shipping cantaloupes to the said city of Washington, D. C., duly notified the defendant of his purpose to have a car load of cantaloupes crated and prepared for shipment on the said date at its depot in the said town of Blackville, which was a point from which the defendant usual-

ly handled such shipments; ordered a car of the defendant of the class above described, and to be properly refrigerated, which the defendant agreed to furnish as ordered.

"(4) That the plaintiff duly hauled to the said depot a car load of 502 crates of cantaloupes upon the said date, in pursuance of said contract, and the defendant had the refrigerator car at said point, on the said date as agreed, but to the plaintiff's great disappointment, regret, and loss, the same was not iced or otherwise refrigerated, as was its duty to have done, and hence totally unfit for shipment of said cantaloupes or any other fruits, and the defendant's agents and servants refused to receive the same for shipment; and the plaintiff was forced by reason thereof, and because of the perishable character of the said freight, and the necessity of quick transportation, to ship the said cantaloupes to the said city of Washington by express,—a method of shipment much more expensive and unsatisfactory than that agreed on with the defendant.

"(5) That by the said contract the plaintiff was to pay the defendant the sum of \$147.35 for the said transportation, including refrigeration, which was the rate for such cargo from Blackville to Washington; and the plaintiff on the said day was ready and willing to pay the same, had the defendant not refused to receive the said shipment as above stated, and failed and neglected to ice and refrigerate the car as aforesaid.

"(6) That the express charges on the said shipment which were paid by the plaintiff were \$234, and plaintiff has been damaged by the defendant by reason of the matters and things above set forth, and by said violation of its duty as said common carrier, in the sum of \$146.65, which is the difference between the cost of shipment by freight in refrigerator cars on the said date and the express rates which plaintiff was compelled to pay as aforesaid."

The second cause of action is identical with the first, except as to dates and amounts.

The answer of the defendant was a general denial. The jury rendered a verdict in favor of the plaintiff for \$511.34.

The defendant appealed upon the following exceptions:

"(1) Because it is respectfully submitted that his honor erred in charging the jury as follows: 'In determining the issues in this case, if you should find that both the railroad company and the company known as the Swift Company were involved in this matter of transportation, and you should have any question in your mind as to which company is liable, or whether they are both liable, or whether the Swift Company is liable and the railroad company is not liable, the difficulty will be solved by determining for yourselves the question as to who was the common carrier;' thus making the liability of the defendant company depend upon the question as to whether the refrigerator company, which defendant contended furnished the cars, was a common carrier or 61 L. R. A.

not, whereas it is submitted that the liability of the defendant company was not to be determined by the question as to whether the refrigerator company was a common carrier or not, but by the question, 'Did the railroad company, defendant, hold itself out as a common carrier of vegetables by refrigerator cars, or not?'—whether such cars were furnished by a common carrier or private carrier.

"(2) Because it is respectfully submitted that his honor erred in charging as follows: 'Now, the Swift Company, if it also held itself out to the public generally for the business of common carrying, would, of course, also be a common carrier; but if the plaintiff has established that the railroad company was the common carrier in this instance, and the proof fails to show that the Swift Company was a common carrier, then as a matter of course, the Swift Company cannot be held liable for any failure to perform the duty of a common carrier whatever. It might be held liable for failing to perform any other contract which it might be capable of entering into, and might enter into;' thus making the liability of the defendant company dependent upon the question whether the refrigerator company, commonly called the Swift Company, was a common carrier or not, and upon the question whether the Swift Company was liable for any failure to perform its duty or not, whereas, it is submitted that the liability of the defendant company did not depend upon whether the company which furnished the cars was a common carrier or not, or whether it could be held liable or not, but upon the question whether the defendant had failed to do any duty in not furnishing refrigerator cars.

"(3) Because it is respectfully submitted that his honor erred in charging as follows, as requested by the plaintiff in his third request: 'That if the jury find that the defendant railroad company owned no cars of suitable build and construction for safely carrying and preserving perishable fruits and products; that cantaloupes are a perishable fruit or product, requiring quick transportation, in refrigerated or iced cars; and that the defendant company used or employed the cars of another company, whose duty was to furnish refrigerator cars, and to ice them, and to keep them iced, and such cars became a part of the trains of the defendant company,—then the refrigerator car company and its employees were, in law, the servants and employees of the defendant company, and their negligence in furnishing cars, or in furnishing suitable cars, or in furnishing the ice to refrigerate them, was the negligence of the defendant company.'

"(4) Because it is respectfully submitted that his honor erred in charging as follows, as requested by the plaintiff in his fourth request: 'The law will not permit a railroad company engaged in the business of carrying freight for hire, through any device or arrangement with a refrigerator car company whose cars are used by the railroad

company, and constitute a part of its train, to evade the duty of seeing to it that the cars thus employed are properly constructed and properly iced, if the preservation and safety of the freight which the railroad company has undertaken to carry, or holds itself out to the public to carry, depends upon such proper construction and icing.'

"(5) Because it is respectfully submitted that his honor erred in charging as follows, as requested by the plaintiff in his fifth request: 'The defendant cannot excuse itself from liability to the plaintiff for failure to furnish cars by saying that the cars belong to some other company, which had undertaken to supply suitable cars, and to see to it that the same were properly refrigerated. It knew, or ought to have known, that the goods it was inviting the public to ship over its line, if you believe it so invited the public, were perishable, and the law imposed upon it the duty to use due diligence in providing suitable cars to carry the goods which its invitation would naturally bring.'

"(6) Because it is respectfully submitted that his honor erred in refusing to charge the following, as requested by the defendant in its first request: 'That the plaintiff, Charles H. Mathis, cannot recover anything from the defendant, the Southern Railway Company, on either cause of action set out in the complaint, unless he proves by the preponderance of the evidence that the railroad company held itself out to the public who might be engaged in the production and handling of fruits and vegetables as a company furnishing to the public, when desired, certain freight cars, of special construction, commonly known as "refrigerator cars," provided with tanks or receptacles for ice necessary to preserve such fruits and vegetables from decay and deterioration during transportation, in which case it would be liable only for unreasonable delay; or unless the plaintiff proves that the said company, defendant, made an agreement or contract with the plaintiff to furnish the car or cars of the class above described, properly refrigerated, on the days mentioned in said causes of action, respectively, and unless they find from the preponderance of the evidence that having so held itself out, or having so agreed, the defendant failed to furnish the cars on the days mentioned in said causes of action, respectively.'

"(7) Because it is respectfully submitted that his honor erred in refusing to charge the jury as requested by the defendant in its second request, as follows: 'That if the jury find from the evidence that a company known as the Swift Refrigerator Transportation Company, or California Fruit Transportation Company, alone furnished refrigerator cars suitable for the transportation of fruits and vegetables, and that the same were not furnished by the defendant company, and that the railroad company did not solicit the business, and that the contract or agreement referred to or alleged in the said cause of action was not entered

into with the defendant company, or its agents, but between the plaintiff and the said California Fruit Transportation Company, commonly known as the Swift Refrigerator Company, alone, and that the said transportation company failed to furnish refrigerator cars, or ice for the same, and not the defendant, then the plaintiff cannot recover anything from the railroad company, defendant.'

"(8) Because it is respectfully submitted that his honor erred in refusing to charge the jury as requested by defendant in its third request, as follows: 'That if the jury find from the evidence that there was no agreement on the part of either the railroad company or the California Fruit Transportation Company, commonly known as the Swift Company, to furnish the plaintiff with cars on the days mentioned in the said causes of action, respectively, then the plaintiff cannot recover from the defendant in this suit.'

"(9) Because it is respectfully submitted that his honor erred in refusing to charge the jury as requested by the defendant in its fourth request: 'That if the jury find from the evidence that there was such a contract on the part of the California Fruit Transportation Company, commonly called the Swift Company, but that the plaintiff had agreed prior to the day of shipment that he would look to some other company for the refrigerator cars to transport his vegetables or fruits, then the plaintiff cannot recover anything in this suit.'

"(10) Because it is respectfully submitted that his honor erred in refusing to charge the jury as requested by the defendant in its first additional request: 'That if the jury find the defendant liable, yet, if they find from the evidence that the amount of cantaloupes permitted to be carried in the refrigerator cars alleged to have been engaged or contracted for was limited to a less amount than the amount alleged or proved to have been shipped by express, then the plaintiff cannot recover any express charges on any excess in the amount shipped by express over and above the amount limited to be carried in the refrigerator cars so engaged or contracted for.'

"(11) Because it is respectfully submitted that his honor erred in refusing to charge the jury as requested in the defendant's second additional request: 'That if the Southern Railway Company simply held itself out to the public as prepared and willing to haul the refrigerator cars of refrigerator transportation companies, when shippers perfected their arrangement with such refrigerator companies, that would not bind the railroad company to itself furnish refrigerator cars.'

The twelfth exception was withdrawn.

Messrs. Joseph W. Barnwell, B. L. Abney, and Robert Aldrich, for appellant:

The causes of action are not based upon the general duty of defendant to supply ice and cars after holding itself out as doing

such business, but upon a contract to furnish a specific number of cars. This is a substantive distinction. There may be a cause of action merely for not supplying cars. In that case the defendant is responsible only for unreasonable delay.

Dawson v. Chicago & A. R. Co. 79 Mo. 296; 5 Am. & Eng. Enc. Law, 2d ed. p. 168, note.

Where, on the other hand, there is a specific contract to furnish cars on a certain day, then no excuse can be offered.

Gulf, P. & S. F. R. Co. v. Hume Bros. 87 Tex. 211, 27 S. W. 110.

A railroad company may refuse to carry perishable goods offered for transportation when it has not the means for immediate transportation of such goods.

Tierney v. New York O. & H. R. R. Co. 76 N. Y. 305; *Hutchinson, Carr.* 2d ed. 117.

It is only held to reasonable care and diligence in providing transportation for any goods whatever. It is not bound to provide, in advance, for extraordinary occasions, nor for the unusual influx of business which is not reasonably to be expected.

Thomas v. Wabash, St. L. & P. R. Co. 4 Inters. Com. Rep. 802, 63 Fed. 200; *Michigan C. R. Co. v. Burrows*, 33 Mich. 6; *Houston & T. C. R. Co. v. Smith*, 63 Tex. 322.

It may show that an unforeseen wreck on its track has caused the refusal to carry.

Newport News & M. Valley R. Co. v. Mercer, 96 Ky. 475, 29 S. W. 301; 5 Am. & Eng. Enc. Law, 2d ed. p. 257.

It is only responsible for its own defaults, and not for those of others.

Michigan C. R. Co. v. Burrows, 33 Mich. 6.

A common carrier may refuse to carry goods which he has no means of carrying with security.

Story, Bailments, 4th ed. § 508; *Hutchinson, Carr.* 2d ed. § 117; *Porcher v. North-eastern R. Co.* 14 Rich. L. 181.

A railroad corporation, though by law a common carrier, is not such a carrier as to goods which it does not hold itself out as undertaking to carry, and which are not transported in the ordinary manner, and in the ordinary cars customary among railroads.

Pfister v. Central P. R. Co. 70 Cal. 169, 59 Am. Rep. 404, 11 Pac. 686; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275; *Oxlade v. North-Eastern R. Co.* 1 C. B. N. S. 454.

The duties of a forwarder, in the strict sense, are to get goods ready for transportation, and to start them on their way on the lines of railroads, or other carriers. He does not undertake to carry himself.

Story, Bailments, 4th ed. § 502; *Stannard v. Prince*, 64 N. Y. 300; 13 Am. & Eng. Enc. Law, p. 1165; *Maybin v. South Carolina R. Co.* 8 Rich. L. 240, 64 Am. Dec. 753.

Messrs. Bates & Simms, for respondent: The evidence plainly indicates a contract between the defendant and the Swift company, and that they were to enjoy in common the profits realized from the shipments. 61 L. R. A.

Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; *New York, P. & N. R. Co. v. Cromwell*, 98 Va. 227, 49 L. R. A. 462, 35 S. E. 444; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746, 15 S. W. 962; *Houston, E. & W. T. R. Co. v. Campbell*, 91 Tex. 551, 43 L. R. A. 225; 45 S. W. 2; *Branch v. Wilmington & W. R. Co.* 77 N. C. 347; *Kueter v. Wilmington & W. R. Co.* 86 N. C. 346; *Illinois C. R. Co. v. Harris*, 184 Ill. 57, 48 L. R. A. 176, 56 N. E. 316.

Gary, A. J., delivered the opinion of the court:

The first and second exceptions will be considered together. We agree with the appellant that the liability of the defendant was not to be determined by the question as to whether the refrigerator company was a common carrier or not. But the defendant was not prejudiced by the charge, as it tended to relieve it of liability in case the jury found that the refrigerator company was a common carrier.

The third, fourth, and fifth exceptions will be considered together. These exceptions are open to the objection that they fail to specify in what particulars the charge was erroneous. But waiving this objection, and considering the exceptions, we are satisfied that the charge was free from error. In the case of *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141, the plaintiff, while occupying a berth in the Pullman car as a passenger, was injured by the falling of the berth. On appeal from a judgment in his favor, the court thus stated the law: "As between the parties now before us, it is not material that the sleeping car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. . . . For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping car company, its conductor and porter, were, in law, the servants and employees of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety and security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey." The same principle was applied to carriers of freight in *New York, P. & N. R. Co. v. Cromwell*, 98 Va. 227, 49 L. R. A. 462, 35 S. E. 444. The plaintiff in that case shipped strawberries over the New York, Philadelphia, & Norfolk Railroad in one of the Swift Company's cars, and the ice failed in transit. The railroad company contended that

the Swift Company, and not the railroad company, was liable. The court used this language: "Recognizing the higher duty due by common carriers to passengers, we are of opinion that the principles announced by the supreme court in this case [Roy] are applicable to the case at bar. . . . The California Fruit Transportation Company for a consideration furnished its cars to the plaintiff in error. These cars were agencies or means employed by the plaintiff in error for carrying on its business and performing its duty to the public as a common carrier one of which was to provide suitable cars for the safe and expeditious carriage and preservation of the freight it undertook to carry. A railway company cannot escape responsibility for its failure to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry by alleging that the cars used for the purposes of its own transit were the property of another. The undertaking of the plaintiff in error was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which they were carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars, or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employees were the agents of the plaintiff in error."

We proceed to the consideration of the sixth exception. Unless all the propositions of law embodied in a request are sound, it cannot be successfully contended that there was error in refusing it. The proposition that the plaintiff cannot recover from the defendant unless he proves that the railroad company held itself out to the public as furnishing refrigerator cars for transporting fruits and vegetables is erroneous, inasmuch as it was only necessary for the plaintiff to show that the defendant was a common carrier of freight, and that the defendant refused to transport articles of freight, which resulted in damage to the plaintiff. If there were reasons excusing the defendant for refusing to ship the articles, it was incumbent on it to establish such facts. In *Porcher v. Northeastern R. Co.* 14 Rich. L. 181, the court says: "A common carrier is bound to receive and carry all goods offered for transportation by any persons whomsoever, upon receiving a suitable hire. This is the result of his public employment as a carrier, and he will be liable to an action unless there is a reasonable ground for the refusal. But if he refuses to take charge of the goods because his coach is full, or because they are of a nature which will at the time expose them to extraordinary danger or to popular rage, or because he has no convenient means of carrying such goods with security, etc., these will furnish reasonable grounds for his refusal, and will, if true, be a sufficient legal defense to a suit for the noncarriage of the goods;" citing *Story. Bailments*, § 508. The proposition 61 L. R. A.

that the defendant would only be liable for unreasonable delay is also erroneous. The defendant would be liable for all damages that were the direct and proximate result of its refusal to transport. The articles of freight tendered were of a perishable nature. It was reasonable to suppose that they would either decay, or that the shipper would be compelled to resort to a more expensive mode of transportation to market.

Neither was the proposition a correct statement of the law, that the plaintiff cannot recover unless he proves that the defendant made an agreement to furnish cars properly refrigerated at the times mentioned. The defendant, as a common carrier of freight, was bound to transport, even in the absence of an agreement, unless it showed facts excusing it for failure to ship the articles of freight. *Porcher v. Northeastern R. Co.* 14 Rich. L. 181.

The proposition is likewise unsound, that the plaintiff cannot recover unless the jury find that the defendant failed to furnish the cars after holding itself out or having agreed to do so. In *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 353, the court says: "It is admitted that common carriers in this state cannot limit their common-law responsibility by any notice or declaration or special contract for or in respect of any goods to be carried by them;" citing the statute. Section 1709 of the Civil Code is as follows: "No public notice or declaration shall limit or in any wise affect the liability at common law of any public common carriers for or in respect of any goods to be carried and conveyed by them; but they shall be liable, as at common law, to answer for the loss of, or injury to, any articles and goods delivered to them for transportation, any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding." [1 S. C. Rev. Stat. 1893, § 1436.]

We proceed to consider the seventh exception. While the facts set forth in this exception would make the refrigerator company liable, it does not follow that they would relieve the defendant of liability; for if, as alleged in the complaint, the plaintiff made application to the defendant to ship the cantaloupes, it was bound to do so, unless there were circumstances excusing its failure. The complaint alleges that the plaintiff not only notified the defendant of the intended shipment, but that it agreed to furnish the refrigerator cars. If this was the fact, the defendant could not relieve itself from liability under the facts mentioned in the exception.

We will next consider the eighth exception. It has already been shown that, in the absence of an agreement either with the defendant or the refrigerator company, the defendant may still be liable, by reason of the rule that a common carrier is bound to transport unless there are circumstances justifying its failure.

The ninth exception will next be consid-

ered. We have already shown that, if an agreement was made with the refrigerator company, it would not relieve the defendant from liability, in case the plaintiff, as alleged, not only notified it of the intended shipment, but that it agreed to furnish suitable cars.

We proceed to consider the tenth exception. The authorities hereinbefore mentioned make it plain that even if there was an agreement for a certain number of cars, and the plaintiff tendered for shipment a larger number of crates than could be shipped in those cars, the defendant was nevertheless bound to transport all the crates tendered, unless excused from so doing under the circumstances of the case. If the circumstances were not such as to excuse the defendant's failure, the plaintiff had the right to recover damages directly and proximately caused by the defendant's failure, not only to ship the number of crates that could have been transported in the cars mentioned, but likewise the other crates

tendered for shipment. The request was therefore erroneous.

The eleventh exception will next be considered. The request therein set out embodies an erroneous principle of law. Such a rule would enable a railroad company to shift its responsibility as a common carrier on others, which cannot be done. It must transport when the demand is made, unless excused, and it cannot refuse on the ground that others had assumed any part of the duty resting on it as a common carrier. In addition to the foregoing authorities, we cite the cases of *National Bank v. Atlantic & C. Air Line R. Co.* 25 S. C. 222; *Harmon v. Columbia & G. R. Co.* 28 S. C. 401, 5 S. E. 835; *Parr v. Spartanburg, U. & C. R. Co.* 43 S. C. 197, 20 S. E. 1009; *Youngblood v. South Carolina & G. R. Co.* 60 S. C. 9, 38 S. E. 232.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

NEW YORK COURT OF APPEALS.

Patrick BARRETT, Admr., etc., of Thomas Barrett, Deceased, *Appt.*,
v.

LAKE ONTARIO BEACH IMPROVEMENT COMPANY, *Respt.*

(174 N. Y. 310.)

1. The owner of a structure to be used as a toboggan slide at a bathing resort is liable for resulting injuries in case a person attempting to use it falls from it by reason of insufficiency of the railing, although it is in possession of a tenant, if the railing intended for the protection of persons upon it is so faulty in construction that such accidents are likely to happen.
2. A person constructing a toboggan slide to be used by the public for a consideration, at a bathing resort, is bound to anticipate and provide against injuries from defects in construction, to the extent that reasonable, prudent men might foresee the necessity of doing.
3. The jury must decide whether or not a structure intended to be used by the public for a consideration is constructed with that due care which, in the judgment of prudent men, in view of its purpose, should have been exercised to prevent injuries to persons using it.

(April 7, 1903.)

A PPEAL by plaintiff from an order of the Appellate Division of the Supreme Court. Fourth Department, reversing a

judgment of the Monroe County Circuit in plaintiff's favor, in an action brought to recover damages for the alleged negligent killing of his intestate. *Reversed.*

Statement by **Gray, J.:**

The action was brought against the defendant to recover damages for the death of the plaintiff's intestate, which is alleged to have been caused by the negligent construction of a toboggan slide. The plaintiff recovered a verdict, but, upon appeal to the appellate division in the fourth department, the judgment entered upon the verdict was reversed, and a new trial was ordered "upon questions of law only, the facts having been examined, and no error found therein."

These are the facts of the case, so far as they are necessary to be stated: The defendant is the owner of lands upon the beach of Lake Ontario, at Charlotte, in this state. Among the properties comprehended within its ownership was a bathing establishment, to which was appurtenant, or incidental, a toboggan slide. The latter had been constructed, as it existed at the time of the trial, in 1896. It consisted of a troughlike structure, extending from a platform, erected some 25 feet above the ground, into the waters of the lake. The platform was 11 feet 2 inches square, made of planks, and supported with a framework of sills, posts, and cross-braces. About the platform, and designed to protect it upon three of its

NOTE.—For other cases in this series as to liability of landlord to third person for injuries caused by condition of premises in possession of tenant, see *Lee v. McLaughlin* (Me.) 26 L. R. A. 197, and *note*; *Henson v. Beckwith* (R. I.) 38 L. R. A. 717; *Canandaigua v. Foster* (N. Y.) 41 L. R. A. 554; *Waterhouse* 61 L. R. A.

v. Joseph Schlitz Brewing Co. (S. D.) 48 L. R. A. 157; *West Chicago Masonic Asso. v. Cohn* (Ill.) 55 L. R. A. 235; *Gardner v. Rhodes* (Ga.) 57 L. R. A. 749; *Lauer v. Palms* (Mich.) 58 L. R. A. 67; *Brown v. White* (Pa.) 58 L. R. A. 321; and *Louisville & N. Terminal Co. v. Jacobs* (Tenn.) 61 L. R. A. 188.

sides, was a railing 4 feet in height; consisting of an upper rail, and of another rail intermediate the platform and the upper rail. The spaces between this middle rail and the platform and the upper rail were of 21 inches each. An access to the platform from the lake was furnished by a space, or walk, constructed at the side of the slide. The slide was continued from the edge of the platform so as to project over it to a point about over the center. Upon the projecting portion a sled, or toboggan, would be placed in the trough, and the person taking part in the sport would throw himself upon the toboggan and slide down it into the lake waters. A step was placed upon the platform, at the point where the walk up the incline terminated, which was about 10 inches in height and in width, and which reached from the side of the toboggan slide to the railing, a distance of some 24 feet. The walk up the incline and the platform would, of course, become wet from their use by persons coming out of the water, and there was evidence to show that a person had slipped, at least, upon the walk in consequence. The testimony as to how the accident in question happened was given by two witnesses, who were standing below, upon the ground, and one of them, only, was able to describe the apparent actions of the deceased before and as he fell from the platform. The witness could not see the surface of the platform nor the feet of the deceased; but he described the latter as falling from the step, feet foremost, through the space between the middle rail and the floor of the platform, to the ground below, and striking, in his fall, a part of the structure. The deceased had just mounted upon the step, and had placed his sled in the trough of the slide, when his feet shot out from under him. Whether he slipped while in the act of throwing himself upon the sled, or whether he lost his balance from some other cause than slipping, was not clear from the evidence. The accident occurred in August, 1900, and the premises were in the possession of one Briggs, under a lease by the defendant for the season, at a fixed rental. By the terms of the lease, the lessee could make no alteration in the premises without the written consent of the lessor, and reservation was made to the latter of the right to permit its officers and agents to enter upon the premises at any time for the purpose of examination, or of doing any work necessary for the care and preservation of the property.

Mr. James Breck Perkins, for appellant:

There was evidence of negligence in the construction of the platform by the defendant, which was properly submitted to the jury.

Donnelly v. Rochester, 42 App. Div. 624, 58 N. Y. Supp. 1140; *Quill v. Empire State Teleph. & Telg. Co.* 92 Hun, 539, 37 N. Y. Supp. 1149; *Cleveland v. New Jersey S. B. Co.* 125 N. Y. 299, 26 N. E. 327; *Hubbell v.* 61 L. R. A.

Yonkers, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858; *Dinnihan v. Lake Ontario Beach Improv. Co.* 8 App. Div. 509, 40 N. Y. Supp. 764.

The question of contributory negligence was properly submitted to the jury.

Kelly v. Pelham Hod Elevating Co. 51 N. Y. S. R. 549, 21 N. Y. Supp. 1107; *Crosby v. New York C. & H. R. Co.* 88 Hun, 196, 34 N. Y. Supp. 714; *Doud v. New York, O. & W. R. Co.* 170 N. Y. 459, 63 N. E. 541; *Stackus v. New York C. & H. R. Co.* 79 N. Y. 464; *Weil v. Dry Dock, E. B. & B. R. Co.* 119 N. Y. 147, 23 N. E. 487.

The action was properly brought against the defendant.

Francis v. Cockrell, L. R. 5 Q. B. 501; *Butcher v. Hyac*, 10 Misc. 275, 30 N. Y. Supp. 1073; *Currier v. Boston Music Hall Asso.* 135 Mass. 414; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672, 4 N. E. 188; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659; *Timlin v. Standard Oil Co.* 126 N. Y. 514, 27 N. E. 786; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Grote v. Chester & H. R. Co.* 2 Exch. 251; *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503; *Wendell v. Baxter*, 12 Gray, 494; *Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800.

Mr. Charles J. Bissell, with *Messrs. Satterlee, Yeoman, & Taylor*, for respondent:

Assuming that the tenant was negligent in this case, and assuming that the defendant would have been guilty of negligence if it had been occupying the premises and carrying on the business, instead of the tenant, still, the defendant, having leased the premises to the occupant, and being out of possession, is not liable.

Jaffe v. Harteau, 56 N. Y. 398, 15 Am. Rep. 438; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659; *Franklin v. Brown*, 118 N. Y. 110, 6 L. R. A. 770, 23 N. E. 126; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; 2 Shearm. & Reif. Neg. 4th ed. § 711; *Burdick v. Cheadle*, 26 Ohio St. 397, 20 Am. Rep. 767; *Robbins v. Jones*, 15 C. B. N. S. 221; *McKenzie v. Cheatham*, 83 Me. 543, 22 Atl. 469; *Woods v. Naumkeag Steam Cotton Co.* 134 Mass. 357, 45 Am. Rep. 344; *Bow v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Fellous v. Gilhuber*, 82 Wis. 639, 17 L. R. A. 577, 52 N. W. 307; 1 Thomp. Neg. § 1154.

There is no question of nuisance in this case.

Sterger v. Van Sicklen, 132 N. Y. 499, 16 L. R. A. 640, 30 N. E. 987; *Murphy v. Brooklyn*, 98 N. Y. 642; *Fisher v. Rankin*, 25 Abb. N. C. 191, 7 N. Y. Supp. 837.

The question whether or not the construction was negligent ought not in this case to be left to a jury. The question is, whether

an ordinarily prudent man would have been satisfied with the construction as it was.

Larkin v. O'Neill, 119 N. Y. 221, 23 N. E. 563; *Crafter v. Metropolitan R. Co.* L. R. 1 C. P. 300; *Hart v. Grennell*, 122 N. Y. 371, 25 N. E. 354; *Burke v. Witherbee*, 98 N. Y. 562; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Loftus v. Union Ferry Co.* 84 N. Y. 455, 38 Am. Rep. 533; *Laftin v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *Craighead v. Brooklyn City R. Co.* 123 N. Y. 391, 25 N. E. 387; *Glacier v. Hebron*, 131 N. Y. 447, 30 N. E. 239; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858; *Favro v. Troy & W. T. Bridge Co.* 4 App. Div. 241, 38 N. Y. Supp. 433; *Donnelly v. Rochester*, 166 N. Y. 315, 59 N. E. 989.

If there was negligence, the deceased was guilty of contributory negligence. And in any event the proof does not show that he was free from contributory negligence.

Beach, Contrib. Neg. § 37; *Koehler v. Syracuse Specialty Mfg. Co.* 12 App. Div. 50, 42 N. Y. Supp. 182, 1105; *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308, 26 N. E. 916; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Buckley v. Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 540, 21 N. E. 717; *Ogley v. Miles*, 139 N. Y. 458, 34 N. E. 1059; *Ten Broeck v. Wells, F. & Co.* 47 Fed. 690; *Dowd v. New York, O. & W. R. Co.* 170 N. Y. 459, 63 N. E. 541.

There is nothing in the evidence tending to show that the accident was not the result of something done by the deceased which it was negligent to do.

Bond v. Smith, 113 N. Y. 378, 21 N. E. 128.

Gray, J., delivered the opinion of the court:

The appeal from the order of reversal permits of our reviewing any of the questions of law which were before the appellate division. *Albring v. New York C. & H. R. R. Co.* 174 N. Y. 179, 66 N. E. 665.

Upon the facts which have been stated, the first question for our consideration, and one which is much dwelt upon by the defendant respondent, is whether, if the accident complained of is attributable to negligence in the construction of the structure of the platform to be used in connection with the toboggan slide, the defendant can be held to have been responsible. While, as a general rule, a lessor, in the absence of any agreement or of fraud, is not liable to the lessee for the condition or tenantable use of premises demised (*Sutton v. Temple*, 12 Mees. & W. 52; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438), that rule is subject to exceptions. If the premises which are rented are in such a dangerous condition as to constitute a nuisance at the time of the renting, the lessor remains liable for the consequences of the nuisance, notwithstanding that his lessee may also be liable. *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295. If the premises are rented for a public use for which he knows that they are unfit

and dangerous, he is guilty of negligence, and may become responsible to persons suffering injury while rightfully using them. Such instances would be where he lets a warehouse so imperfectly constructed that the floors will not support the weight necessarily upon them; or where he lets a building for public amusements, or exhibitions, or other public purposes, and its construction is so unsafe, structurally, as to be the cause of injury to anyone. *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Fow v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, Affirmed in 163 N. Y. 559, 57 N. E. 1109; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659. This liability for injuries, attributable to the unfit condition of premises, which have been let for a specific purpose, rests upon negligence; that is to say, upon the omission of a duty to use due care in their erection or construction. The law holds the lessor responsible, not upon any contractual obligation, but because of the *delictum*. If, as claimed in this case, a person has erected a structure and designed it for the use of the public, which was either structurally defective, or which was faulty in failing to afford what, in the judgment of reasonable men, would be a proper and adequate protection to persons using it, then he has incurred the risk of being made responsible for occurrences resulting in injury to anyone by reason of the faulty construction. The contention in this case is that the toboggan structure was unsafe for the specific use for which the defendant intended and let it to Briggs, and the question is simply whether the platform was built in so reasonably safe a manner as to prevent the occurrence of accidents which men of ordinary prudence, and knowing the nature of the public use to which it was to be put, might have foreseen as possible. There is a difference between this case and other cases in this: That the defect in question was not in the supports of the structure, but in the manner in which the railing around the platform was constructed, which rendered it possible for a person to fall through it to the ground. The difference, however, is not one which affects the doctrine of the lessor's responsibility; for, obviously enough, the essential principle of the doctrine is the omission or the neglect of a duty, in preparing a structure to be put to a particular public use, to make it reasonably fit or safe for that use.

In my opinion, the defendant, having built the structure for the amusement or entertainment of the public, impliedly warranted that it might be used with such safety to the person as could reasonably be demanded.

If, then, the defendant could be made responsible for any neglect in the construction of this toboggan slide, the question then presents itself whether, upon the evidence, the court could say that, as matter of law, the railing constructed about the platform was a reasonably sufficient protection to the

persons using it. However imperfectly described the occurrence of this accident, it is certainly evident that the railing was not, as it existed, sufficient to prevent a person falling through its openings. Whether the deceased slipped, or whether, stumbling, he lost his balance when in the act of making use of the slide, is not material, because, in either event, the particular form of sport to be indulged in rendered slipping or stumbling a reasonably possible occurrence. All persons were invited, upon the payment of an entrance fee, to make use of this structure, and the amusement provided for involved some risks. These risks, attending an amusement which was prepared to allure the public for their emolument, the proprietors or lessors were bound to anticipate and to protect against, so far as they were not necessarily incidental thereto. A stricter measure of duty was involved in preparing such a structure to induce the public use, and it was required that the risks should be minimized to the extent that reasonably prudent men might foresee the necessity of doing so. The risk of falling from the platform may have been apparent to persons using it, but those persons had the right to assume that they went there without incurring any risk which might have been reasonably anticipated by the proprietor of the concern. They came there by invitation, and with the right to believe that every reasonable care had been taken for their safety in the erection of the slide. That an accident of the same kind had never before happened furnishes no ground of de-

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fense, if it might in reason have been anticipated. *Cleveland v. New Jersey S. B. Co.* 125 N. Y. 299, 26 N. E. 327; *Donnelly v. Rochester*, 166 N. Y. 315, 59 N. E. 989.

In my opinion, the situation being such that a fall from the platform was a possible occurrence to the majority, if not to all, of the persons who used the toboggan slide, a question of fact was presented upon the evidence whether the platform structure had been constructed with that due care which, in the judgment of prudent men, in view of the purpose, should have been exercised by the defendant. That question was for the jury to answer.

I think that whether the deceased was free from contributory negligence was properly left to the jury. The circumstances under which the deceased was seen to fall furnish no inference that he was careless. He was a lad of some fifteen years of age, concededly bright and active, and he was engaged in doing something to which he was expressly invited. The court could not hold, as matter of law, under the circumstances, that he had contributed to the result.

I think that the order of the Appellate Division should be reversed, and that judgment should be ordered to be entered upon the verdict for the plaintiff, with costs in all the courts.

Parker, Ch. J., and O'Brien, Bartlett, Haight, Martin, and Werner, JJ., concur.

NORTH CAROLINA SUPREME COURT.

F. N. MULLEN

v.

LAKE DRUMMOND CANAL & WATER
COMPANY, *Appt.*

(130 N. C. 496.)

1. The title of one in possession of a right of way for a canal will, in the absence of evidence showing how the right was acquired, or its extent, be presumed to be a mere easement limited to the extent to which it has been used.
2. The submission to the jury, in an action to recover damages for injuries to adjoining land by the widening of a canal, of an issue as to permanent damages, is, in effect, a statutory condemnation of an additional easement, and cannot be demanded by either party if the injury can be remedied at reasonable expense without interfering with the performance by the canal company of its public duties.
3. A canal company cannot divert water into its canal, and permit it to injure

adjoining proprietors by soaking through the embankments.

4. A lower owner cannot obstruct a natural waterway so as to flood the lands above him.
5. A sweat ditch constructed by a canal company along its embankment either upon the site of an old waterway which drained adjoining property, or as a substitute for one running in the same general direction, must be considered as the waterway, so that it cannot be closed without liability for the injuries thereby inflicted on the upper owner.
6. No injuries are contemplated in the original condemnation of a right of way for a canal for which damages must be allowed, except such as necessarily arise in the proper construction of the work.
7. The rule permitting the acquisition of an easement by the payment of permanent damages for injuries done to adjoining property by the construction of a public work is applicable in favor of canal companies.

(June 13, 1902.)

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- XII. Prescription, 877.

I. As public improvement.

Transportation facilities are an absolute necessity for the development of a country. Before the discovery of the locomotive the only means of furnishing it which was at all adequate in the absence of natural waterways was the construction of artificial ones. Consequently, in the early history of this country artificial waterways, or canals, were regarded as public improvements within the power of the government to make, if it was not its duty to make them as much as state roads, forts, or other things which were regarded as peculiarly within the scope of governmental power. Such improvements, however, proved expensive, and placed a burden of taxation upon the people, and the expenditure of the money involved in their construction proved a severe strain on official honesty, so that, with the advent of the railroad, there was a popular revolt against the

government's undertaking such work; and it is prohibited now in many constitutions. The object, however, is so far of a public nature that private corporations may be organized for their construction, and they may be clothed with the power of eminent domain to secure a right of way and a supply of water, and they may be endowed with a franchise to take tolls for the use of the improvement.

The legislature may impose a local tax upon the parties benefited by a canal to pay for its construction, although certain private individuals, to obtain the location of the canal at that place, entered into a bond conditioned to pay the expense of such construction. *Thomas v. Leland*, 24 Wend. 65.

A river does not become a canal from having its navigation improved by artificial means, within the meaning of the constitutional provision prohibiting the general assembly from loaning the credit of the state, or making appropriations from the treasury in aid of railroads and canals, so as to render it unlawful for the state to resume control of works constructed for the improvement of the navigation of certain rivers by a company whose franchise is forfeited by misuser. *People ex rel. Atty. Gen. v. Kanakake River Improv. Co.* 103 Ill. 491.

A state which grants to individuals authorized to cut a canal the right to use state lands adjacent thereto for a term of years, and which confers on them a preference in the purchase of lands drained by the canal, does not thereby give state aid contrary to a constitutional provision. *State ex rel. Belden v. Burgess*, 23 La. Ann. 225.

An act authorizing counties to condemn land for a right of way for a ship canal projected by the general government is not in violation of a constitutional provision forbidding counties to give money or property, etc., to or in aid of any individual, association, company, or corporation, as neither the state nor the United States can be brought within the meaning of that provision. *Lancey v. King County*, 15 Wash. 9, 34 L. R. A. 817, 45 Pac. 645.

The fact that it is proposed to convey the right of way for a ship canal, when obtained, to the United States, does not render the act authorizing the counties in which it extends to acquire such right of way void as the exercise of the state's eminent domain for the use and

A PPEAL by defendant from a judgment of the Superior Court for Camden County in favor of plaintiff in an action brought to recover damages for the flooding of his land. *Affirmed.*

Statement by **Douglas, J.:**

This is an action for damages to plaintiff's land by the discharge thereon of diverted water and the obstruction of a ditch by which it had been previously drained. The defendant owns and operates what is known as the "Dismal Swamp canal," between the Pasquotank river, in North Carolina, and Elizabeth river, in Virginia. The plaintiff owns the land in question, which is situated in Camden county, adjacent to and bordering on said canal for about $\frac{3}{4}$ of a mile. The water in said canal was artificially brought and maintained therein by locks and banks

at an elevation several feet higher than the surrounding land. The banks of the canal not being sufficient to prevent the water from leaking through them and running upon the lands of adjacent owners, the defendant had constructed and maintained, prior to 1898, ditches parallel with its canal, and adjacent thereto, to catch and carry off the water percolating through its banks, or falling thereon. These were called "sweat ditches," and emptied into a natural water course known as "Joyce's creek." The ditch adjacent to the plaintiff's land was also the "lead ditch" to his farm, being the only practical outlet for the drainage of about 135 acres of his land. In 1898 and 1899 the defendant widened and deepened its canal, and raised its banks and the water therein. In doing so, it threw large quantities of mud and sand into the sweat and lead ditch,

benefit of the United States, where the canal will be merely regulated by the general government for the use of the general public as a great public waterway of great local benefit to the counties through which it passes,—especially as there are no express constitutional provisions prohibiting it. *Ibid.*

Such an act authorizing the county to levy a tax for the prosecution of the work is not in violation of a constitutional provision prohibiting counties from incurring debt for any other than strictly county purposes, when such canal will be a public improvement entirely within the limits of the county, and is for the purpose of connecting inland waterways with the ocean, the benefits from which will be largely local notwithstanding the fact that it may also be of great general benefit. *Ibid.*

A state does not acquire title to a strip of land 90 feet wide on each side of a canal by virtue of an act of Congress granting the same upon certain conditions, in the absence of any showing that those conditions were ever complied with,—especially where it appears that the canal, in aid of which the act was passed, was finally constructed under a subsequent act of Congress not referring to the former act, and granting other land in aid of the proposed canal. *Werling v. Ingersoll*, 182 Ill. 25, 54 N. E. 1008, *Affirmed* in 181 U. S. 131, 45 L. ed. 782, 21 Sup. Ct. Rep. 570.

The provisions in the act of Congress granting land to the state of Michigan in aid of the construction of the Portage ship canal, that it shall be a public highway free of toll for United States vessels, and stipulating that, when the whole expenditures are reimbursed, either by tolls or by payment from the United States, the subsequent tolls shall be confined to what may be necessary to preserve the canal,—do not contemplate that the canal, upon its completion, shall remain in the possession of the state as a trust for the United States; but, under the congressional and state legislation concerning it, the Lake Superior ship canal company is entitled to its possession. *People ex rel. Atty. Gen. v. Lake Superior Ship Canal, R. & Iron Co.* 32 Mich. 233.

Authority vested by Congress in the Secretary of War to prescribe rules and regulations for the use, administration, and navigation of canals owned by the United States is not invalid as a delegation of legislative power; but rules made thereunder have the force of law, and persons violating them by drawing off water from the canal are punishable under the provisions of the act. *United States v. Ormsbee*, 74 Fed. 207.

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The floating of wood, lumber, and other materials to market, and the supplying of pure water to a city, are matters in which the public have an interest justifying the exercise of the power of eminent domain for the appropriation of land for the construction of a canal or flume for that purpose. *Dalles Lumbering Co. v. Urquhart*, 18 Or. 67, 19 Pac. 78.

Acts of Parliament authorizing the construction of navigable canals are to be construed in favor of the public. *Priestley v. Foulds*, 2 Mann. & G. 175, 2 Scott N. R. 265, 2 Railway Cas. 422.

A statutory provision authorizing a city to cause common sewers, drains, and canals to be constructed means canals for drainage, and not for navigation. *Louisiana State Bank v. Orleans Nav. Co.* 3 La. Ann. 294.

A corporation for the construction of a canal for the purposes of navigation is not authorized by a statute permitting the organization of corporations for the construction of canals for irrigation and manufacturing purposes. *Texas & M. R. Canal & Nav. Co. v. Galveston County Ct.* 45 Tex. 274.

The Nebraska act providing for the appointment of a board of trustees to constitute a body corporate and politic to sue and be sued, contract and be contracted with, acquire and hold real estate and personal property in its corporate name, have a seal, and construct and operate a canal for commercial purposes, and for supplying power, heat, and light, does not create a municipal corporation, and, as attempting to create a corporation is nugatory, because in effect the general corporation law is attempted to be amended thereby without its provision being referred to in any way in the amendatory act. *State ex rel. Patterson v. Douglas County*, 47 Neb. 428, 66 N. W. 434.

II. Acquisition of rights.

a. What may be acquired.

When it is established that a canal is a public improvement for which the right of eminent domain may be exercised, then the conclusion follows that everything may be taken which is necessary to the completion of the enterprise.

A company incorporated to construct an extensive line of canal, and connected with other large canal systems, is engaged in a public work for which private property may be taken as in the case of other public uses. *Willard v. Hamilton*, 7 Ohio, pt. 2, p. 111, 30 Am. Dec. 195.

An incorporated lumber company has the right, under the laws of Oregon, to condemn

whereby it was obstructed to such an extent as to flood and injure the plaintiff's land. The complaint is as follows: "The plaintiff complaining of the defendant, alleges: (1) That he is a resident of Camden county, state of North Carolina. (2) That the defendant is a corporation duly incorporated under the laws of the state of Virginia, as he is informed and believes, and operating a canal business in the state of Virginia and the state of North Carolina, and it owns what is known as the canal property formerly known as the 'Dismal Swamp canal,' which runs from Elizabeth river, state of Virginia, to Pasquotank river, state of North Carolina, by way of Deep creek and South Mills. (3) That the defendant during 1898 made a change in the width of this canal, and, in doing so, filled up what is known as the 'sweat ditch' to the canal, and also the

lead ditch of this plaintiff, leading from his farm, hereinafter described, to the creek; being the only practical way by which he can drain said farm. (4) That the plaintiff is the owner of and in possession of that certain tract of land known as the 'old tract,' containing 250 acres, more or less, and being a part of the 'old farm,' that the plaintiff is now in possession of, adjoining the lands of the Isaac Burnham heirs, Mrs. H. C. Pinnix, Wm. Eason, S. O. Mullen, main road, and others. (5) That the defendant, its agents and employees and contractors, negligently and carelessly threw dirt and water in the lead ditch aforesaid, draining said farm, and threw water and mud upon the lands of said farm, and in this manner seriously damaged both the crops upon said lands and the lands themselves. (6) That by such unlawful conduct the defendant caused the lead ditch to

land for the purpose of constructing a flume to convey lumber from its mills to a city. *Maffet v. Quine*, 93 Fed. 347.

The state may legally appropriate the land of a private citizen for canal purposes, and acquire title thereto, if means are provided for making compensation afterwards if claimed. *Birdsall v. Cary*, 66 How. Pr. 358.

The power to take private property for public use for canal purposes upon just compensation is not a power in derogation of common right so as to justify the court in confining the words of the charter of a canal company to their strictest and strongest sense against the company. *Chesapeake & O. Canal Co. v. Key*, 3 Cranch, C. C. 599, Fed. Cas. No. 2,649.

Land taken for the purposes of the Chesapeake & Ohio canal is taken for public use. *Ibid.*

A state may appropriate land to be used in connection with a canal as a wharf, or excavated as a basin, as the wants of the canal might require, under the provision of a statute authorizing the entry upon, and taking possession of, and using, any land, waters, streams, etc., necessary for the construction of all such canals, feeders, dikes, locks, dams, and other works as the canal commissioners may think proper in the prosecution of said work. *Nelson v. Fleming*, 56 Ind. 310.

A provision in the charter of a canal company authorizing the taking of land by the company before the assessment of damages, necessary for constructing a canal and hydraulic works desirable to be connected with it, and also for works necessary for its navigation, will authorize the taking of an owner's land adjoining a lock and hydraulic power as a site for a gristmill and other mills and factories. Such a provision is not inconsistent with the constitutional clause prohibiting the taking of private property for public use without just compensation. *Hankins v. Lawrence*, 8 Blackf. 266.

Materials.

Statutory authority to take "land" for the construction of a canal will give the right to take the stone in the earth which is needed for that purpose. *Baker v. Johnson*, 2 Hill, 342.

Under the New York statute for the connection of Lake Champlain with the Hudson river, which authorizes the canal commissioners to enter upon lands adjoining the improvement and take such stone as may be necessary for the work, they may enter on lands near the Hudson to take stone from a ledge of rock in a hill 60 rods from the river, which are necessary for completing a lock and dam at the connection of 61 L. R. A.

the canal with the river. *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484.

Under a statute permitting canal commissioners to enter upon premises contiguous to a state canal and procure materials to make necessary repairs whenever navigation shall be interrupted or endangered, there is a right to enter upon such lands and take materials for ordinary repairs whenever navigation is endangered by want of them. *Ten Broeck v. Sherrill*, 71 N. Y. 276.

The authority given by a statute providing for a canal, to take materials for the prosecution of the improvements intended thereby, extends to the taking of materials for repairs necessitated by a breach therein,—at least where necessary for the purpose of the completing of the canal and rendering it navigable. *Bates v. Cooper*, 5 Ohio, 115.

In *Lyon v. Jerome*, 15 Wend. 569, it was held that, under a statute permitting commissioners for the construction of a canal to enter by themselves, their agents, or engineers upon lands of individuals and take materials for the prosecution of the work, the engineers need not obtain express orders or directions from the commissioners for each act of entry committed by them.

But that case was reversed in 26 Wend. 485, 37 Am. Dec. 271, where the court held that such statutory authority must be exercised by the commissioners in person, or by others under their express direction.

Property devoted to other public uses.

Property devoted to public use is not exempt from appropriation for other uses, but the right to appropriate it must be given expressly, or by such plain implication as to leave no room to doubt that such is the legislative intent.

A canal company may appropriate the streets of a municipal corporation when necessary to fulfil the requirements of its charter. *James River & K. Co. v. Anderson*, 12 Leigh, 278.

But the taking of land designated as a public street and in reference to which lots have been sold is not justified on the part of the vendor because it is desired for canal purposes, but the property should be expropriated in accordance with the forms of law. *Bruning v. New Orleans Canal & Bkg. Co.* 12 La. Ann. 541.

Legislative authority to construct a canal along a county road, followed by actual work upon the canal, will work a discontinuance of the road. *Tinker v. Russell*, 14 Pick. 279.

Where the rights of a canal company come in conflict with the rights of the public in a highway, the public will be required to yield its

be insufficient to carry off the water from said lands, and banked the water and forced it back upon the farm, and in this manner drowned and seriously injured and destroyed the crops growing upon said lands during the years 1898 and 1899. (7) That said unlawful conduct of the defendant not only damaged the crops, but, by forcing the water back upon the lands and ponding same upon the lands, has seriously and greatly damaged said lands, causing the water to lie upon same, and the land to sour, and seriously injure its yielding power, and greatly damage same. (8) That it was the duty of said canal company to keep said sweat ditch cleared out and of sufficient capacity to carry off all the water, and it was its duty to protect same against the carelessness and wrongdoings committed by its agents and employees as aforesaid. (9) By reason of

said unlawful and negligent acts and doings of the defendant, the plaintiff has been damaged in the sum of \$900, according to his best judgment and belief. Wherefore," etc. The defendant, answering the complaint, says: "(1) That § 1 thereof is true. (2) That § 2 thereof is true. (3) That § 3 thereof is untrue. (4) That he has no knowledge or information sufficient to form a belief as to the matters and things in § 4 thereof, and therefore denies the same. (5) That § 5 thereof is untrue. (6) That § 6 thereof is untrue. (7) That § 7 thereof is untrue. (8) That § 8 thereof is untrue. (9) That § 9 thereof is untrue. Wherefore defendant demands judgment that he go without day, and recover his costs." The issues submitted, and answers thereto, were as follows: "(1) Did defendant wrongfully and negligently damage the lands and crops

rights to such an extent, only, as may be reasonably necessary to enable the canal company to accomplish the purposes for which it was created. *Lehigh Valley R. Co. v. Orange Water Co.* 42 N. J. Eq. 203, 7 Atl. 659.

A city authorized by its charter to take lands for canal purposes may, for the purpose of extending a canal, condemn the land of a railroad company. *Re Main & H. Street Canal*, 50 How. Pr. 70.

An application for appointment of commissioners to appraise damages for land to be taken for canal purposes raises a question for the court as to whether statutory authority to take land for a canal, without more, gives a right to take property already in possession of a railroad company under the right of eminent domain. *Re Buffalo*, 64 N. Y. 547.

Power of a municipal corporation to take for canal purposes land appropriated by railroad companies as part of their right of way must be expressly given, or must be necessary to the attainment of the object for which the grant to the municipal corporation was made. *Re Buffalo*, 68 N. Y. 167.

b. What is taken or acquired.

When a canal company has the right to divert water from a mill privilege for an annual compensation, there is no taking under its powers of eminent domain until it does not renew the agreement but continues to use the water. *Hellman v. Union Canal Co.* 50 Pa. 268.

To acquire the title to lands for canal purposes by appropriation, the state of Ohio, under the act of February 4, 1825 (25 Ohio Laws, 57), was required to assert such exclusive control of the lands taken as to put the owner on notice that the property had been taken by the state for its own, and incorporated as part of the canal system, so as to afford said owner opportunity of demanding an appraisal of the damages, if any, resulting over and above the benefits received. *Smith v. State*, 59 Ohio St. 278, 52 N. E. 638.

A mere occupation of lands by the state for canal purposes, under the Ohio statute, constitutes a seizure and appropriation therefor, and vests in the state a title in fee simple thereto, leaving to the owner simply a claim for compensation. *State ex rel. Richards v. Pittsburgh, C. C. & St. L. R. Co.* 53 Ohio St. 189, 41 N. E. 205; *State v. Griftnr*, 61 Ohio St. 201, 75 N. E. 612.

Where a portion of land was surrendered to the Crown at a certain price per acre to be overflowed with water for the purposes of a canal, and a plan was made showing the land

surrendered as covered with water and the remainder dry land, which turned out to be extremely inaccurate, covering much more land than was in reality submerged, the grantor is nevertheless entitled to retain only the land shown as dry on the plan. *Doe ex dem. Gilder-sleeve v. Kennedy*, 5 U. C. Q. B. 405.

The act of a canal company in surveying land and ascertaining the number of acres required, and taking possession thereof, cutting down and burning the timbers growing thereon, and constructing a reservoir on a creek running through the same with locks at each end, and using it for the supplying of water to the canal, is an appropriation of the land for canal purposes; and, after the lapse of many years, it will be presumed that the damages were assessed and tendered, or were waived so as to vest a fee-simple title thereof in the company, where it acquired that title to all other lands appropriated for the canal. *Blair v. Kiger*, 111 Ind. 193, 12 N. E. 293.

The fact that by a freshet a canal was washed away so as to return to its natural channel water diverted by the original construction of the canal does not render a repair of the canal a new appropriation of the waters, so as to entitle riparian owners who had neglected to institute proceedings for the assessment of their damages within the time from the original construction, fixed by statute in which to institute such proceedings, to count the time from such restoration, where the original taking was by authority of law, with intent to appropriate permanently, and which appropriation was never voluntarily relinquished. *Null v. White Water Valley Canal Co.* 4 Ind. 431.

Mere words of appropriation of the water of a lake for canal purposes, without any act toward carrying the appropriation into execution, are not sufficient to give the owners of mills on the outlet a claim for damages against the state. *Waller v. State*, 144 N. Y. 579, 39 N. E. 680.

Land set apart for a canal, which was granted by the inadvertence of the Crown before the passing of a statute vesting such lands in the ordnance department, are reverted in the Crown by being afterwards marked out and reserved by the ordnance department as necessary for the canal. *Doe ex dem. Malloch v. Her Majesty's Ordnance*, 3 U. C. Q. B. 387.

Where the state has acquired the right to use the water of a stream for a lock navigation, "provided that it shall not use the water for any other purpose than the navigation, subject to which the riparian owners are entitled to use the waters of the stream, the state will be liable under a statute giving a claim against it for

of the plaintiff as alleged? Yes. (2) What permanent damage has the plaintiff sustained to his lands? \$100. (3) What damage has he sustained annually to his crops for 1899 and for 1900? 1899, \$353.50; 1900, \$226.75."

Messrs. Shepherd & Shepherd and Pruden & Pruden for appellant.

Messrs. E. F. Aydtlett and P. H. Williams, for appellee:

Having brought water into its canal, raised it higher than the adjacent lands, and not having constructed its banks sufficiently to prevent the water from percolating and leaking through them and flooding the lands of its neighbors, it was the duty of the defendant to provide some precaution and some means for taking care of the water leaking from its canal.

Injury sustained through the management of the canals in case the water is wasted by the walls and gates becoming out of repair so that the water does not flow in its usual course. *Silaby Mfg. Co. v. State*, 104 N. Y. 562, 11 N. E. 264.

The land which a state took for a canal will be presumed to have been of the width necessary for the reasonable enjoyment of all rights appertaining to a canal. *Pennsylvania Canal Co. v. Harris*, 101 Pa. 80.

In determining what lands were, and what were not, actually taken by the state for the construction of a state canal, either by condemnation or purchase, at the time of its construction, of which no record was preserved, the court, in *Edwards v. Schlund*, 21 Ohio C. C. 193, holds that, in completing the canal, the canal commissioners might easily have entered upon adjoining land between the canal and the river, with the permission of the owner, and have driven piles, etc., along the edge of the river, to protect the canal from being washed away by the river, and that the mere taking possession of such lands for that purpose is not to be construed as having given the state the right to that land; but land between the canal and the river, over which, by the evidence, it appears that a slope from the canal banks extends substantially, if not entirely, to the river, and was made for the purpose of sustaining the towpath, is held to be state land, on the theory that the state took actual possession of so much of the land as was necessary to form the bed and banks of the canal, and the towpath, and the bank necessary to hold the towpath and keep it in position.

The construction of a waste weir by the state to carry off surplus water from a canal into a natural stream, through which it is again returned to the canal lower down, does not constitute an appropriation of that portion of lands bounded by, and included between, such canal, waste weir, and natural stream, so as to vest the fee thereof in the state, where they were not necessary for the construction and maintenance of the canal, and the state has never been in the occupation of any part thereof except the bed in which such waters so flow. *Merrill v. Currier*, 2 Ohio N. P. 52.

An appropriation by the state of the water of a stream to furnish a water supply for a state canal does not give the state any right to more of the water than is necessary for the purpose of the canal; but the surplus must be allowed to flow down the natural channel for the benefit of riparian proprietors. *Varick v. Smith*, 9 Paige, 547. 61 L. R. A.

Gould, Waters, § 271; *Wood, Nuisances*, § 396; *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 16 Utah, 246, 40 L. R. A. 851, 52 Pac. 168.

As the damage from the seepage and percolating waters of the defendant's canal would be practically avoided by the maintenance of sweat ditches, it was and is the duty of the defendant to construct the same, and not doing so is gross negligence and carelessness and a total disregard of the rights of others.

5 Am. & Eng. Enc. Law, 2d ed. p. 120; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *McKee v. Delaware & H. Canal Co.* 125 N. Y. 353, 26 N. E. 305.

Railroad companies are not permitted to build their roadbed so as to damage the adjacent lands by backing or diverting water

The canal commissioners can take only water enough from a private stream for canal navigation, and may lease the surplus which may accumulate through the exercise of their discretionary power in making sufficient provision for a supply for such purpose; but they cannot take additional water from a stream for the purpose of creating hydraulic power to sell or lease on behalf of the state. *Buckingham v. Smith*, 10 Ohio, 288.

But in *Cooper v. Williams*, 4 Ohio, 253, 22 Am. Dec. 745, in which the evidence showed that the amount of water taken from a river for a canal was no more than necessary for that purpose, Lane, J., says that, "If it were otherwise, I am not sure it would be within the proper duty of the court to control the commissioners in the manner of supplying the canal with water. The power to construct the canal is a high attribute of sovereignty; and in tracing the line, in selecting the materials for its construction, in the introduction and management of the water, and in the thousand subordinate operations attending the execution of so vast a work, there is a necessity for the exercise of large discretionary powers. . . . Although a case strong enough to justify our interposition may arise from corruption, from malicious intention, or caprice, yet, in the absence of these, the court would pause before it will assume to control the discretionary powers the law intends to confide to them." On review in 5 Ohio, 391, 24 Am. Dec. 299, Hitchcock, J., says that upon this point he has no doubt.

The title to land required for a state canal will pass to the state, as well when the benefits are found to equal the damages, as when the balance is paid to the owner. *Rexford v. Knight*, 15 Barb. 627.

Where a statute authorizing a canal company to take the water raised from all mines within a specified distance of the canals contains a proviso that the company shall not be entitled to make use of the water raised in the coal mines unless the coal produced at such mines shall be conveyed along some part of the canal, such proviso is not complied with by taking part of the coal; but the canal must be made the general mode of carriage whereby the product of the mines is directly carried away. *Finch v. Birmingham Canal Co.* 5 Barn. & C. 821, 8 Dowd. & R. 680.

Where an act of Parliament authorizing the construction of a canal and the taking of water for that purpose from a river provided, for the purpose of protecting mill owners on the river, that a weir be constructed for the purpose of

upon the lands; nor are they allowed to bring water from their natural water course by ditches along their right of way so as to damage the lands of adjacent owners.

Hocutt v. Wilmington & W. R. Co. 124 N. C. 214, 32 S. E. 681; *Louisville & N. R. Co. v. Hays*, 11 Lea, 382, 47 Am. Rep. 291; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Burnett v. Nicholson*, 86 N. C. 99.

Surface water cannot be collected in artificial channels and discharged upon the property of adjoining owners.

Gould, Waters, § 271; Wood, Nuisances, §§ 385-387, 389, 396, 397; Washb. Easements, p. 23; *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 16 Utah, 246, 40 L. R. A. 851, 52 Pac. 168.

It was defendant's duty to provide means for taking care of the sand and mud thrown out and the water dipped from the canal,

carrying back to the river the surplus water of the canal, the rights of the parties and the apportionment of the waters as between them become determined and fixed upon the completion of the canal, and the canal company cannot afterwards increase the size of the canal so as to draw a larger quantity of water from the river. *Glamorganshire Canal Co. v. Blakemore*, 1 Clark & F. 263, 5 Bligh N. R. 547.

When water has been taken from a millrace under condemnation proceedings for a canal, it must be presumed that it was foreseen that water would be diverted, and that resulting damages were assessed. *Chesapeake & O. R. Co. v. Rison*, 99 Va. 18.

The state, under its appropriation, in 1843, of the waters of Skaneateles lake and the outlet thereof for a reservoir and feeder to the Erie canal, has the right, in dry season, by shutting the gates at the foot of the lake, to hold back the water and prevent for the time being its flowage in its ordinary quantity past the premises of a riparian owner on the outlet of the lake. *Glenside Woolen Mills v. Hannan*, 63 Hun. 627, 19 N. Y. Supp. 1004.

The right given by statute to take water for canal purposes ceases upon the canal being abandoned or ceasing to exist. *National Guarantee Manure Co. v. Donald*, 4 Hurlst. & N. S. 28 L. J. Exch. N. S. 185, 7 Week. Rep. 185.

The mere incidental backing of water up a stream tributary to a river, caused by the erection of a dam across the river for the purpose of its use as a part of a state canal system, the tributary remaining in a state of nature except as slightly raised by such back water, was not of such character as to induce the canal commissioners to think they had appropriated the stream for canal purposes, or to apprise a riparian owner thereon that his lands were so appropriated, so as to give him a claim against the state for taking and using the same for canal purposes; and therefore vested in the state no title or fee to the bed of the stream. *Miller v. Wisenberger*, 61 Ohio St. 561, 56 N. E. 454.

Temporary rights.

Under the New York statute, canal commissioners have authority to adjust the damages caused by the appropriation of water for a temporary supply of a canal, but not for a permanent supply. *People ex rel. Merriam v. Schoonmaker*, 13 N. Y. 239, Reversing on the facts 19 Barb. 657, where it was held that the canal commissioners in New York were authorized to make compensation for water taken for a temporary supply for the state canals.

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and a failure to provide such means was negligent and careless, and it would be liable to the plaintiff for whatever damage he sustained.

Blackwell v. Lynchburg & D. R. Co. 111 N. C. 151, 17 L. R. A. 729, 16 S. E. 12.

A corporation, or an individual, may increase and accelerate the flow, but cannot divert it from its natural course so as to damage another.

Jenkins v. Wilmington & W. R. Co. 110 N. C. 438, 15 S. E. 193; *Parker v. Norfolk & C. R. Co.* 123 N. C. 71, 31 S. E. 381.

Defendant in the improvement of its canal had no right to obstruct this drainway to the injury of the plaintiff, whether the said ditch was a natural or artificial drainway.

Raleigh & A. Air Line R. Co. v. Wicker, 74 N. C. 220; *Hocutt v. Wilmington & W. R. Co.* 124 N. C. 214, 32 S. E. 681; *Mizzell v.*

A superintendent of a state canal may justify taking the water of a stream for a temporary supply for the canal in pursuance of the directions of the canal commissioner, although at the time of diverting the water he did not claim to act in obedience to such directions. *Walrath v. Barton*, 11 Barb. 382.

Under a statute providing that, before canal commissioners can appropriate a temporary water supply for the canals, they must resume all surplus water which has been leased by them, water leased for the operation of a mill, while passing around a lock, is not surplus water if it is needed for the lower level, since the resumption of such water would not help to supply the deficiency. *Lynch v. Stone*, 4 Denio, 356.

After a state agent, in taking the water of a stream for a permanent supply for a state canal, has thereby misled the owner of mill rights on the stream, and induced him, instead of seeking damages for a temporary appropriation, to bring his action to try the right of permanent use, he will not be permitted to change his ground and set up a temporary appropriation. *Walrath v. Redfield*, 18 N. Y. 457.

c. Extent of title.

The question as to whether the landowner parts with the fee, or only with an easement in the property, depends on the wording of the statute, as well as upon what was taken and paid for, if that can be ascertained.

A conveyance by deed to a municipality, "its successors or assigns," of the right to construct, maintain, and operate a canal across the land of the grantor on certain conditions, conveys a conditional easement in gross and in perpetuity to the grantee, the fee of the land remaining in the grantor. *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. 550.

An easement, only, is conveyed to a canal company by a deed of land to be used for the purposes of the canal so long as said canal shall be continued, and no longer. *Derby v. Hall*, 2 Gray, 236.

The interest acquired by the state, by condemnation proceedings, to lands for canal purposes, is a mere easement, leaving undisturbed in the owner of the fee the right to every use to which the land can be applied not inconsistent with that easement, where the statute under which the canal was constructed declares that the release of a right of way is all that is required for the purpose of constructing the canal. *Edgerton v. Huff*, 26 Ind. 35.

A canal company acquires no title, but a mere easement, by entering upon a person's property

McGowan, 125 N. C. 439, 34 S. E. 538; *Ridley v. Seaboard & R. R. Co.* 118 N. C. 996, 32 L. R. A. 708, 24 S. E. 730; *Parker v. Norfolk & C. R. Co.* 119 N. C. 684, 25 S. E. 722; *Beach v. Wilmington & W. R. Co.* 120 N. C. 498, 26 S. E. 703; *Nichols v. Norfolk & C. R. Co.* 120 N. C. 496, 26 S. E. 643; *Lassiter v. Norfolk & C. R. Co.* 126 N. C. 509, 36 S. E. 48; *Central R. Co. v. Windham*, 126 Ala. 552, 28 So. 392; *Hunter v. Cincinnati, H. & D. R. Co.* 7 Ohio N. P. 202.

Douglas, J., delivered the opinion of the court:

This case has given us much trouble, and has been most carefully considered, not on account of its intrinsic value to the parties, but from the great importance and wide application of its underlying principles. There

and constructing a canal; and, in case the canal is abandoned, the title reverts to the former owner. *Spear v. Allison*, 20 Pa. 200.

A release of the right of way along the line of an existing canal for a canal, the construction of which was contemplated by the state, will not be considered as conveying the fee, where the document has been lost, and the only evidence as to its contents indicates that an easement was granted, and when the work was abandoned, and for forty years the bed of such existing canal has been treated as private property, and the state has made no claim thereto. *Nichols v. New England Furniture Co.* 100 Mich. 230, 59 N. W. 155.

No right to take by eminent domain the fee to land is conferred by a canal franchise authorizing corporators to take and use such lands, waters, and materials as may be necessary to construct and maintain the proposed works. *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23.

When compensation was not allowed by the viewers for taking the fee to land for a proposed canal no such fee could be taken. *Ibid.*

The state, by purchasing a canal for the location of which an easement only was acquired, but which by the statute authorizing the purchase was declared to be a part of another system and subject to the laws governing it, under which the state was declared to have a fee simple, acquired only an easement as to the lands over which such purchased canal was located, so that, on its subsequent abandonment, the easement is determined and the right to the possession of the land reverts to the owner of the freehold. *Corwin v. Cowan*, 12 Ohio St. 629.

Land condemned under powers of eminent domain for the erection of a canal remains the property of the same owners, but subject to the easement of the canal. *Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.* 11 Leigh, 42, 36 Am. Dec. 374.

A canal corporation acquires only a right of way across a public highway, and, so long as it has a full, free, and unobstructed use and enjoyment of that right, it suffers no injury, and has no right to equitable redress. *Lehigh Valley R. Co. v. Orange Water Co.* 42 N. J. Eq. 205, 7 Atl. 659.

A state acquires only a conditional fee in land condemned for canal purposes, depending upon the construction of the canal, where no compensation is made, or the benefits are set off against the damages; and, upon abandonment of the work, the fee reverts to the property owners, and does not pass to the grantees of the state. *Kennedy v. Indianapolis*, 11 Biss. 13, Fed. Cas. No. 7,703.

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are some things that we do not clearly understand, and yet we must decide the case as it is presented to us, as was recently said in *Trimmer v. Gorman*, 129 N. C. 161, 39 S. E. 804. It seems strange that the damage to the crop should amount to \$353 for the year 1899, and to \$226 for the year 1900, while the permanent damage to the land is only \$100; and yet the jury have so found under proper instructions and upon substantial evidence. There are some expensive crops of much greater value than the land on which they are raised. It does not appear when or how the original right of way was acquired by the defendant, nor what was its extent. Under the circumstances, we must presume that it was a mere easement, and that it was limited to the extent of its use prior to the widening of the canal in 1898. We do not

A grant, under a deed, of the "liberty to dig a canal" imports no more than a right to separate and remove the soil for the purposes of the canal, and does not pass title to the grantees, of the soil and stones excavated. *Lyman v. Arnold*, 5 Mason, 195, Fed. Cas. No. 8,626.

But a state legislature has the power, in the exercise of its right of eminent domain, to take a fee-simple title to lands appropriated for canal purposes, provided just compensation is made therefor; and the courts have no power to question the necessity for acquiring such an interest. *Indianapolis Waterworks Co. v. Burkhardt*, 41 Ind. 364.

When statutes authorized the taking of land for a canal in perpetuity only, the state acquired the absolute title, and may dispose of the land in fee. *Wyoming Coal & Transp. Co. v. Price*, 81 Pa. 156.

The state acquires an absolute estate in perpetuity to lands taken and appropriated to permanent use and occupation for a state canal. *Pennsylvania & N. Y. Canal & R. Co. v. Billings*, 94 Pa. 40.

Land taken under powers of eminent domain for a canal are acquired in perpetuity, and not for an easement. *Delosier v. Pennsylvania Canal Co. (Pa.)* 9 Cent. Rep. 632, 11 Atl. 400.

The interest acquired by the state in the land occupied by the Wabash & Erie canal is the fee-simple title, and not a mere easement. *Cromie v. Wabash & E. Canal*, 71 Ind. 208.

Under the statutes as they existed in 1826, affecting the establishment of the canal system of the state, the state acquired an unrestricted title in fee to lots which it took possession of for canal purposes, which had been conveyed to it "in aid of the canal funds of said state." *State v. Snook*, 53 Ohio St. 521, 42 N. E. 544.

If for good consideration a grantor give, grant, cede, and forever transfer to the commonwealth all his lands and the waters thereon needed for the use of a canal, and the agents of the state are authorized and directed to secure the absolute title to such lands, the state acquires a fee-simple estate in the lands, and the estate does not terminate when such use terminates. *Craig v. Allegheny*, 53 Pa. 477.

The commonwealth having taken land in perpetuity for its canal, it has an absolute estate which cannot be defeated or impaired by the owner's failure to make application for assessment of damages within the time limited by law. *Robinson v. West Pennsylvania R. Co.* 72 Pa. 316.

A fee simple absolute, and not a conditional fee, was taken by the state in lands condemned for canal purposes, under a statute authorizing

mean to say that there is any presumption of a right of way in a foreign corporation as such, but that, the existence of the right being practically admitted, the presumption arises as to its extent. The defendant introduced no testimony, but objected to nearly everything that was said or done, except the issues, and at the close of the evidence made the usual motions for nonsuit and direction of the verdict. These were properly refused, as there was ample evidence to go to the jury.

The ditch in question appears to have been constructed by the defendant at some past time, adjoining and parallel to its canal, for the purpose of catching and carrying the "sweat," or water percolating through the banks of the canal, and also as an outlet for the surface water dammed up by the construction of the canal. This ditch seems to

have accomplished its double purpose until the year 1898, when the defendant deepened and widened its canal, and in so doing threw mud and sand into the ditch to such an extent as to practically obstruct the flow of water. Among other things, the plaintiff testified that he cut part of the ditch in June, 1900, at a cost to him of \$50; that he did not complete it; that it would cost \$200 to cut the whole ditch; that, if he had cut the whole ditch, it would not have stood, as every big rain would wash the sand and mud in it and fill it up, which was piled on the banks by the defendant; that the only way to keep a ditch there, since the defendant has piled up the mud and sand on the bank, would be to log it; and that he did not know what it would cost to do so. The plaintiff was referring to cleaning out the old ditch, and by "logging" we presume he meant

their appropriation for that purpose, and providing that the canal commissioners should pay the damages to be assessed and appraised, and the "fee simple" of the premises so appropriated should be vested in the state, when the only constitutional conditions requisite to the exercise of the power were the needs of the public and compensation to the owner, the former of which appears from the fact that the improvement was intended to be of permanent duration in view of the nature and character of the work contemplated and the meager means of transit existing, and subsequent acts relating to the same subject-matter show an intention to take such title, and the vesting of such title was not prevented by failure to actually pay compensation to the owner when provision was made therefor, and, although the owner had notice, he failed to apply therefor within the time limited by the statute; and, therefore, such lands do not revert to the original owner on their transfer to private individuals for private uses by a city to which they were transferred by the state for highway and sewerage purposes. *Malone v. Toledo*, 34 Ohio St. 541.

The state acquired a fee-simple title to lands taken for the construction of a canal, where, although the statute under which the proceedings were had is silent as to the interest acquired by payment of the award, yet, taken in connection with un repealed provisions of a prior statute which expressly vested the fee in the state, and the fact that the entire legislation of the state relative to the canal has been based upon the theory of its complete ownership, such statute will be construed as intending the taking of a fee-simple title, and not a lesser estate. *Indianapolis Waterworks Co. v. Burkhart*, 41 Ind. 384.

The state acquired a fee-simple title, and not a mere easement, to land conveyed and appropriated for canal purposes under an act authorizing the canal commissioners to enter upon and take possession of and use all lands, waters, etc., necessary for the construction of the canal and other works connected therewith, doing no unnecessary damage, and to receive from the owners thereof such grants and conveyances as may be proper and competent to vest a good title thereof in the state, and upon the payment to such owners as do not voluntarily make conveyances, of the damages awarded, based upon the excess of damages over and above benefits accruing from the canal, declaring the fee-simple title to be vested in the state. *Nelson v. Fleming*, 56 Ind. 310.

A conveyance to the state by the owner in fee simple will be presumed from a peaceable

possession by the state and her grantees under color of title for forty years, of land appropriated and used as parcel of, and appurtenant to, a canal, under a provision in the statute under which the canal was constructed authorizing the canal commissioners to receive on behalf of the state, from the owners of land appropriated, "such grants and conveyances as may be proper and competent to vest a good title thereof in the state." *Ibid.*

Title to a parcel of land necessary to the use of a canal will pass by grant of the canal and all rents arising out of it, and the water power "and the appurtenances thereto belonging, including its banks, margins, towpaths, side cuts, feeders, basins, right of way, dams, water power, structures, and all the appurtenances thereunto belonging." *Sheets v. Selden*, 2 Wall. 177, 17 L. ed. 322.

A canal company authorized by its charter to construct a navigable canal with all necessary appendages, and, whenever lands and waters necessary therefor cannot be obtained by voluntary donation or fair purchase, "to enter upon, take possession of, and use," all such lands and streams as may be necessary for such purpose, cannot acquire by appropriation proceedings more than an easement in the lands or streams appropriated; such proceedings cannot vest it with the fee thereto. *McCombs v. Stewart*, 40 Ohio St. 647.

An easement acquired by a canal company of the right to flow lands cannot be enlarged by implication into an estate beyond the corporate existence of the corporation; and, when the corporation ceases to exist, the property reverts to the owner of the soil relieved of the easement acquired by appropriation proceedings. *Ibid.*

When land taken for a canal vests by law in the proprietors of the canal, their heirs and assigns forever, as tenants in common in proportion to their respective shares, the owner of the reversionary interest is presumed to lose nothing, although the land never reverts. *Bass v. Roanoke Nav. & Water Power Co.* 111 N. C. 439, 19 L. R. A. 247, 16 S. E. 402.

An owner of mines adjacent to, but not under, a canal does not come within a statute reserving to the owner of lands in, upon, and through which the canal is to be made, the mines and minerals therein, and authorizing the owners to work such mines and minerals not thereby injuring the canal; and the owner is not, therefore, under any statutory liability toward the canal company in working his mines. *Chamber Colliery Co. v. Rochdale Canal Co.* [1895] A. C.

building a wall of logs against and as high as the embankment of the canal. This would evidently have been a work of considerable magnitude and expense, as the canal bounded the plaintiff's land for $\frac{3}{4}$ of a mile; and its necessity was probably the foundation for the issue of permanent damages, which was submitted without objection. Such an issue is, in effect, a statutory condemnation of the additional easement, and cannot be demanded by either party where the injury can be remedied at reasonable expense without interfering with the operation of the defendant company in the performance of its public duties. *Lassiter v. Norfolk & C. R. Co.* 126 N. C. 509, 36 S. E. 48; *Raleigh & A. Air Line R. Co. v. Wicker*, 74 N. C. 220. Where the issue is submitted by consent, it is equivalent to a grant of the easement, the value of which alone remains to be determined by the jury.

564, 73 L. T. N. S. 258, 64 L. J. Q. B. N. S. 645, 11 Reports, 264.

d. Compensation.

1. In general.

An appropriation of water to the injury of a lower mill privilege constitutes a "taking" for which compensation must be made by a canal company entering thereon under its power to purchase mills, mill ponds, water, water courses, or real hereditaments, or, in default of purchase, to pay the awards of a jury therefor. *Union Canal Co. v. Stump*, 81* Pa. 355.

A canal company is a private corporation and liable as such for injuries caused to a riparian owner by diversion of water for canal purposes. *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275, Fed. Cas. No. 12,139.

A canal company constructing a dam across a river for the purpose of furnishing water for its canal, whereby adjoining owners are deprived of the use of the water, is not relieved from liability by reason of the fact that it was acting in a careful and prudent manner in accordance with its charter, and under the supervision of the canal commissioners. *Denslow v. New Haven & N. Co.* 16 Conn. 98.

The state is liable to lower owners if it takes the water of a lake for supplying a canal. *Lakeside Paper Co. v. State*, 15 App. Div. 169, 44 N. Y. Supp. 281.

The owner of land bordering on a nonnavigable river, whose title extends to the thread of the stream, is entitled to damages for a diversion of the waters thereof by one above, to supply water for a canal. *Illinois & M. Canal v. Haven*, 10 Ill. 348.

The conveyance of land after the completion of a canal across it, but before the payment of the damages, will give the grantee a right to enforce payment of the damages where the title to the land does not, under the statute, pass to the public until the damages are paid. *Brinckerhoff v. Wemple*, 1 Wend. 470.

A town is not within the meaning of a statute requiring a canal company to pay damages to the owners of land through which the canal passes, as regards a highway which it is bound to maintain, but of which it does not own the fee. *Millbury v. Blackstone Canal Co.* 8 Pick. 473.

That a dam, by reason of the manner of its maintenance, may be a nuisance, merely subjects the riparian owner to the penalties and liability attaching to its maintenance in such manner, and does not deprive him of the right 61 L. R. A.

Two important questions are presented to us: (1) Has the plaintiff been injured by the legal negligence of the defendant? (2) If so, were such damages included in the original condemnation of the defendant's right of way? In the present case the plaintiff occupies the singular position of being the upper and lower landowner by virtue of the same piece of land. The canal is constructed across the lower end of the plaintiff's farm, thus damming up the natural outlet for his surface water, while the canal itself is so much higher than the surrounding land as to cause its percolating waters to run down upon the defendant. It appears that the water soaking through the banks of the canal was brought there by artificial means. This is diversion, and it is now well settled that "neither a corporation nor an individual can divert water from its natural course so as to damage another. They may

to compensation for interference with his right to the use of the water upon the diversion thereof for canal purposes. *Walker v. Board of Public Works*, 16 Ohio, 540.

Under the New York statute, the appropriation of land for a canal by authorized agents of the state conferred a right to enter to prosecute the work before the damages were paid. *Baker v. Johnson*, 2 Hill, 342.

A statute authorizing canal commissioners or their agents to appropriate private property for the purposes of a public canal, and providing for a subsequent compensation for the property so applied, is not a violation of the constitutional clause providing that an owner's private property shall not be taken for public use without the consent of his representatives, or without a just compensation being made therefor, and is a valid law. *Rubottom v. McClure*, 4 Blackf. 505.

Under the statute chartering the Morris Canal Company, the right to enter upon and occupy lands before agreeing with the owner upon the compensation or resorting to condemnation proceedings was subject to the right of the owner to sue for damages. *Kough v. Darcey*, 11 N. J. L. 237; *Gridley v. Darcey*, 11 N. J. L. 292.

The charter of that company is not unconstitutional, as adequate provision is made by contemplated condemnation proceedings, or an action for damages in default of their institution. *Den. v. Morris Canal & Bkg. Co.* 24 N. J. L. 587.

A statute containing ample provision for the cheap and easy assessment of individual damage and the payment of the amount in money, for the taking of lands in the construction of a canal thereby authorized, although compensation is not required to be paid before the work can progress, is in conformity with the Ohio Constitution, declaring private property inviolate, but always subservient to the public welfare, provided compensation in money be made to the owner. *Bates v. Cooper*, 5 Ohio, 115. *Wright, J.*, says: "We are not advised that the courts have ever held that compensation must be actually assessed and paid over to the owner before the public work can progress, whether desired or not."

The possession and use of land, taken by a canal company by virtue of its charter as a mill site to be used in connection with the hydraulic works of the canal, before compensation has been made therefor, are upon condition subsequent that it will not make default with respect to the payment as prescribed by the charter,

increase and accelerate, but not divert." *Hocutt v. Wilmington & W. R. Co.* 124 N. C. 214, 32 S. E. 681; *Mizzell v. McGowan*, 125 N. C. 439, 34 S. E. 538, 129 N. C. 93, 39 S. E. 729; *Lassiter v. Norfolk & C. R. Co.* 126 N. C. 509, 36 S. E. 48. That a lower owner cannot obstruct a natural water way so as to flood the lands above him has long been settled. *Pugh v. Wheeler*, 19 N. C. (2 Dev. & B. L.) 50; *Overton v. Sawyer*, 46 N. C. (1 Jones L.) 308, 62 Am. Dec. 170; *Cagle v. Parker*, 97 N. C. 271, 2 S. E. 76; *Ridley v. Seaboard & R. R. Co.* 118 N. C. 996, 32 L. R. A. 708, 24 S. E. 730; *Raleigh & A. Air Line R. Co. v. Wicker*, 74 N. C. 220; *Porter v. Durham*, 74 N. C. 767.

The extent of the defendant's right of way, and how and when acquired, does not appear, nor is it clear whether the ditch is on the land of the plaintiff or defendant; but the

presumption of an easement carries with it the counter presumption that the fee of the land is in the plaintiff. The plaintiff testified that it was dug by the defendant, but that "said ditch was also the lead ditch, and the only means or way of draining about 135 acres of his land." Thus it would appear, either that the ditch is in the same place as the old water way, or that the water way running in the same general direction was closed up by the construction of the canal, and the ditch substituted therefor. In either event, the ditch would be considered as the water way, the obstruction of which would render the defendant liable for the resulting injury. We are now treating the ditch as the "lead" ditch of the plaintiff,—a service it rendered in addition to being the "sweat" ditch of the defendant. Considered in its latter character, the negligence of the

nor with respect to the erection of the works for which the land is taken. *Hankins v. Lawrence*, 8 Blackf. 266.

A grant by the state, in compensation for injuries caused to a mill owner by the taking of the water of the stream for a canal, of the right to draw water from the canal to operate the mill provided that the commissioners may from time to time modify or wholly revoke the grant, will give the mill owner no claim against the state for damages in case the right is revoked, although the revocation is rendered necessary by the enlargement of the canal, so that the water is all needed for its use. *Dermott v. State*, 99 N. Y. 101, 1 N. E. 242.

Where a canal company is required to deposit a fund with the state treasurer to be applied by the court to the payment of any damages caused by the laying out, construction, and maintenance of the canal, the fund is for the benefit of all persons having claims; and, if it is insufficient to pay all the claims in full, it should be divided ratably between them, for which purpose all persons interested should be brought before the court. *Crowell v. Cape Cod Ship Canal Co.* 164 Mass. 235, 41 N. E. 290.

A deposit of government bonds accepted by the state treasurer is a compliance with a provision in the charter of a canal company that it shall not take any property until it has deposited with the state treasurer a certain number of dollars. *Briggs v. Cape Cod Ship Canal Co.* 137 Mass. 71.

In *Bradshaw v. Rodgers*, 20 Johns. 103, it was held that the state, in prosecuting the work of a canal in such a manner as to require the alteration of a turnpike, cannot appropriate land for the new road without compensating the owner therefor; and, therefore, the officers doing the work are guilty of trespass in entering upon the property before compensation is made.

But that case was reversed in 20 Johns. 735, where the court held that the canal commissioners were not liable in trespass for entering upon the lands to construct such road prior to the making of the compensation,—especially since the statute permitted the commissioners to enter upon and use, all and singular, any lands, waters, and streams necessary for the protection of the improvements intended by the act, and also provided compensation for damages for land taken for any of the purposes aforesaid.

The owner of land condemned for canal purposes is entitled to an injunction restraining the construction of the canal through such land, where no payment has been made of the value. 61 L. R. A.

tion fixed in the condemnation proceedings, and irreparable injuries will result to the owner unless the use of the property is restrained, under a statute providing for the condemnation of lands for canal purposes upon condition that the company shall pay therefor the valuation fixed by the judge, and that the title shall pass only upon such payment; and the right to the injunction is not affected by the character or form of any security, by judgment or otherwise, for the payment thereof, given by the company or taken by the owner, where such security fails and remains unpaid. *Harness v. Chesapeake & O. Canal Co.* 1 Md. Ch. 249.

Equity will not restrain a canal company from taking land prior to compensation therefor before the coming in of the answer, when the corporation acts under a valid charter, and it does not appear that constitutional rights are being violated. *Elmslie v. Delaware & S. Canal Co.* 4 Whart. 424.

The right of action at law preserved to one whose lands or rights are appropriated by the Morris Canal Company without first compensating him therefor in case condemnation proceedings are not instituted, is but another means of obtaining by action the damages which might have been awarded in the condemnation proceedings, and, therefore, it may be brought any time before the user by the company has ripened by prescription into an adverse title, and it is not barred by the statute of limitations as applied to debt and to trespass. Such an action, too, is an entirety, to be brought once for all for full compensation for the injury suffered; hence, a mill owner, whose mill is rendered powerless by back water from a canal dam built by the company, cannot recover of the company's lessee, nor have successive actions for recurrent damages. *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605; *McFarlan v. Morris Canal & Bkg. Co.* 44 N. J. L. 471.

Where persons who have contracted to procure the right of way and construct a canal for a corporation entered into an agreement, for purposes of their own, with a landowner to permit the construction of the canal over his property, which is out of the line surveyed for the canal, in consideration of benefits to him, without paying him any money damages, which contracts are afterwards rescinded,—the canal company cannot use the land without paying for it, on the ground that the right was acquired by such contract, since the landowner's agreement amounted to no more than personal license to the contractors. *Cobb v. Hampshire & H. Canal Co.* 18 Pick. 340.

Under a constitution requiring compensation

defendant was not so much in stopping up the ditch, as in its failure to perform the positive duty resting upon it of taking care of its own percolating waters. In the case at bar, it appears that the defendant owed the duty to the plaintiff in respect to the ditch in consequence of its closing the original water way, and hence it does not come within the doctrine discussed in *Porter v. Armstrong*, 129 N. C. 101, 39 S. E. 799. At times, different principles come so near together in their practical application that it is almost as important to state what the court does not decide as what it does decide. The issues made no distinction as to the damage resulting from the ponding back of surface water and the flooding by percolating waters; and as there was no exception to the issues, and no tender of additional issues, we presume the defendant was content to regard

them as on an equal footing. We deem it better to discuss the general principles applicable to the facts of this case, than to consider separately the 23 exceptions filed by the defendant.

The defenses relied on are practically the following: (1) That the damages recovered were contemplated in the original condemnation of the right of way; (2) that there is no evidence of negligence in the widening of the canal in 1898; (3) that the plaintiff cannot recover more than it would have cost to remove the cause of injury by cleaning out the ditch; (4) that the plaintiff cannot recover for the crop of 1900. We do not think that any of these defenses can be maintained, in view of the evidence and the resulting verdict of the jury. It is well settled that no damages are contemplated in the original condemnation, except such as necessarily

for property taken for public use, the right to enter upon and use the property is complete as soon as the property is actually appropriated under authority of law for a public use; but the title does not pass until compensation is made, so that, in case compensation has not been made, the property cannot be sold to a private individual so as to defeat the rights of the former owner. *Kennedy v. Indianapolis*, 103 U. S. 599, 26 L. ed. 550.

Estoppel; water.

A landowner may be estopped from reclaiming his land by permitting a canal company to go upon and construct a canal across it at the outlay of a large amount of money. *Pleson v. Cincinnati & W. Canal Co.* 2 Disney (Ohio) 100.

The right to damages for injuries by the construction of a canal may be lost by laches. *Forward v. Hampshire & H. Canal Co.* 22 Pick. 462.

A state legislature has the power to limit the time within which claims for damages for private property taken for the construction by a private corporation of a canal shall be asserted. *Null v. White Water Valley Canal Co.* 4 Ind. 431.

The state may provide that failure to make claim for compensation for land taken for a state canal within one year shall vest the title in the state free from the obligation to make such compensation. *Rexford v. Knight*, 11 N. Y. 308.

A landowner, damaged by the construction of a canal through his lands, must make his claim for damages within the time prescribed by the statute under which such canal was constructed, and is barred from presenting it thereafter. *White Water Valley Canal Co. v. Ferris*, 2 Ind. 331.

A claim for property taken for the New York canals must be presented within a year. *People ex rel. Buell v. Canal Appraisers*, 9 Barb. 496; *Stewart v. State*, 105 N. Y. 254, 11 N. E. 652; *Mark v. State*, 97 N. Y. 572.

Under the New York statute limiting the time within which to file a claim for property taken for canal purposes, the time does not begin to run until the quantity required has been ascertained and its boundary lines, described by the map which the commissioners are required to file, are marked on the ground by monuments; and, as to land temporarily occupied, the time does not begin to run until the use of the land has ceased. *Yaw v. State*, 127 N. Y. 190, 27 N. E. 829.

Failure on the part of a landowner to file his application for damages for land appropriated 61 L. R. A.

by the state for canal purposes within the time limited by a statute relating to the construction of such canal will vest title to such land in the state as thoroughly and completely as if damages had been assessed and paid. *Nelson v. Fleming*, 56 Ind. 310.

The two years' limitation provided by statute for the presenting of claims against canal trustees for damages occasioned by the taking of land or materials for the construction of a canal does not apply to damages to an owner's land from overflow occasioned by the action of the trustees in raising a dam across a river and cutting waste ways through embankments. Such damages belong to the class of consequential damages recoverable in an action on the case. *Wabash & E. Canal v. Spears*, 16 Ind. 441, 79 Am. Dec. 444.

In an action against a canal company for judgment upon an award of damages for injury to a landowner by reason of the construction of the canal over his land, the fact that a deed of release had been executed and delivered to the company by the grantor of the present owner, releasing it from the same damages caused by the award, but, by reason of its having been lost or mislaid, the company had no knowledge of its existence until after the time for appeal from the award had elapsed, and that its existence was fraudulently concealed by the landowner,—is not a defense to a recovery. *White Water Valley Canal Co. v. Henderson*, 3 Ind. 3.

The diversion of water by a canal company through the improper construction of a weir, which does not permit the surplus water to return through it to the water course from which it was taken, is not continuous within the meaning of the statute of limitations providing that actions shall be commenced within a specified period after the act committed unless there be a continuation of damage, where the damage inflicted is periodical, although the defective condition of the weir is continuous. *Blake-more v. Glamorganshire Canal Co.* 3 Younge & J. 60.

The court will not grant a mandamus to compel a canal company, pursuant to the provisions of an act of Parliament, to proceed to an assessment of the value of the land taken for the purposes of its canal, and also of the recompense to be made for the damages thereby inflicted, if the parties interested in the land do not make their application to the court within a reasonable time after the land is taken by the company,—especially if the parties have another remedy by indictment. *Rex v. Stainforth*

arise in the proper construction of the work. Any other rule would be contrary to public policy, as well as private right, and could never receive the sanction of the courts. The rule, with its underlying principles, as applicable to the case at bar, is clearly stated in *Raleigh & A. Air Line R. Co. v. Wicker*, 74 N. C. 220, 227, as follows: "In the first of these cases [the obstruction of a natural or artificial drain way] it is the duty of the company in constructing its roadbed to leave a space sufficient for the discharge of the water through its accustomed drain way, whether natural or artificial. If it fails to do so, any owner whose land is injured, whether he be one a part of whose land is taken for the road or not, may compel the company to discharge its duty by opening the drain to its previous capacity. And so, if the obstruction causes a nuisance, the corporation may be compelled to abate it. If the damage to the land of the defendant

from this cause should be assessed to him, the corporation would acquire against him a right to pond his land perpetually, but not against any adjoining or other person injured, or against the public if it creates a nuisance. These might deprive the corporation of its use of the defendant's lands by reason of their right to compel it to open the drain. Under a rule which should subject the corporation to damages in cases of this sort, it would pay for a right which it could never get. And even if the ponding were entirely on the land of the defendant, so that this result would not follow, and the corporation would obtain a perpetual right to flood the land, yet it is contrary to public policy to give to one not the owner of the soil a right to reduce any land to perpetual uselessness without necessity and without a corresponding benefit to any one." This case has been repeatedly cited with approval, and on this point especially in *Broun v. Caro-*

& K. Canal Co. 1 Maule & S. 32, 1 Revised Rep. 389.

Where the owner's intention to allow his lands to be used for a public canal is otherwise clearly proved, the question as to the length of time of occupation for such public highway will not be important. In such a case the use of the way for comparatively a few years is sufficient to establish the right of the public. *Piereson v. Cincinnati & W. Canal Co.* 2 Disney (Ohio) 100.

Permitting a canal company to take possession of land through his property, and to construct a canal thereon, and to a continuous use of the same thereafter for a period of several years, will be deemed an original dedication of said land by its owner for the purposes of a public highway, and he will be estopped from claiming the right of possession thereof, and can assert only his right to compensation, even though he claimed damages from the start, and frequently thereafter insisted upon said company settling with him. *Ibid.*

But a canal and basin, although designated as such on the original plan of a city, will be considered as private property, where they were used and sold by the proprietors. *Carrollton R. Co. v. Municipality No. Two*, 19 La. 62.

2. Amount.

Land actually taken for the construction of a canal must be paid for independent of any advantage that may result to the owners thereof from the improvement; but benefits are to be set off against such other damages as will result to the owners of the residue in consequence of the taking of a part thereof. *Willamet Falls Canal & Lock Co. v. Kelly*, 3 Or. 99.

A statute allowing benefits to be set off against damages to be assessed for the taking of property for a state canal is not unconstitutional. *Rexford v. Knight*, 15 Barb. 827.

If the construction of a canal shall be held to be sufficient compensation for the taking of the land on which it is placed, it must be a complete improvement for public navigation, and it is not sufficient to complete it a portion of the way for that purpose, and over the property taken merely for use as a mill race. *Kennedy v. Indianapolis*, 103 U. S. 599, 26 L. ed. 550.

No damages are contemplated in the original condemnation of land for an artificial waterway except such as necessarily arise in the proper construction of the work. *Mullen v.* 61 L. R. A.

Lake Drummond Canal & Water Co. 130 N. C. 496, 41 S. E. 1027.

Damages in gross for land taken by a canal company under powers of eminent domain cannot be awarded by a jury when the law requires it to value the land taken in perpetuity, to value or ascertain the damages the owner shall sustain by cutting a canal through the land, and the damages for the partial and temporary use and occupation of such land. *Chesapeake & O. Canal Co. v. Hoyer*, 2 Gratt. 514.

A provision in the charter of a canal company authorized to condemn land, that the jury, in assessing damages, may consider the actual benefit which will accrue to the owner from the construction of the canal, does not infringe the 5th Amendment of the United States Constitution, providing that private property shall not be taken for public use without just compensation. *Chesapeake & O. Canal Co. v. Key*, 3 Cranch C. C. 599, Fed. Cas. No. 2,649.

When assessors of damages caused by the construction of a canal are to consider the quantity and quality of the land, and both the inconveniences and advantages which the owner of the land will derive from the construction of the canal for the use for which his land is condemned, those inconveniences and advantages are to be considered which peculiarly and exclusively affect that parcel of land, and not those which the owner may derive in common with the public. *James River & K. Co. v. Turner*, 9 Leigh, 818.

The measure of damages in proceedings by a canal company to condemn land and a water right is the market value of the premises at the time of such proceedings and the direct loss resulting plainly and immediately by the making of the canal thereon; and possible future value or profits in the event of large investment and expenditures for the development of the water right in combination with other water power cannot be considered. *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479.

In estimating the damages from the appropriation of land for the construction of a canal, the jury should take water power into consideration, if the appropriation carries with it any water power, or renders it less valuable, or interferes with the owners' use thereof to which they would be otherwise entitled. *Willamet Falls Canal & Lock Co. v. Kelly*, 3 Or. 99.

The benefits which the jury are authorized to take into consideration in a condemnation proceeding to assess the damages a landowner has sustained by the construction of a canal over a

lina R. Co. 83 N. C. 128, and *Knight v. Albemarle & R. R. Co.* 111 N. C. 80, 15 S. E. 929.

We have already said there was evidence of negligence to go to the jury. There is no evidence tending to show that the ditch could have been permanently repaired by the plaintiff at a cost less than his injury, even if it had been his duty to do so. On the contrary, the plaintiff testifies that it would have cost him a large amount to clean out the ditch, and that he could not have kept it clean without logging the bank of the canal, which would evidently have entailed great expense. This is not like a fence on the plaintiff's own land, which he might have permanently repaired at little trouble or expense. The defendant not only failed to perform its positive duty of keeping the ditch open, but caused the injury by a direct act of negligence or of wilful indifference. As this action is not simply for the recovery of

yearly damages, but includes a legal condemnation of the resulting easement, it is proper that all damages should be included. *Beach v. Wilmington & W. R. Co.* 120 N. C. 498, 26 S. E. 703; *Lassiter v. Norfolk & O. R. Co.* 126 N. C. 509, 36 S. E. 48. While chapter 224 of the Public Laws of 1895 applies only to railroads, yet, as this court has extended the rule of permanent damages to water companies and telegraphs, under the principle laid down in *Ridley v. Seaboard & R. R. Co.* 118 N. C. 996, 32 L. R. A. 708, 24 S. E. 730, we see no reason why it should not equally apply to canals. *Geer v. Durham Water Co.* 127 N. C. 349, 37 S. E. 474; *Phillips v. Postal Tele. Cable Co.* 130 N. C. 513, 41 S. E. 1022. As the issue of permanent damages was submitted without objection, we must assume its propriety, under the circumstances of this case.

The judgment of the court below is affirmed.

portion of his land, under a statute providing that they shall take into consideration the benefits resulting to such person from the construction of the works, are those resulting to him from the enhanced value of the same body of land a part of which has been appropriated for the canal, and does not embrace the enhanced value of other land belonging to him not connected with or contiguous to that appropriated. *State v. Digby*, 5 Blackf. 543.

In assessing the damages to a landowner by the construction of a canal over his land, separating that part on which his dwelling house is situate from the rest of the tract, and also overflowing a part, the expense of building a bridge over the canal so as to afford better access from one part to the other, and the cost of draining off the overflowed water, may be taken into consideration. *State v. Beackmo*, 6 Blackf. 488.

In estimating the damages to the lands of an owner by the construction of a canal over the same, the jury are to ascertain the value of the land taken for the canal at the time it was taken, and also the enhanced value, at that time, of the land adjoining that taken by reason of the location of the canal there, for the purpose of ascertaining which, it is competent to show how the canal was progressing when the land was taken, and what appropriations of money had been made for its completion. *Vanblaricum v. State*, 7 Blackf. 209.

The jury, in estimating the value of riparian land through which a right of way was condemned for the use of a canal company, may also take into consideration all damage which the owner of the land would sustain in times of freshet from back water caused by the construction, as part of the company's works, of a dam across the river, which at the time of the condemnation of his land had been planned and projected and the site therefor condemned, although it was not yet erected; and will be presumed, where no objection is made on the return of the inquisition, to have taken such damages into consideration, so as to defeat a subsequent action from overflow by back water from such land. *Chesapeake & O. Canal Co. v. Grove*, 11 Gill & J. 398.

Possible or probable future profits which might be made in their business by tenants of part of premises sought to be condemned by a canal company, if left unmolested in the enjoyment of the premises for the balance of their term, are too uncertain and variable to serve as a measure of the damages to which they are 61 L. R. A.

entitled; but only direct damages sustained by them can be considered. *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479.

In *Jubb v. Hull Dock Co.* 9 Q. B. 443, 3 Railway Cas. 795, 11 L. J. Q. B. N. S. 403, 11 Jur. 15, it was held that the statute providing for compensation for lands damaged by the construction of a canal is broad enough to include compensation to a landowner for loss which he would sustain by having to give up his business until he could obtain other suitable premises for carrying it on.

One conveying land to the state for canal purposes, part of the consideration for which was an agreement by its agents that a certain amount of surplus water should be turned into a tail race to be constructed by the grantor, is entitled, under a private act permitting the maintenance of an action for damages from breach of a contract, to recover for the construction of the race between the points of leaving and being returned to the main channel, and the value of the land dedicated to the state and destroyed; but no recovery can be had for the depreciation in value of real estate along the line of the race, purchased with a view to speculation. *Seely v. State*, 11 Ohio, 501, Affirmed on rehearing in 12 Ohio, 496.

A state is not liable for damages of a consequential character in the exercise of rights of eminent domain, as the "taking" is to be construed in its natural significance. *West Branch & S. Canal Co. v. Mulliner*, 68 Pa. 357.

Unless authorized by law, damages for injury to a water right cannot be recovered if consequential to the construction of a state canal. *Delaware Div. Canal Co. v. McKeen*, 52 Pa. 117.

But damages consequential upon the erection of a canal may be recovered when the viewers are required to add to the compensation for land actually taken those damages appearing upon a fair and just comparison of the advantages and disadvantages resulting from its construction. *Hoffer v. Pennsylvania Canal Co.* 87 Pa. 221.

Under the New York act of 1817, for the construction of a public canal, an appraisal of damages may be made for injuries caused by the entry upon adjoining lands and destroying crops, removing fences, and appropriating materials for the prosecution of the work, so that the agents of the state will not be liable in trespass for so doing. *Wheelock v. Young*, 4 Wend. 648.

Upon an assessment of damages for taking land for canal purposes, there must be included

all physical injuries resulting from a careful and proper construction of the work, whether readily apparent or not easily foreseen; and if any of such damages be either not claimed through inadvertence or mistake, or erroneously excluded by the court from consideration, they cannot afterwards be recovered in a subsequent action. *Van Scholck v. Delaware & R. Canal Co.* 20 N. J. L. 249.

8. How paid.

The assessment and payment of damages for injuries to real estate in constructing a canal must be in gold and silver. It is a "debt" in the sense of that word as used in the Constitution of the United States. *State v. Beackmo*, 8 Blackf. 246.

So, a statute which required all the expenses of constructing the work upon a canal to be paid in canal script will not be construed as extending to the compensation to be made for damages to real estate taken for the canal. To be so construed would make the act unconstitutional. *Ibid.*

But it is no objection to an act authorizing the taking of private property for the construction of a canal that payment of the damages assessed such landowners is required to be made in certain script, where by a subsequent act other means for the payment of such damages are provided. *Lucas v. Hawkins*, 8 Blackf. 337.

The canal laws providing for internal improvements by navigable canals and the taking of land for that purpose without the consent of the owner or compensation made do not authorize the canal commissioners to compensate mill owners for the damages they have sustained by the construction of the canal and supplying it with water from the river on which their mill is located, compensation for which is required by the Constitution to be in money, by appropriating the lands of another without his consent for the construction across it from the canal of a race solely for the benefit of the mill owners, and not for the protection of the canal, the construction of which in connection with waste weirs in the canal is authorized by statute on the release of damages by the mill owners, but in which no agreement is made by the state to procure the right of way for such race; and the owner of the land is entitled to an injunction restraining the construction of the race. *McArthur v. Kelly*, 5 Ohio, 139.

e. Remedy.

1. In general.

The owner of land condemned for a canal may be limited by the legislature to the process prescribed by law for the recovery of his damages. *North Branch Canal Co. v. Hlreen*, 44 Pa. 419.

Compensation for injury caused by raising a dam for purposes of obtaining water for a state canal is to be sought in the usual way, and no action will lie against the state officers for acting under the authority of the statute. *Shaver v. Eldred*, 114 N. Y. 236, 21 N. E. 411.

The provision of a special mode for the assessment of damages for injuries caused by the construction of a canal will supersede the common-law remedies. *Stevens v. Middlesex Canal*, 12 Mass. 466.

After an entry upon land for the construction of a state canal under authority of the canal commissioners, the appropriation of the land is complete, so that future acts done in the construction of the canal will give no right of action in the former owner, although the title does not vest until the compensation is ascertained and fixed. *Turrell v. Norman*, 19 Barb. 263. 61 L. R. A.

A landowner cannot maintain ejectment for nonpayment of damages for land taken for a canal, when the canal company has the title to the land for a highway forever subject to an undisputed and indefeasible first mortgage on the canal works in the state. *North Branch Canal Co. v. Hlreen*, 44 Pa. 419.

The remedies given an owner whose land has been taken possession of and used by the Morris Canal Company without first making compensation are limited to the condemnation proceedings contemplated by the charter at the instance of the company, or an action for damages. Ejectment cannot be maintained. *Den. v. Morris Canal & Bkg. Co.* 24 N. J. L. 587.

A person having an easement over lands taken for construction of a canal cannot maintain trespass, but must proceed under the act authorizing the commissioners to purchase lands, and directing them to make compensation for all damages done. *Thickness v. Lancaster Canal Co.* 4 Mees. & W. 472, 8 L. J. Exch. N. S. 49, 3 Jur. 11.

The common-law doctrine of cumulative remedies is not applicable to damages sustained by riparian owners for diversion by a canal company, under authority of law, of the waters of a stream for the supplying of water for a canal, where the charter of the company prescribes a particular mode in which compensation shall be made for private property taken for the construction of such canal; but the mode prescribed must be followed. *Null v. White Water Valley Canal Co.* 4 Ind. 431.

Where a canal company empowered to supply the canal with water from all streams within a specified distance, except as to certain streams from which they are not to take water during the summer months unless the streams overflow, violates the statute by taking water during the prohibited months, such conduct, unless it is malicious and wilful, is within the protection of the statute providing that actions for anything done in the execution of powers and authorities given shall be commenced within a specified time after the commission of the act. *Gaby v. Wilts & B. Canal Co.* 3 Maule & S. 580.

A riparian proprietor on a stream is confined, in his mode of obtaining redress for damages sustained by him by reason of the diversion by a canal company of water from the stream as a feeder for its canal, to the mode prescribed in the charter of such company; such work being of a public character, duly authorized by an act of the legislature. *Kimble v. White Water Valley Canal Co.* 1 Ind. 285.

Damages caused by a navigation company in constructing a canal bank, and thereby diverting a stream, may be recovered in the special proceeding prescribed for recovering those caused by its dams, as the company will not be presumed to have been exempted from liability for any injury it may cause. *Schuylkill Nav. Co. v. Looee*, 19 Pa. 18.

Where a canal company, in constructing its canal, deviates from the powers granted it by its charter, a person injured may have his legal remedy, and need not pursue the remedy fixed by the charter for determining differences arising between the company and landowners for acts done in pursuance of the powers granted. *Shand v. Henderson*, 2 Dow P. C. 519, 14 Revised Rep. 202.

After lands have been appropriated without authority for a canal and a reservoir for water therefor, the legislature cannot require the owner to submit to an appraisal of his damages in eminent domain proceedings; but he is entitled to his action at law for the injury. *Re Townsend*, 39 N. Y. 171.

When a canal company, under a power in its charter to take private property without first

making compensation, instituting later condemnation proceedings, or, in default of so doing, submitting to an action to recover damages equivalent to an award in condemnation, diverts water from a stream to the injury of a lower mill owner, if there is a permanent, though not necessarily continuous, appropriation of the diverted water,—a complete deprivation of the miller's rights therein,—his remedy is under the charter provisions for full compensation once for all; but, if such diversion is merely occasional, irregular, and not intended to be lasting, and interference temporarily with, not a taking of, the mill owner's right, then his remedy is an ordinary common-law action for damages occasioned by the particular act complained of; and, while the remedy given by the charter is available at once and against the canal company only, the common-law action accrues when the diversion is made, and lies against the successor of the canal company if it made the diversion complained of. *Halsey v. Lehigh Valley R. Co.* 45 N. J. L. 26.

Equity will not restrain a canal company from diverting a stream under its powers of eminent domain, although a mill privilege be injured, when the statutory mode of compensation has not been resorted to. *Spangler's Appeal*, 64 Pa. 387.

Equity will not restrain a diversion of water by a canal company from a mill owner having the right thereto when the complainant has assented to, and received compensation for, the use of the encroachment upon his right, although the canal company be shown to be insolvent. *Hellman v. Union Canal Co.* 37 Pa. 100.

When damages from the exercise of a canal franchise can only be recovered by the statutory process, the insolvency of the canal corporation confers no jurisdiction on the equity courts. *Spangler's Appeal*, 64 Pa. 387; *Stump's Appeal*, 1 Walk. (Pa.) 420.

An action of ejectment by a landowner against a canal company will be restrained, and the company permitted to take proceedings to acquire the property, where it took possession under invalid proceedings while the landowner was an infant, on the ground of acquiescence, the landowner having, after reaching his majority, accepted an annual rental for a period of forty years. *Somersetshire Coal Canal Co. v. Harcourt*, 2 De G. & J. 596, 4 Jur. N. S. 671, 6 Week. Rep. 670.

A riparian proprietor, even if he is owner of natural mill sites, is not entitled to an injunction restraining the authorized construction of a dam and canal in aid of navigation of the river on which they are located, which it is alleged will result in injury to such mill sites by the diversion of the water of the river, where the canal will run through the lands necessary to constitute such sites, and such lands are under statutory authority subject to condemnation for canal purposes, in proceedings for which the value of the lands as mill sites would no doubt be duly considered and estimated; since he thereby has a legal and proper remedy; and especially will injunction not issue where the statute authorizing condemnation provides that the pendency of any proceedings in any suit in the nature of a writ of *ad quod damnum*, or any other proceedings, shall not hinder or delay the progress of the work. *Binney's Case*, 2 Bland, Ch. 99.

A mill owner cannot enjoin a canal company from diverting water from his milldam and using it for the purposes of its canal, without showing some sufficient reason for adopting that form of proceeding to obtain redress for the damages he may sustain, where such diversion is authorized by its charter, and a particular mode for obtaining compensation for private

property taken is pointed out in such charter. *Conwell v. Hagerstown Canal Co.* 2 Ind. 588.

But equity has jurisdiction in a case involving rights to the use of water from a stream between parties having public franchises, by reason of the magnitude of the interest involved, and the numerous equities set up by complainant, which consist in no small degree of equitable estoppels, and of his liability to a multiplicity of suits at law. *Lehigh Valley R. Co. v. Society for Establishing Useful Manufactures*, 30 N. J. Eq. 145.

The several owners of land through which a canal company has constructed its canal without paying the land damages cannot unite in a single suit to enjoin the use of the canal until payment is made. *Marsells v. Morris Canal & Bkg. Co.* 1 N. J. Eq. 31.

When a riparian owner has an action for damages caused to his mill by the diversion of water by a canal, he may recover if the dam of which he complains was a new erection after he came into possession, its construction having been but partially completed during the term of his grantor, who instituted no suit for the partial damages. *Union Canal Co. v. Kelsier*, 19 Pa. 134.

An action to condemn private property for canal purposes in pursuance of congressional legislation may be maintained by the United States so far as to ascertain the value of the lands proposed to be taken, although provision has not been made for payment of their value; but such payment must be made before judgment of condemnation can be given. *United States v. Oregon R. & Nav. Co.* 9 Sawy. 61, 16 Fed. 524.

2. Procedure.

The United States government may permit the compensation which it is to pay for land taken for public improvements to be ascertained by procedure in the state courts. *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346.

A canal company, in diverting water from a natural stream as a feeder for its canal, is entitled to have the entire damages, past and prospective, that a mill owner will sustain by reason of such diversion, assessed in one action, by virtue of a clause in its charter providing for the mode of assessing the compensation to be awarded owners for land, water, or materials taken for the construction of the canal, or any of its feeders, or works connected therewith. *Kimble v. White Water Valley Canal Co.* 1 Ind. 285.

The act of a canal trustee in hearing the proof and making a certificate that a claimant for damages caused by the construction of a feeder to the canal through his lands had produced satisfactory proof that he was the owner of such land, and that the same had been injured by the construction of such feeder, in a certain amount, will be construed as being in compliance with an act of the legislature requiring all unliquidated claims against the state for damages growing out of the construction of the canal to be proved before the state trustee and filed with the secretary of state before a certain date, and not as a settlement of such claim under a previous act, authorizing the state trustee to settle existing claims for damages arising from the construction of the canal by issuing certificates of state indebtedness to the claimants, and that in any event, whether acting under the one act or the other, not having issued the certificate of indebtedness to such claimant, the act of such trustee would not be binding on the state so as to entitle such claimant by mandamus to compel a subsequent trustee to issue

to him a certificate of state indebtedness. *People ex rel. Brush v. Wells*, 12 Ill. 102.

To make a legal and permanent appropriation by the state of land or water for the use of a canal, the quantity must be definitely ascertained and described, so that the owner may know what has been taken, and for what he is entitled to compensation. *Hayden v. State*, 132 N. Y. 533, 30 N. E. 961.

The direction in the charter of a company authorized to condemn land for canal purposes that the jury describe and ascertain the bounds of the land valued by them requires a description of the lands valued and a statement of their bounds with certainty, so that it may be known what would pass to the company upon payment of the valuation; but it does not necessarily imply that they are to run and measure the lines. *Chesapeake & O. Canal Co. v. Union Bank*, 4 Cranch C. C. 75, Fed. Cas. No. 2,653.

The appropriation of land for canal purposes is completed by entering upon and using the land for such purposes under the statute authorizing such appropriation, but requiring no particular formality in making the same, and no record is required to be kept, and the proceedings to assess the damages are to be had after such appropriation. *Nelson v. Fleming*, 56 Ind. 310.

An appropriation takes place upon the entry of the state agents upon land for the construction of a canal, so as to entitle the owner to have his damages appraised at that time; and he is not bound to wait until the work is completed. *People ex rel. Utley v. Hayden*, 6 Hill, 359.

Although the charter of a canal company authorized to condemn land for canal purposes does not provide for notice to parties interested, it should be given if they are within the county. *Chesapeake & O. Canal Co. v. Union Bank*, 4 Cranch C. C. 75, Fed. Cas. No. 2,653.

When, having the power by its charter to take private property without first making compensation, instituting later, if it chooses, condemnation proceedings, or, in default thereof, submitting to an action for damages equivalent to an award, a canal company diverts water to the injury of a lower mill owner, and its acts in respect thereto are so equivocal that it is doubtful whether or not there is intended to be a permanent, lasting appropriation of the water at the point of taking it, or only an occasional and intermittent interference with the mill owner's rights, to cut him off from his common-law actions for recurrent injuries, and shut him up to the once for all suit allowed by the charter,—either actual or constructive notice of a permanent appropriation must be given him; and, upon this point, a declaration of the president of the company, made when the works were being constructed, that a diversion was not intended, is competent evidence, though made to a third party having similar rights. *Halsey v. Lehigh Valley R. Co.* 45 N. J. L. 26.

A provision in an act of the legislature authorizing a corporation to construct certain canal works, which prescribed the method in which compensation should be made to those whose lands might be taken or affected by the company's works, and which provided that persons damaged, to whom the corporation made no compensation, might "apply by petition to the superior court of judicature . . . to have the damages estimated and adjudged,"—will not be construed as meaning that the damages are to be ascertained and paid for from time to time as they actually arise, but as conferring a remedy by which compensation may be obtained at once for all damages that might be sustained by having the lands perpetually subjected to the

encumbrances laid upon them by the company. *Woods v. Nashua Mfg. Co.* 5 N. H. 467.

Where a statute providing for the construction of a canal requires the appraisers to enter in books to be kept for that purpose a description of lands taken for the purpose of the canal, parol evidence is not admissible to show that land not in fact covered by the canal was taken by the state, although it consists of a basin covered with water and connected with the canal by a ditch. *Jackson ex dem. Atwood v. Daley*, 5 Wend. 526.

The necessity for the taking of land sought to be condemned for a canal and reservoir for shipping, irrigation, and water-supply purposes is a question of fact for the jury. *Wilmington Canal & Reservoir Co. v. Dominguez*, 50 Cal. 505.

An inquisition condemning land for canal purposes will be set aside for failure of the jury to describe the bounds of the land valued by them. They ought also to describe the quality and duration of the interest valued. *Chesapeake & O. Canal Co. v. Union Bank*, 4 Cranch C. C. 75, Fed. Cas. No. 2,653.

One who revokes a submission to arbitration made under statutory authority to ascertain the damages for the taking of a strip of land for canal purposes will be liable for the fees of the arbitrators and the counsel and witness fees which have been paid by the opposite party upon the hearings already had. *Miller v. Junction Canal Co.* 41 N. Y. 98.

An appeal from an award of arbitrators assessing the damages sustained by a landowner by the construction of a canal over his land must be taken to the court of the county in which the land lies. *White Water Valley Canal Co. v. Henderson*, 8 Blackf. 528.

f. Other matters.

An agreement entered into between canal trustees and a riparian owner having a mill site on a river, in and by which the latter for a valuable consideration released to the former the right to divert the water from the river above the milldam as a feeder to the canal for the purposes of navigation, and the continuous possession by each, their successors and assigns, of their respective properties, is notice of the rights claimed by each to all dealing thereafter with either in respect to the subject-matter of that agreement, so that a lessee from the canal trustees, of the water from such feeder for use as water power, is bound to know what the agreement was, and holds subject to the terms thereof. *Druley v. Adam*, 102 Ill. 177.

Diverting the water from a river by canal trustees in excess of the quantity needed for navigation, creating a motive power for the benefit of others, is a use not within the language or strict spirit of an agreement entered into between such canal trustees and a riparian owner, whereby, for a money consideration and the settlement of the controversy between them as to the diversion of the water by the trustees from the mill site of the riparian owner, the latter released to the trustees the right to use and appropriate the water of the said river at a point above the mill as a feeder "for supplying the said canal for the purpose of navigation" in the same manner it was then used. *Ibid.*

Canal trustees, acquiring the right, by an agreement with the owner of a milldam on a river, to divert water from the river above his dam into the canal by means of a feeder "for the purposes of navigation," cannot, after a deepening of the canal above so as to afford drainage for a city, whereby the volume of water is increased so that a large volume of waste water is emptied into the river above, divert

water through such feeder in excess of the quantity needed for the navigation of the canal, for the purposes of water power, although such excess does not amount to the additional volume of the river caused by the discharge of the waste water therein from the canal above. The moment such waters were discharged into the water of the river, and mingling therewith, passed over the soil of such owner, his rights thereto attached, and the canal trustees will be regarded as having abandoned them and placed the same beyond their right of legal reclamation or control; and the agreement cannot be construed as restricting such riparian owner to the use of such water as naturally flowed therein without the aid of art. *Ibid.*, Affirming *Adams v. Slater*, 8 Ill. App. 72.

Persons authorized by act of Parliament to cut a canal, and to construct and maintain works to protect a harbor in which the canal was intended to terminate, and to levy a specified tax for such purpose, will not be restrained from cutting the canal through their land upon the ground that the funds raised are insufficient for the completion of the undertaking, although, when they attempt to cut the canal through land belonging to others, such owners may be entitled to relief. *King's Lynn v. Pemberton*, 1 Swanst. 244, 252.

Under a contract between the riparian owner on both sides of a stream and a canal company, giving the canal company the right to use so much of the water of the stream as would be necessary to the operation and maintenance of the canal, the company takes the right to use the water of the stream so far only as needed for the canal, and, upon the dissolution of the canal company, this right reverts to the owners. *Day v. Pittsburg, Y. & C. R. Co.* 44 Ohio St. 406, 7 N. E. 528.

The fact that one of two connecting canals has been accustomed for a long period of years to receive the surplus waters of the other canal does not give it a right by prescription to such water, as such a right cannot be the subject of a grant, the canal company being bound to use its water for the purpose of sustaining its navigation, and not being able to grant to another the use of such water. *Staffordshire & W. Canal Nav. Co. v. Birmingham Canal Nav. Co.* L. R. 1 H. L. 254, 272, 35 L. J. Ch. N. S. 757, Affirming 11 Jur. N. S. 71, 11 L. T. N. S. 647, 13 Week. Rep. 130.

Specific performance will not be decreed of a contract by a sanitary district to pump water into a state canal sufficient to maintain a certain depth of water therein, where it has, by withdrawing water from the river feeding the canal, reduced the water level at the head of the canal, if the said certain depth of water in the canal could not be maintained without pumping, even if said district had not withdrawn water from the river. *Canal Comrs. v. Sanitary Dist.* 191 Ill. 326, 61 N. E. 71.

In *Doe ex dem. Patrick v. Beaufort*, 6 Exch. 498, it was held that the owner of land might maintain ejectment against a canal company which had constructed a canal across the land by an arrangement with the lessee, although it was so constructed with the knowledge and consent of the owner. Subsequently, in *Beaufort v. Patrick*, 17 Beav. 60, 22 L. J. Ch. N. S. 489, 17 Jur. 682, 1 Week. Rep. 280, an injunction was granted restraining further proceedings in the ejectment action upon the ground that the owner of the land, having sanctioned the formation of the canal, was not entitled to take possession, but only to compensation for its value; and that one purchasing the land from such owner with full knowledge of the existence of the canal was in no better position than the owner.

A landowner cannot restrain a canal company
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from proceeding with its work where he has knowingly suffered the operations to be carried on, but he will be left to his action for damages. *Shand v. Henderson*, 2 Dow P. C. 519, 14 Revised Rep. 202.

Where one injured by a work erected at great expense failed to give notice to the proprietors not to proceed, equity will not remove it as a nuisance, but will leave the complainant to his remedy at law. *Jones v. Royal Canal Co.* 2 Molloy, 819.

The works of a canal corporation are not indictable as a public nuisance, as works of public improvement never can be regarded by the law as a public nuisance. *Com. v. Reed*, 34 Pa. 275, 75 Am. Dec. 661.

III. Location.

The provision in the charter of the Chesapeake & Ohio Canal Company that the eastern terminus of the canal shall be from the tide water of the River Potomac, does not limit the company to the highest point of tide water in the District of Columbia, but the precise point of commencement is left to the discretion of the company within the limits fixed by the charter. *Chesapeake & O. Canal Co. v. Key*, 3 Cranch C. C. 599, Fed. Cas. No. 2,649.

The extension of a navigation canal to the city of Washington was authorized by the act of 1784 providing for the making of a navigable canal "from the tide water" of the River Potomac in the District of Columbia over to the Ohio river, and the termination thereof was not confined to the most interior point on such tide, which was of great extent, where the canal was one intended to facilitate transportation of the products of the interior to tide for exportation, and for the importation of foreign commodities by the same route; since for that purpose it must terminate at a port or point where marine and interior transportation can meet, and it was universally understood that such canals must be extended, and was the common practice to extend them, into the very port itself; and the act must be construed to have contemplated its extension to one or all of the ports on the tide water in such district, and particularly to Washington, its chief port, as most suited. *Binney's Case*, 2 Bland Ch. 99.

A canal company is not confined to the bed of the river in improving the navigation thereof, but may make such improvement partly or entirely by canals outside of the bed of the stream, or in any other known mode, under a charter the preamble of which recites that it may be necessary to cut canals and erect locks and other works on both sides of the river, and the body of which gives power to cut such canals and erect such locks and other works as may be necessary for the opening, improving, and extending the navigation of the river from place to place in such manner as it shall think proper, giving the right to purchase or condemn lands for the purpose of making such canals, conferring power to collect tolls in consideration of the expense to be incurred in cutting them, and making the river and the works thereon a public highway when completed; and the discretion as to the manner of improving navigation is not limited by a section merely requiring that the company "shall make the river well capable of being navigated," without a designation of the particular mode of doing it, except that canals are required at specified falls, since the making of it navigable in its natural course, rather than in any other of the various known ways, is not to be understood as intended thereby. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1.

A canal company is not put to an election between the different modes of improving the nav-

igation of a river to connect the Atlantic states with the country west of the Alleghany mountains, nor concluded by any selection made from having recourse to another, if the mode selected for the execution of the work of such great and acknowledged utility shall fail, the means of accomplishing which were at the time of the grant of the right but little understood, where the charter authorizes the cutting of canals and erection of such locks and other works as it shall judge necessary for improving and extending the navigation from place to place and from time to time in such manner as it shall think fit; nor would failure for many years to exercise the right to make such improvement by means of canals or a continuous canal because of the adoption of other expedients in the first instance and their continuance during that time be construed into an abandonment of the right to use that method of improvement in favor of a railroad company seeking to secure a priority in the selection of lands along such river for its right of way over the selection thereof by the canal company for the construction of canals considered necessary to the improvement. *Ibid.*

A navigable stream may be used for the purpose of carrying out the object of a statute authorizing the construction of a "canal" to connect another stream with Lake Erie so as to create a navigable waterway for boats, and, a side cut having been made into such stream, the bank thereof may be appropriated for a tow-path. *Carpenter v. State*, 12 Ohio St. 457.

More charter authority to acquire a strip of land of a certain width for purposes of a canal will not, in case the title is acquired to, and the canal constructed upon, a strip of much less width, entitle the company to enter upon and cultivate the property to the full width which its charter gave it authority to take. *Jones v. Tatham*, 20 Pa. 398.

Statutory authority to construct a ship canal across, along, through, or upon any of the bays within the jurisdiction of the state for the purpose of conducting vessels from the coast to safe harbors on the main line will authorize the construction of the canal on the land along the shore of the bay, and it need not be confined to the waters of the bay. *Crary v. Port Arthur Channel & Dock Co.* 92 Tex. 275, 47 S. W. 967.

A channel and dock corporation authorized by statute to construct its channel "across, along, through, or upon" specified waters may locate it along the borders of a bay. *Davis v. Port Arthur Channel & Dock Co.* 31 C. C. A. 99, 59 U. S. App. 155, 87 Fed. 512.

An injunction *pendente lite* to restrain a channel and dock company from constructing its channel along low, flat, salt, marsh lands until the final termination of the litigation will not be granted where it is sought thereby to defeat the construction of the channel rather than to contest the value of the lands taken, and the company has filed a bond conditioned for the payment of all damages which may be awarded against it in the condemnation proceedings. *Ibid.*

A landowner cannot object to the construction of a canal through his land upon the ground that, in crossing other land, the canal has deviated from the line fixed by statute, unless such deviation has been to his injury. *Lee v. Milner*, 2 Younge & C. Exch. 611.

Under a statute which provides for the creation of private corporations for the purpose of constructing deep water channels from the "waters of the Gulf of Mexico" to the mainland for the purpose of navigation; and which also provides for the condemnation of land for the construction of the channels,—a channel may be constructed from any bay, inlet, or stream

upon the gulf coast in which the tide ebbs and flows. *Crary v. Port Arthur Channel & Dock Co.* 92 Tex. 275, 47 S. W. 967.

IV. Use of.

a. As highway.

The purpose of a canal being the transportation of the merchandise of the people, it is generally held that there is a public right to use it similar to the right to use waters navigable by nature, but with this difference,—that the owner of the canal is entitled to compensation for the facilities which he has furnished.

In *Robinson v. Chamberlain*, 84 N. Y. 389, 90 Am. Dec. 713, it is said that canals open and free to all for navigation upon payment of toll as fixed by law are in every sense public highways.

In *Bonaparté v. Camden & A. R. Co. Baldwin*, 205, Fed. Cas. No. 1,617, it is said a canal constructed by the public or a corporation is a public highway for the public benefit if the public have a right of passage thereon by paying a reasonable stipulated uniform toll; its exaction does not make its use private or defeat the right of the corporation to appropriate property for such use without the owner's consent.

A canal constructed under authority of the state by the exercise of the power of eminent domain is open to the use of all citizens upon making suitable compensation to its owner. *Pennsylvania Coal Co. v. Delaware & H. Canal Co.* 1 Keyes, 72.

A canal company chartered with power to construct a canal and give the right to take tolls for its use has not a private title to its works, and cannot exclude the public from the use of the canal except on the conditions authorized by its charter. *Perrine v. Chesapeake & D. Canal Co.* 9 How. 172, 13 L. ed. 92.

An artificial channel owned and controlled by a company having the right to collect tolls, under a charter from the state, is a public highway for vessels; and as such the owners of all vessels have a right to regard it, using it at their pleasure, subject to the lawful conditions imposed upon them for such use. *Buffalo Bayou Ship Channel Co. v. Milby*, 63 Tex. 492, 51 Am. Rep. 668.

The construction and opening of a canal for the use of the general public, and permission to all who have occasion, to use it, will amount to a dedication of it to the public, although it was constructed without a charter from the legislature. *Olcott v. Banfill*, 4 N. H. 537.

When a canal was constructed for public use, it is affected with a public interest; and when it becomes the property of a manufacturing concern largely for its own convenient use, but is still patronized by others, by whatever name such transportation business is conducted,—whether as an accommodation to those desiring to so use it, or otherwise,—it is still held subject to that interest. *New York Cement Co. v. Consolidated Rosendale Cement Co.* 37 Misc. 746, 76 N. Y. Supp. 469.

The public acquires no vested rights in a canal constructed as a private enterprise at private expense, although it is permitted to use it. *Potter v. Indiana & L. M. R. Co.* 95 Mich. 389, 54 N. W. 956.

All commonwealth lines of canal are not highways which the citizen is entitled to use of common right. Being made at her particular cost, they are, so to speak, her private property; and they are consequently subject to her exclusive use, or the use of those to whom she farms them for her emolument. *Com. ex rel. Leech v. Canal Comrs.* 5 Watts & S. 388.

The court will not take judicial notice that

the Gowanus Canal in Brooklyn is a public highway. *New York & B. Saw-Mill & Lumber Co. v. Brooklyn*, 71 N. Y. 580.

A canal is a public highway within the rule which entitles owners of land adjacent to a highway to receive light and air therefrom. *Barnett v. Johnson*, 15 N. J. Eq. 481.

But the Morris canal, though declared by its charter to be a public highway, is not such within the meaning of a statute prohibiting grade crossings of city highways. *State, Lehigh Valley R. Co., Prosecutor, v. Dover & R. R. Co.* 48 N. J. L. 528.

The mere filing of a map without the actual construction of the proposed canal or use of the waterway along which it is proposed to be constructed is not sufficient to constitute it a public waterway. *Re New York*, 64 App. Div. 604, 72 N. Y. Supp. 461.

Where a ship channel is controlled by a company under a charter from the state, and is a public highway subject to the right of the company to collect tolls, and the character of the channel is such as to require the agency of tugs to carry vessels through it, any wrongful refusal of the company to permit a tug engaged in the effort to tow a vessel laden with merchandise through the channel, whereby damage results to the owners of the vessel and cargo, is a proximate cause of the damage, so as to enable the owners of the vessel and cargo to maintain an action against the company. *Buffalo Bayou Ship Channel Co. v. Milby*, 63 Tex. 492, 51 Am. Rep. 668.

A ship canal company which has constructed an artificial channel as a public highway for the purposes of navigation, the company having the right to collect tolls, cannot lawfully, as against vessel owners, refuse to permit a tug, not owned by the vessel owners, to tow a vessel through the channel because of the past indebtedness of the tug owner to the company; and, in an action by the vessel owners against the canal company for damages resulting to them by reason of such refusal, it is no defense that the vessel owners might have paid the past indebtedness, and thereby prevented the damage to themselves. *Ibid.*

Where a canal company wrongfully refuses to permit a tug to pass through its canal and thereby tow a vessel through it, and the natural and proximate result of the wrongful refusal is to cause the detention of the loaded vessel and compel the discharge of her freight by lighters, whereby damage results, such damage may be recovered from the company. *Ibid.*

Steam may be used as the motive power for boats navigating a canal, where no greater damage is thereby done to the canal than is produced by horse traction. *Case v. Midland R. Co.* 5 Jur. N. S. 1017, 27 Beav. 247, 28 L. J. Ch. N. S. 727.

But a canal company required to keep it in good order is vested with discretionary power necessary to the proper regulation of the canal and its navigation, and it has the right to prevent the passage of steamboats if the canal is thereby injured. But the discretion is not an arbitrary one. *Sheldon v. New Orleans Canal & Bkg. Co.* 9 Rob. (La.) 360.

Under the New York statutes boats used for carrying passengers are entitled to preference in lock privileges in the use of the state canals. *Houghton v. Walce*, 64 Barb. 613.

Noncompliance with the statutory rules for the navigation of the state canals will render the person responsible therefor liable for injuries caused thereby to other boats. *Sheerer v. Kissinger*, 1 Pa. St. 44.

The power of a canal company, authorized by its charter to open a canal, provide the same with suitable locks, docks, etc., and to demand

tolls for the passage of vessels, boats, etc., through such canal, to contract for the passage of a boat through its canal for a reasonable reward is necessarily incident to the powers specifically granted; and such company is liable for a breach of such contract to the same extent and in the same manner as would be a natural person, even though it might not be able to enforce payment of more than legal tolls for such passage. *Muir v. Louisville & P. Canal Co.* 9 Dana, 161.

If a canal company, authorized and empowered by its charter to conduct boats through its canal and to superintend the passage thereof, induces a boat to enter such canal with a view to a passage through the same, the law will imply a promise to let the boat through in a reasonable time; and such company will be liable for any damages suffered by the owner thereof by reason of the detention of such boat beyond a reasonable time, through the neglect or other failure of duty on the part of such company. *Ibid.*

A company maintaining between two rivers a canal through which, on payment of toll, timber is floated under the direction and care of the owners or their agents, is bound only to keep its canal and basins in good order; and the charging of an additional sum per month for timber remaining in the canal or basins more than fifteen days after inspection does not impress upon the canal the character of a water warehouse, or make the company a bailee for storage or safe keeping, so as to render it liable for timber stolen while so remaining therein, in the absence of any wrongful act by the company or its agents with respect to such timber, or of any special contract for care and custody. *Watts v. Savannah & O. Canal Co.* 64 Ga. 88, 37 Am. Rep. 53.

In *Bosley v. Susquehanna Canal*, 3 Bland Ch. 63, the chancellor, in granting an injunction to restrain the obstruction by a canal company of its towpath over which the plaintiff claimed a right of way for access to a mill site on the canal, remarked that it had been expressly declared that the canal, when completed, should be kept in good repair by the corporation for the use of the public, so that the corporate land, so far as dedicated to the public use, had been subjected to the servitude of a highway, the toll for passing along which alone belonged to the corporation; and consequently the canal with its appurtenances and necessary towing path must be considered and treated in like manner as other highways, because all navigable rivers and great roads or canals, common to all passengers, and which are to be kept in repair for the use of the public, are in law deemed highways.

Private canal.

The owner of a tract of land has the right to excavate entirely within his own boundaries and at his own expense a navigable canal, and may require payment for its use from all who avail themselves of its facilities. Those using the canal impliedly promise to pay, and it is immaterial what term the owner uses to denote the remuneration claimed. *Harvey v. Potter*, 19 La. Ann. 264, 92 Am. Dec. 532.

But where a riparian owner, for the purpose of improving the navigation of a stream for the benefit of anyone choosing or desiring to use the same, cuts an artificial channel through which the water is turned, he cannot, after permitting it to be thus used, compel those seeking to use it to pay toll for so doing. *Weathervy v. Meklejohn*, 56 Wis. 73, 13 N. W. 697.

Although a dedication to the public of a right of navigation of a channel can only be estab-

lished on evidence that the proprietor knowingly offered the channel for that purpose, where a dam is erected across a public stream and thereby a new channel is formed on the land of a proprietor who does not own the site of the dam, and who did not build it or cause it to be built. *Dwinel v. Barnard*, 28 Me. 554, 48 Am. Dec. 507.

b. Other uses.

1. In general.

As to the authority to use a canal as an outlet for a sewer, see also note on *Liability of municipalities for drainage, ante*, 673.

The servitude or right to drain a city into a navigable canal does not pass without a grant. *Orleans Nav. Co. v. New Orleans*, 2 Mart. (La.) 214.

A city cannot claim the right to discharge its entire drainage into a canal on the ground that the canal is on land lower than that on which the city stands, and therefore under a natural servitude to receive its waters, where about the city lie other low lands upon which some portion of the drainage would naturally flow. *Ibid.*

The city of New Orleans has no right to drain surface water and sewage into the canal Carondelet, thereby unfitting it for navigation; and it will be enjoined from so doing. *Ibid.*

Injunction is the proper remedy to prevent a municipal corporation from discharging the contents of a sewer in the street, constructed on the bed of an abandoned canal, through a culvert over private property, which had been constructed to receive the surplus water of the canal, where the healthfulness of the property is impaired by such proceeding. *Beach v. Elmira*, 22 Hun, 158.

A corporation becoming the sanitary authority in a town may be restrained from draining sewage into a canal, and thereby creating a public nuisance, though it derives no profits from the works by which the nuisance is created. *Atty. Gen. v. Basingstoke*, 45 L. J. Ch. N. S. 726, 24 Week. Rep. 817.

The city of New Orleans has no right to drain the waters of the city into the Bayou St. John through the canal Carondelet. *Orleans Nav. Co. v. New Orleans*, 1 Mart. (La.) 260.

A canal company has a right of action against a municipal corporation for laying sewers through its land emptying into its canal, though the municipal corporation has a right to construct sewers through private land, and the canal is constructed along the channel of an ancient natural water course. *Locks & Canals v. Lowell*, 7 Gray, 223.

Where a canal company is the owner of the bed of the canal, it may restrain the discharge of sewage into the canal although it had abandoned the use of the canal and stopped the flow of water therein, thereby permitting the sewage to accumulate in one place, whereas, had the water been flowing, it would have carried it off. *Atty. Gen. v. Basingstoke*, 45 L. J. Ch. N. S. 726, 24 Week. Rep. 817.

Lessees of a canal may maintain an action against a city for injury to their business by the accumulation of dirt and filth in the canal from drains constructed by the city, although actions for injury to the canal are required by statute to be in the name of the state. *Public Works v. Cleveland*, 4 Ohio Dec. Reprint, 378.

The board of control of a canal belonging to the state into which a city is authorized by statute to drain has no authority to close the culvert through which drainage enters the canal, and, after closing it, cannot interfere with drainage into it through other practicable channels until it restores the old culvert,—especially 61 L. R. A.

where the board has to a certain extent designated the place of drainage. *New Orleans v. New Basin Canal*, 47 La. Ann. 241, 16 So. 842.

A statute prohibiting acts by reason of which any substance may be washed into a public canal does not confer upon the canal commissioners any authority to interfere with the rights of citizens in the lawful use of their own property, and does not make that an offense which, in the absence of the statute, is lawful, and which of itself could do no injury. *People v. Utica Cement Co.* 22 Ill. App. 159.

A riparian owner upon a creek is not liable for the washing of waste matter into a public canal so as to obstruct the same, where such waste matter was carried into the creek and from thence into the canal only by reason of an unusual, extraordinary, and unexpected flood according to the natural course of the seasons in this country. *Ibid.*

In a suit for obstructing a canal with sawdust thrown into a feeder, it is no defense to say that navigation would not have been injured if there had not been intermingled with it dust and refuse from other sawmills, as the dust from defendant's mill must have been of itself an obstruction. *Delaware & H. Canal Co. v. Torrey*, 33 Pa. 143.

A mill owner is liable on his first deposit of sawdust in a canal, although it caused no practical inconvenience, because it was a violation of the rights of the canal company, and because a continued deposition for twenty-one years would have given him a right to continue it. *Ibid.*

A mill owner who has received compensation for damages caused by a canal erected under state authority cannot excuse his tort committed by throwing sawdust into a feeder of the canal by showing that the canal was unskillfully constructed, without due regard to the rights of individuals, as for that the law has furnished a remedy. *Ibid.*

A railroad company which purchased an abandoned canal, constructed its road on the tow-path, and maintained a spillway to carry off water which had been turned into the canal under license from the state to improve adjoining land, and which would injure its embankment, is not liable to a landowner whose property is thereby overflowed, although it had been dry and arable while the water flowed in the canal, where there was nothing to prevent the railroad company from revoking the license. *Dailey v. Western N. Y. & P. R. Co.* 53 App. Div. 551, 65 N. Y. Supp. 970.

While a grant by a canal company by deed of the sole and exclusive right or liberty of using pleasure boats for hire on its canal is binding as between the parties, it gives the grantee no right of action in his own name against a third person infringing his right; but he must obtain permission of the canal company to sue in its name. This is upon the ground that the owner of property cannot create at his will and pleasure a new species of incorporeal hereditament. While he can bind himself by covenant to allow any right he pleases, he cannot annex to it a new incident, so as to enable the grantee to sue in his own name for an infringement of such a limited right as that now claimed. *Hill v. Tupper*, 2 Hurlst. & C. 121, 9 Jur. N. S. 723, 8 L. T. N. S. 792, 11 Week. Rep. 784, 32 L. J. Exch. N. S. 217.

A canal company cannot let out boats for hire on its reservoir constructed upon lands purchased under a statute authorizing it to do so for the establishment of a navigation, but for no other use whatsoever, and which statute reserved to the proprietors of the purchased lands the right of fishing in the water and the right to use pleasure boats thereon

Bostock v. North Staffordshire R. Co. 4 El. & Bl. 798, 3 C. L. Rep. 1027, 24 L. J. Q. B. N. S. 225, 1 Jur. N. S. 921.

In Edgerton v. Huff, 26 Ind. 35, it was held that an owner of land through which a canal passes has the exclusive right to use and control the ice formed thereon, the taking of which does not interfere with the easement acquired by the state of the right of way for the canal for navigation and hydraulic purposes.

But that case was overruled in Indianapolis Waterworks Co. v. Burkhart, 41 Ind. 364, which held that the owners of land along which a canal runs are not entitled to take ice from the canal where the state acquired a fee-simple title in the lands when appropriated for canal purposes.

Ice in a canal is as much a part of the canal as the water in a fluid state, and ownership in fee of the land occupied by the canal carries with it title to the ice formed thereon. Cromie v. Wabash & E. Canal, 71 Ind. 208.

The state having previously granted the privilege to all persons resident upon the line of a state canal to cut and remove ice from the same, which privilege has never been retracted by subsequent acts, the canal commissioners possess no power, under the general clause authorizing them to "take charge of and exercise full control" over such canal, to sell or lease the exclusive right to cut and remove the ice from any distinct portion to one person to the exclusion of others desiring to avail themselves of that privilege. Card v. McCaleb, 69 Ill. 314.

Canal trustees cannot recover for the value of ice taken from a certain portion of the canal by one of the members of a copartnership during its possession of that portion of the canal under a written agreement by which, for a valuable consideration, "all the tolls and revenues to be derived, or which may accrue," from the use of that portion of the canal were transferred to the copartnership for a specified time. The word "revenue" is broad enough to cover income derived from ice formed in the canal during the term of such agreement. Cromie v. Wabash & E. Canal, 71 Ind. 208.

The licensee of a conditional privilege of taking ice from a canal level, made without consideration and enjoyed without investment or expenditure, cannot maintain trespass *q. o. f.* against another who takes the ice without his consent. Payne v. Ulmer, 1 Walk. (Pa.) 516.

But one owning the fee to lands adjoining a canal, overflowed by the waters of the canal so as to form a pond, the easement to flow which exists in the owner of the canal, has the right to the ice formed on the pond, and to gather it, subject to the condition that no injury be done to the easement. Brookville & M. Hydraulic Co. v. Butler, 91 Ind. 134, 46 Am. Rep. 580.

2. For water power.

(a) Right to use.

Although the appropriation of water for the operation of a canal is within the power of eminent domain, an appropriation for the generation of water power is not, as a general rule. The question then arises whether or not the valid appropriation for transportation purposes is affected by a devotion of part of the water to power purposes. The solution seems to be that, so far as a surplus is created merely incidentally, the proprietor of the canal may make such disposition of it as will operate most to his own advantage.

In North Carolina it would seem that an appropriation might be made for power purposes in the first instance. For it is held that when a waterway has been constructed for navigation

purposes by the exercise of powers of eminent domain the legislature may substitute another public use for that use of the canal works by authorizing its use as a supply of power for water mills. Bass v. Roanoke Nav. & Water Power Co. 111 N. C. 487, 19 L. R. A. 247, 16 S. E. 402.

The mere fact that a canal company uses a portion of the water taken from a stream for the purpose of mills will not give a mill owner on the stream a right of action against it if it had a right, as against him, to take the water for canal purposes, and it does not appear that more water has been taken than was necessary for the canal, or that the canal was constructed of greater dimensions than were required by the charter. Rundie v. Delaware & R. Canal Co. 14 How. 80, 14 L. ed. 385.

A canal company authorized to impound water to feed its canal has the power to agree to furnish to a mill owner the surplus or waste thereof so long as it is not needed for canal purposes, and will be liable for cutting the supply so long as it is not necessary for the interest and convenience of the company. Armstrong v. Pennsylvania R. Co. 38 N. J. L. 1.

A riparian mill proprietor has no such vested right in the accidental benefit to his property from a canal feeder which crosses his land from the river to the canal and from a basin in which he is permitted by the state agents to make a cut for mill purposes, as will give him authority to interfere by injunction with the discretion of the canal commissioners to sell water power from such feeder to be taken therefrom above such owners' premises and returned to the canal below. Cooper v. Williams, 4 Ohio, 253, 22 Am. Dec. 745, Affirmed in 5 Ohio, 391, 24 Am. Dec. 299.

A canal company having a right to draw water from a river may agree to discharge its waste water at a certain point in consideration of a grant of land and loss of water rights for its chartered purposes, and it is not a mere agreement to sell water or to furnish power. Hoppock v. United New Jersey R. & Canal Co. 27 N. J. Eq. 286.

Silence of intervening riparian proprietors during the construction of mills at large expense by lower proprietors for the utilization of water from a canal feeder taken from the stream above the upper proprietors will not estop them from asserting their rights to the water of the stream not needed for actual canal purposes, where they were in utter ignorance that they possessed any rights to the use of the waters of the stream until both the canal and the mills were supplied, and the mills were not constructed by the lower owners under an erroneous opinion, in view of the fact that the commissioner advised them that he did not assume to sell anything but the surplus water in the feeder, and the lease itself shows that such surplus water and the use, "so far as the rights and interests of the state are concerned," of the feeder to flow more was all it purported to convey. Buckingham v. Smith, 10 Ohio, 288.

The power to grant or lease water privileges in state canals is incidental and subordinate to the public use, and the duty of those having charge of the canals to employ all the water, if needed, to the public use, is imperative, canals being public navigable highways. State *ex rel.* Fanger v. Board of Public Works, 42 Ohio St. 607.

Where a canal company legally acquires by condemnation proceedings the right by means of a dam to overflow the lands of upper riparian proprietors, it can grant to others a portion of the surplus water thus acquired; but, as soon as its corporate existence is terminated, the

rights of its grantees in this water are extinguished. *McCombs v. Stewart*, 40 Ohio St. 647.

The agent of a canal corporation may acquire water for mill as well as canal purposes, although the corporation is not authorized to acquire water for the former purpose, where he acts in behalf of himself and others who desire to obtain mill sites. *Lonsdale Co. v. Moles*, *Brunner Col. Cas.* 635, *Fed. Cas. No.* 8,496.

And a canal corporation may permit an individual to draw water through the canal for mill purposes so long as the public use of the canal is not interrupted and no private right is infringed. *Ibid.*

A canal company constructing a canal under parliamentary authority, which all the Queen's subjects were to have the right of using on paying certain tolls, cannot grant the use of the water for any other purpose than that prescribed by statute, and hence, no one can get a prescriptive right to the same; hence, where the statute authorized the use of the water by factories for the purpose of condensing steam, they cannot gain a prescriptive right to use it for any other purpose. *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287, 315, 21 L. J. Q. B. N. S. 297, 16 Jur. 1,111.

Where a dam is erected on an ancient stream to obtain a head of water for a state canal the surplus of the water not needed for the canal, and which continues to flow over the dam and down the ancient channel, cannot legally be diverted by the lessee of the surplus water of the canal to the injury of owners of mill privileges upon the stream. *Varick v. Smith*, 5 Paige, 188, 28 Am. Dec. 417.

Grist mills, oil mills, carding machines, and woolen factories to be propelled by water are embraced in the term "hydraulic works" which a canal company is authorized by its charter to construct in connection with its canal. *Hankins v. Lawrence*, 8 Blackf. 268.

The state board of public works has no power to grant water power to an elevator company, from a canal which the state had previously granted to the city as a public highway and for sewerage purposes by a statute by which the state abandoned the water power for all other purposes than milling purposes, when such elevator company was not a milling corporation; as the state cannot, after a grant of property by her to the city, place an encumbrance on the property so granted. *Little Miami Elevator Co. v. Cincinnati*, 13 Ohio Dec. Reprint, 950.

The conduct of a canal company in failing to object to the construction of pipes for the purpose of drawing water from the canal to a newly constructed mill for purposes other than those authorized by statute, knowing at the time the purpose for which they were being constructed, and the great expense incurred in so doing, deprives it of the right subsequently to ask equitable relief by way of injunction, although its conduct may not have been sufficient to bar an action at law. *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78, 20 L. J. Ch. N. S. 675, 15 Jur. 962.

No right in the waters of a canal constructed in aid of navigation of the Potomac river under authority of the act of 1784, the sole object of which was to open a line of boat navigation above the tide of that river, was either given or reserved to a riparian proprietor by virtue of the provision thereof that the water should not be used for any purposes but navigation, except with the consent of the proprietors of the land through which a canal is constructed, and empowering the officers of the canal company to enter into agreements with the owners of land over which it so passes, and on which there may be places convenient for the erection of mills, as to the expense of constructing canals 61 L. R. A.

large enough to supply water, both for navigation and power, if it can be conveniently done to answer both purposes, where such proprietor is not the owner of a natural mill site, and no agreement has been made with him by the company; since the places convenient for the erection of mills must be construed as meaning natural mill sites, and no right can be acquired under the terms of the act except by agreement with the company, and the expression, "if it can be conveniently done," leaves the matter of making agreements entirely to the discretion of the company. *Binney's Case*, 2 Bland Ch. 99.

No presumption arises, from the long continuance of breaks in a canal caused by freshets by reason of its poor construction, that such outlets were intended as sluices by the canal owners, or that the water was suffered by them to continue flowing through such breaks with an implied or tacit understanding that they might be considered by the owners of lands through which they flowed as constant streams on which they might erect mills, so as to create in them any sort of prescriptive right thereto. *Ibid.*

Under the provisions in a charter of a canal company that the water shall not be used for any purpose but navigation, unless the consent of the proprietors of the land through which the water shall be conducted be first had, and giving the corporation a right to enter into reasonable agreements with such proprietors for the use of surplus water, and the apportioning of the expense of making the canal large enough to carry such surplus, a riparian owner cannot maintain a bill to compel the corporation to permit them to use the surplus and to contribute to the expense of making any enlargement of the canal for carrying it. *Binney v. Chesapeake & O. Canal Co.* 8 Pet. 201, 8 L. ed. 917.

Mill owners on a stream do not acquire such a right to the waste water flowing into the stream from a canal by reason of a statute requiring the canal company to maintain weirs to secure to the mill owners the benefit of the waste water flowing from the lower canal level as will deprive the canal company of the right to pump back the water from the lower level into the upper levels after it has flowed out of them. *Ellwell v. Birmingham Canal Navigation*, 3 H. L. Cas. 812.

The facts that only nominal damages were recovered at law by a canal company against a mill owner for drawing water from the canal for purposes other than that authorized by statute, and that such damages will never be greater, and that future damages will be trifling, do not deprive the canal company of the right to an injunction. *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78, 20 L. J. Ch. N. S. 675, 15 Jur. 962.

No easement in waters of a state canal can be acquired by prescription. *Burbank v. Fay*, 65 N. Y. 57, Affirming 5 Lans. 397.

The use by an abutting owner on a canal into which the waters of a stream have been turned of the surplus thereof beyond which he was entitled to as a riparian owner in the stream under grant from the state, however long continued, and whether adverse or by permission, cannot impair the rights of the state to divert the surplus in other directions. *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345, 14 L. R. A. 481, 28 N. B. 358, Affirming 58 Hun, 50, 11 N. Y. Supp. 829.

(b) Grant of right.

A parol authority to divert the water of a canal through a culvert onto lands of the licensor is a mere license in its nature revocable. *Foot v. New Haven & N. Co.* 23 Conn. 214.

A contract under seal as to the taking of a water supply for manufacturing purposes from a canal which provides for the manner in which the aperture, trunk, and gates shall be constructed may be varied by parol during the work of construction. *Chesapeake & O. Canal Co. v. Ray*, 101 U. S. 522, 25 L. ed. 792.

Where the state contracts to collect and appropriate rents to be derived from leases of water power developed by private individuals in connection with a canal to the use of such individuals until their expenditures are repaid, the canal cannot be sold in such a way as to deprive them of their right to the rents until payment has been made. *French v. Gapen*, 105 U. S. 509, 28 L. ed. 951.

A lease of surplus water from canal works creates no obligation in the lessor to continue to have surplus water, or to continue the maintenance of the works. *Com. ex rel. Cass v. Pennsylvania R. Co.* 51 Pa. 351.

Where a lease of the surplus water of a canal reserves the right to resume the privilege whenever it may be deemed necessary for the purposes of navigation, a conversion of the canal into a street, which prevents the further enjoyment of the lease, will not deprive the lessee of his property without due process of law. No provision for the resumption of the water was necessary in case of the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. *Fox v. Cincinnati*, 104 U. S. 783, 26 L. ed. 928.

A lease from the state of the surplus water of a canal over and above that needed for navigation imposed upon the state and its grantees no obligation to maintain the canal in repair, or to keep it in such a condition as that a surplus of water above that needed for navigation should be available, or to furnish the lessee with any water whatever in the absence of an express covenant to that effect; but the latter took the lease subject to all the vicissitudes which might attend a public work of that character, and to the right of the lessor or its grantees to abandon the canal for purposes of navigation, and to appropriate it to other uses without becoming liable to any other consequences than the inability to collect rent from the lessee. *Hoagland v. New York, C. & St. L. R. Co.* 111 Ind. 451, 12 N. E. 83.

The lessor of water power from a canal sufficient to run designated machinery is not liable in damages for a failure to repair, within a reasonable time, a break in an aqueduct letting the water out of the canal, also a break in the banks, and for conducting the water by means of pipes from the canal so as to deprive the lessee of the stipulated quantity of water, where the lease provides but one remedy for a failure of the water supply, and that is a proportionate abatement of the rent; although it contains a covenant that the lessee should not be deprived of his water supply by any act of the lessor for more than one month in the year, and the lessor was authorized to drain off the water whenever necessary to repair breaches, remove obstructions, or to make any improvements in the canal, and to leave the water out as long as necessary for the required purpose. *Skillen v. Indianapolis Waterworks Co.* 49 Ind. 193.

The act of canal trustees in leasing so much of the surplus water power of a canal as shall be required to run a mill of a given capacity does not render them liable for damages sustained by the lessee by a failure of the water supply caused by the abandonment of that part of the canal and allowing it to fall into decay, in the absence of any covenants in the lease to keep the canal in repair,—especially as the lease expressly provides for damages for nonsupply of water in the single instance of its being used

for navigation, thereby excluding the implication of liability for damages for nonsupply caused by failure to keep in repair. *Wabash & Erie Canal v. Brett*, 25 Ind. 409.

The state, as against lessees of the public works, has the unqualified right, even though rendering valueless all the water power, used or unused, at the several locks in a designated portion of its canal, to abandon such portion thereof under leases of the surplus water of that portion of the canal with the right to have additional surplus water, conditioned that nothing therein shall preclude the state from granting permission to a designated city to enter upon and improve, as a public highway and for sewer purposes, all or any of the designated portion thereof. *Little Miami Elevator Co. v. Cincinnati*, 80 Ohio St. 629.

A grant of water power by a navigation company conferred no right in the grantee to maintain the canal works after the termination of the franchise, although his rights were to remain the same then as if no forfeiture or resumption had taken place. The reservation was held to refer to rights against the state or its subsequent grantee of the franchise, who should have control of the works. *Jessup v. Loucks*, 55 Pa. 350.

No liability to a lessee of surplus water on the part of the state or of a city claiming under it is created by the abandonment of the canal under a lease containing no covenants to repair, nor stipulation to maintain, nor obligation to operate, the canal, nor agreement on the part of the state to supply water, but amounting merely to a license to take such water, and reserving the power to resume the right to the use of the water at any time when unnecessary for the purpose of navigation, or by reason of interference therewith, without other covenant on the part of the state, in case of a permanent resumption totally destroying the value of the privilege, than an obligation to absolve the lessee from all further liability under the agreement, executed under a statute permitting the use of surplus water for hydraulic purposes subject to such conditions as the board of public works may consider necessary and proper, and requiring every lease, grant, or conveyance of such water to contain a reservation of the right to resume the privilege, or any portion thereof, whenever deemed necessary for purposes of navigation, or by reason of interference with the navigation of the canal, feeders, or streams supplying the same, and providing for the refunding or remitting of rent in case of resumption. *Hubbard v. Toledo*, 21 Ohio St. 379.

And this decision was followed in *Fox v. Cincinnati*, 33 Ohio St. 492, as to a similar grant to that city.

A reservation in a lease of the surplus water of a canal which will flow over a waste weir of a certain height, of the right of resuming the subject of demise without being liable to pay damages or make compensation for improvements, etc., will include the right to resume the subject-matter partially by raising the weir so that less water flows over it than formerly. *Ex parte Miller*, 2 Hill, 418.

An obligation contained in a lease of certain water privileges in a state canal, made by the board of public works to private parties, to pay for all lasting improvements made by said parties on the state resuming the said privileges, is in legal effect a covenant to purchase, and not a condition annexed to the use of the water within the meaning of a statute giving power to lease upon conditions. *State ex rel. Fanger v. Board of Public Works*, 42 Ohio St. 607.

The grantee of a right to use waste water from a public canal cannot, during the winter season when the canal is not used, open the

weir and help himself according to his own judgment, as the canal company possesses the water for the purposes of its canal, and the grantee cannot define its rights and interfere with that possession. *Erie Canal Co. v. Walker*, 29 Pa. 170.

Where the right of one claiming the use of the surplus water of a canal, to be taken at a point above its seventh lock, was determined by an indenture permitting the canal company to use such surplus water for the purpose of supplying a deficiency below such lock whenever necessary for maintaining the navigation of the canal, the company may use such water to refill the lower part of the canal where it has been emptied for the purpose of making repairs; but it cannot use it for the purpose of refilling the canal where the water had been drawn off for the purpose of raising boats which had sunk, as it was not for the purpose of maintaining the navigation, but for raising the boats, that the water was used. *Llewellyn v. Swansea Canal Nav. Co.* 2 Hurlst. & N. 509, 27 L. J. Exch. N. S. 55, 3 Jur. N. S. 1,005, 5 Week. Rep. 763.

In *Hopock v. United New Jersey R. & Canal Co.* 27 N. J. Eq. 286, it was held that equity will accept jurisdiction when damages are claimed by reason of a canal company's failure to supply water power as contracted, and when discovery is necessary to determine in whom the present liability lies by reason of the several conveyances of the canal property and franchise.

But that case was overruled in 28 N. J. Eq. 261, which held that, where a contract for supplying waste water from a canal for the use of a mill owner is alleged to have been broken, until judgment at law equity will not interfere; but then it will assist in discovering and applying property which cannot be reached by the process of execution.

One receiving, in consideration of the surrender of certain rights, a license from the state to draw for the use of his mill a given quantity of water from a canal constructed by the state for the improvement of the navigation of a river and for the creation of hydraulic power, is not thereby authorized to create a serious obstruction greatly endangering navigation and which might defeat that purpose of the improvement, but is only authorized to make such use of the water as is consistent with the right of the public to the use of the highway, although no conditions or restrictions were imposed by the license other than as to the quantity of water to be drawn therefrom by him; and he is responsible for damages sustained from the loss of a boat by reason of such an obstruction, in the absence of negligence or carelessness on the part of the owner of the boat contributing to the accident. *Guthrie v. McConnell*, 2 Ohio Dec. Reprint, 157.

A lease of a canal with a proviso that the state shall be furnished free of charge a certain number of horse power for the use of purposes named, and declaring that the state's right to such use shall be absolute, includes the right to lease such portion of the reserve power as it does not require. *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

Duties of grantor's successor.

A provision in an act transferring a canal franchise, that all existing contracts for water privileges shall be respected and maintained at rates not exceeding the present rates, refers to contracts executed, and not future contracts. *Hurt v. Myers*, 83 Va. 167, 1 S. E. 911.

A city is not, in the absence of statutory provision

therefor, liable for damages to a mill owner whose water power under a lease of surplus water from the state out of a canal running through the city is destroyed by the abatement as a nuisance and impediment to navigation in violation of the ordinance of 1787, at the suit of the riparian proprietor especially injured thereby, of an aqueduct carrying the canal across a navigable stream, after a grant to the city by the state of that part of the canal and by such grant abandoned by the state as part of its public canals so as no longer to be within the protection, if any, of its sovereignty as an obstruction to the stream for the promotion of public works. *Hubbard v. Toledo*, 21 Ohio St. 379.

A grant to a city by the state of part of a canal running through it, authorized by statute to be made "subject to all outstanding rights and claims, if any," with which it might conflict, providing that the state shall be liable for all "damages which might accrue from the vacation" of the canal, and requiring the city to deposit with the governor a written release executed by the lessees of the public works relinquishing their rights in that part of the canal, or a bond in lieu thereof indemnifying the state against all "liabilities and damages which may result from said vacation,"—contemplates only the liabilities and damages for which the state would be responsible to the lessees of surplus water therefrom. *Hubbard v. Toledo*, 21 Ohio St. 379, Followed in *Fox v. Cincinnati*, 33 Ohio St. 492.

The grantee of a canal, acquiring title under a foreclosure of the lien of bond holders against the state, is not liable for damages for obstructing the flow of water to the mills of certain lessees by abandoning the canal and filling up its channel as a roadway for a railroad, on the ground that such act was in violation of an implied covenant in the lease for quiet enjoyment, where the lease was of so much of the surplus water not required for navigation as should be adequate to operate a designated amount of machinery in their mills, without imposing upon the lessor the obligation to maintain the canal in repair or keep it in such a condition that a surplus of water would be available, or to furnish them with any water whatever; so that the implied covenant for quiet enjoyment was only such that, so long as the canal was used for purposes of navigation, and while there was during that period a surplus of water, the lessor agreed to do no acts which would interrupt or deprive the lessee of its enjoyment, and therefore did not prevent an abandonment of the canal and its appropriation to other use provided none of the lessee's property be invaded by so doing,—especially as such lease was subordinate to the liens of the state creditors, under whose prior rights the present owner derived title. *Hoagland v. New York, C. & St. L. R. Co.* 111 Ind. 451, 12 N. E. 83.

Damages for injury to the entire property, caused by the closing and filling up by the agent of the board of internal improvement of the state of a canal through which the water necessary to operate a sawmill was conducted, in breach of a contract between the owner thereof and the board for the use of such waters, cannot be recovered against the state by one who, although the owner of the whole of such sawmill at the time the action was instituted, owned the same jointly with another at the time such wrongful act was committed, and the act of legislature in authorizing such suit to be brought by him against the state did not provide for or contemplate any litigation as to damages sustained by other than himself, and the deed by which he acquired the interest of the other owner does not purport to transfer to

him such other's claim against the state for the damages sustained by him. *Com. v. Jackson*, 5 Bush, 680.

Rights of grantee against third persons.

A lessee from the state of surplus water from a canal has a vested property right in the flow of the water therein and a right of action against a city which interferes with such flow to his damage, since the lease is not an executory contract by the state to furnish a daily supply of water to the lessee, but is a grant of an interest in the artificial water course. *Canal Elevator & Warehouse Co. v. Cincinnati*, 9 Ohio Dec. Reprint, 744.

A city which lets to an independent contractor the work of tunneling under a canal in the construction of a sewer, with permission of the state authorities so to tunnel on condition that it shall indemnify lessees of water power and protect their rights, is not thereby relieved from liability for damages to a lessee of surplus water, whose rights are interfered with by stoppage of the flow during the construction of a tunnel, and by the giving way of the canal on turning the water into it after the completion of the sewer; since it was its duty to uphold the canal when it put its tunnel under it, and it could not shift that duty upon another. *Ibid.*

Purchasers from the state and the lessees of the public works, of theretofore unused water power from a state canal, the lease of which was merely an incident of the public use, are not entitled to an injunction restraining interference with such power by the manner of construction of a previously commenced sewer improvement by a city to which, prior to the grant to them, had been granted by the state, in exercise of a reserved power, the right to enter upon and use a designated portion of the canal as a public highway and for sewer purposes, by an act conditioned that the grant should be made subject to outstanding rights or claims, if any, with which it might conflict, should not extend to the revenues derived from water privileges in said canal which were thereby expressly reserved, and should not obstruct the flow of water through said canal, nor destroy or injure a present supply of water for milling purposes, and that said city should be liable for all damages that might accrue from such obstruction or injury, since their rights were not at the time of the grant outstanding; unused water power is not included within the reservation of "water privileges" which, read in connection with other provisions as to outstanding rights and the prohibition of injury to the present supply, indicates an intention merely to protect the existing rights, if any, of lessees of water privileges, and the condition against obstruction of the flow of water through the canal was for the prevention of injury to the rest of the canal still owned by the state, which had been leased for a term of years, and the outlet of which was through the abandoned section. *Little Miami Elevator Co. v. Cincinnati*, 30 Ohio St. 629.

A similar decision was made in *Fox v. Cincinnati*, 33 Ohio St. 492 (1878), excluding from the saving clauses a water privilege which, while it had existed prior to the grant to the state, was at the time of the grant abandoned, the state had received therefrom no rents for several years, and the locks from which it was taken had become dilapidated and decayed, and the canal at that point had been permitted by the state to remain unused either for purposes of navigation or revenue.

Conflicting grants.

Successive lessees of the surplus water power
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of a canal, over and above that required for navigation, should be supplied with power in the order in which the leases were executed, when the supply is insufficient to furnish the requisite amount to all; and the fact that a prior lessee requested the making of subsequent leases by the canal trustees so as to increase the revenues, thereby facilitating the collection of a debt due him from the trustees, does not change the legal effect of the lease, nor the rights of the parties. *Wabash & Erie Canal v. Reinhart*, 22 Ind. 463.

A licensee from the state of water power sufficient to run one sawmill and two run of mill stones with labor-saving machinery attached is entitled to, and to an injunction restraining interference with, the amount of water specified in a subsequent agreement made by the canal commissioner for the purpose of avoiding disputes as to the construction of the race, as against a subsequent licensee of water power from the same level of the canal which is insufficient to supply both, of whose lease the plaintiff had no knowledge, and which was not recorded until after such agreement was made, although executed previously thereto, and under which, or a renewal thereof, no use was made of the water power until after the making of such agreement and the renewal of the first lease specifying such agreed amount; and is not bound by the amount determined in experiments made previous to such agreement at the instance of the state canal officers, to be sufficient to run a saw and run of mill stones, where it does not appear that plaintiff had any knowledge of such experiments, or that his machinery was the same as that used in making them. *Detwiler v. Toledo*, 5 Ohio C. C. 360.

The mere existence of facts justifying the state in declaring the forfeiture of a lease of water power for nonpayment of rent is no defense to an action by the licensees to restrain interference with the amount of water to which they are entitled by a subsequent license of water power from the same level of the canal. *Ibid.*

Duration.

A canal corporation cannot grant a use of surplus water from its dam which will exist longer than its franchise. There could be no fee-simple estate in it. *Jessup v. Loucks*, 55 Pa. 350.

The grantees of a right to use the surplus water from a navigation company's dam can acquire no right from the corporation or its user to maintain the dam after the termination of the franchise. *Ibid.*

A provision in an act of the legislature limiting the length of time for which canal commissioners can lease water power does not apply to an agreement entered into by them providing for the restoring of a dam, connected with canal lands on one side, which had existed with the consent of the canal commissioners for more than forty years prior to such agreement, although its effect is to grant an interest in the land for dam purposes in perpetuity. *Sanitary Dist. v. Adam*, 179 Ill. 406, 53 N. E. 743.

Contracts for the use of waters or other privileges of a canal, made by the board of public works or other agent of the state with an individual, terminate with the abandonment of the canal by the state; and no damages can be recovered by such individual against the state for such abandonment. *Vought v. Columbus, H. Valley & A. R. Co.* 58 Ohio St. 123.

Under a grant from the state of a right to draw surplus water from a canal for manufac-

turing purposes so long as the canal shall be maintained, the state cannot sell the canal in such a way as to defeat the right. *French v. Gopen*, 105 U. S. 509, 28 L. ed. 951.

The state officials can only lease water privileges in state canals, with the privilege of the state to resume the use of the water so leased at any time; and should such use be resumed or the canal be abandoned by the state, it will not be liable to respond in damages, to the lessee, by the destruction of the value of permanent improvements dependent on the use of the water, although the officials agreed to do so. *State ex rel. Fanger v. Board of Public Works*, 42 Ohio St. 607.

There can be no dower in the right of taking for hydraulic purposes the surplus water of a state canal. *Kingman v. Sparrow*, 12 Barb. 201.

Other matters.

Water in a canal reservoir which has not been utilized for the purposes of the canal is not public property so as to prevent the appropriation of the surplus above what is needed for canal purposes for local purposes. *Sweet v. Syracuse*, 129 N. Y. 337, 27 N. E. 1081, 29 N. E. 289, Reversing 60 Hun, 28, 14 N. Y. Supp. 421.

The constitutional provision forbidding the sale of state canals is not violated by a statute permitting a municipal corporation to take the surplus water from the canal reservoir for a municipal water supply. *Sweet v. Syracuse*, 129 N. Y. 337, 27 N. E. 1081, 29 N. E. 289, Reversing 60 Hun, 28, 14 N. Y. Supp. 421, and Affirming 11 N. Y. Supp. 114.

An injunction will not be granted to restrain the grant of a right to the use of waters from a canal to a power company engaged in beneficial uses for the public, but complainant will be left to his remedy at law, when it appears that his loss would be trifling, his business having been almost destroyed by combinations, and that he had been guilty of laches in his application, during which time extensive improvements had been and were being constructed which would materially increase the capacity of the canal. *Stewart Wire Co. v. Lehigh Coal & Nav. Co.* 203 Pa. 474, 53 Atl. 352.

V. Injury by construction and use.

Flowage by dam.

Where a statute authorized the trustees of a canal constructed by the state for public purposes to take possession of the same and to construct a dam across a river for the purpose of raising the water to a specified height, it by implication authorized the entry and invasion of adjoining land to the extent necessary to maintain such height of water; and a further provision granting a right of way in and along the course of the canal, and providing that if, "in enlarging the canal, or in constructing the dam," it became necessary to use private property, the trustees should have the power to acquire "such right of way" in the manner provided by law, will not be construed as limiting the right of way to the line of the canal and the land actually occupied by the dam, but will include all lands and easements necessary to maintain the water at its increased height, as the rule that statutes granting power to condemn private property should be strictly construed must not be enforced to the extent of defeating the object of the grant. *Leitzey v. Columbia Water Power Co.* 47 S. C. 464, 34 L. R. A. 222, 25 S. E. 744.

Any flowage caused by a canal corporation under a power of taking land and water rights without compensation first made will be lawful, 61 L. R. A.

though compensation has not been ascertained or made. *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 708.

Injury is done to a person whose land is flowed at the completion of a permanent dam across a river to raise a head of water for a canal, within the meaning of a statute requiring persons injured to present their claim within one year from the injury. *Heard v. Middlesex Canal*, 5 Met. 81.

Failure to present within a year claims for damages for the permanent overflow of land by the raising of a dam for the use of a state canal will, under the New York statutes, amount to a waiver of the claim. *Benedict v. State*, 120 N. Y. 228, 24 N. E. 814.

A canal company given power to construct a dam across a water course to secure a water supply will not be limited to the first exercise; but, in case a new dam becomes necessary, it may build it, and one injured thereby must seek his remedy under the charter requiring payment of damages for injuries done, and not by a common-law action. *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 86.

A canal corporation will not be presumed to have been negligent in constructing a dam in a public river under its franchise. *Whitaker v. Delaware & H. Canal Co.* 87 Pa. 34.

When a canal corporation raises its breast dam, a riparian owner is not precluded from recovering the damages caused by the increased taking by having recovered damages for the first taking. *Union Canal Co. v. Stump*, 81* Pa. 355.

A company, although authorized to build and maintain a canal by act of the legislature, is liable for injuries due to the penning back of a stream it crosses by a culvert. *Delaware & R. Canal Co. v. Lee*, 22 N. J. L. 243.

The depreciation or diminution in value of adjacent property not actually occupied, caused by back water, is a taking within the meaning of an act of the legislature authorizing a canal corporation to take such lands, waters, and streams as may be necessary for its works. *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 706.

A canal company authorized by its charter to dam the outlet of a lake, and to take lands overflowed thereby by paying the value thereof, is, after such taking and payment on the construction of the dam, nevertheless liable to an adjacent owner for the value of additional land overflowed beyond what was in the survey and award, although it appears that the dam has not been raised. *Morris Canal & Bkg. Co. v. Seward*, 23 N. J. L. 219.

A grant of a right to flow a portion of a tract of land operates as a release from liability for injuries to the remainder of the tract resulting from the exercise of such right in a proper manner. *Nunnamaker v. Columbia Water Power Co.* 47 S. C. 485, 34 L. R. A. 222, 25 S. E. 751.

A canal company authorized to construct its canal is not entitled to raise the height of a dam and set back water to the injury of upper riparian proprietors, unless its intent is manifested, and proceedings are taken in the manner pointed out by its charter. *Farnum v. Blackstone Canal Co.* 1 Sumn. 46, Fed. Cas. No. 4,675.

The reservation, in a grant to a canal company of the right to maintain a dam, of the "right to claim damages" in the event of the overflowing of the grantor's lands below a designated point, reserves to him only the right which he would have had in the absence of a conveyance had the property been appropriated for the building of the dam and flowing of the land, *viz.*, to prefer his claim against the company and procure an appraisal, and, upon obtaining an estimate of the damages sustained,

as provided by the company's charter, to recover the same as his just compensation. *Elson v. Seaburg*, 11 Ohio St. 265.

Where commissioners having power to adopt a plan for the construction of a canal agreed upon one, and then substituted another which involved the increasing of the height of a private dam, their authorization will not protect the owner of the dam from liability for injuries caused by the increase in height of water, since, having exhausted their authority, their permission for the increase in the height of the dam was of no effect. *Jermaine v. Waggener*, 1 Hill, 279.

But that case is reversed in 7 Hill, 357, on the ground that, if the canal commissioners had a right to erect any structure by which the water should be raised to the level established by them, it is not very material whether they carried this purpose into effect by erecting a state dam, or by directing defendants to raise their dam.

Canal trustees are liable for the damages sustained by a landowner by the overflow of his land caused by the action of the trustees in raising a dam across a river and cutting waste ways through embankments. *Wabash & E. Canal v. Spears*, 16 Ind. 441, 79 Am. Dec. 444.

A canal company cannot enlarge its right of eminent domain to overflow the lands of upper proprietors by purchasing the land on one side of its dam and securing the acquiescence to its building the dam of the proprietor on the other side, as it thereby only acquires such rights as the proprietors had, which were not rights of eminent domain. *McCombs v. Stewart*, 40 Ohio St. 647.

A canal company having power to enlarge its canal will be liable for the inundation of land of a third person by reason of the improvement, even though the work may have been performed with reasonable care and skill. *Seiden v. Delaware & H. Canal Co.* 24 Barb. 362.

A canal corporation is liable for permitting its dam to become filled up to the injury of riparian proprietors, as the riparian inhabitants have a right to the natural flow of the river preserved, except so far as they may lawfully change it for the improvement of navigation. *Schuylkill Nav. Co. v. McDonough*, 2 Phila. 290.

Since the adoption of the Constitution of 1874, a canal corporation is liable for consequential damages from raising its dam, as it is liable for all property taken, injured, or destroyed by an enlargement of its works. *Fredricks v. Pennsylvania Canal Co.* 148 Pa. 317, 23 Atl. 1067.

A canal corporation does not make such an enlargement of its dam as to make it liable for consequential damages by the use of splash-boards temporary in their character, for a temporary purpose, and invariably swept away by high water. *Ibid.*

Where a canal company claims title by adverse possession to land which it had formerly flooded under statutory authority, for the purpose of creating a reservoir, the time during which the land was flooded cannot be considered for the purpose of fixing the statutory period, as such user was not adverse. *Doe ex dem. Queen v. York*, 19 L. J. Q. B. N. S. 242, 14 Q. B. 81.

Where the trustees of a canal construct a dam across a river under a statute authorizing them, in so doing, to take private property in the manner provided by law, the owner of the property taken, in seeking his compensation, is confined to the remedy provided by the statutes relating to the taking of private property for public purposes, although the trustees, in constructing said dam and raising the height of the water, did so without first giving the notice pre-

scribed by such statutes to the effect that such privilege was required, as it will be presumed, in the absence of objection on the part of the landowner, that it was done with his permission, thereby obviating the necessity for the notice. *Leitzsey v. Columbia Water Power Co.* 47 S. C. 464, 84 L. R. A. 215, 25 S. E. 744.

Waiver as to the canal company, by the grantor of the right to the company to maintain a dam, of the reserved right to claim compensation and have it determined in the manner provided in the company's charter in case of the overflowing of the lands of the grantor below a designated point, inures to a bona fide purchaser from the company so as to defeat the action of damages from the overflowing of the lands by the maintenance of the dam by the latter in the same condition as maintained by the company. *Elson v. Seaburg*, 11 Ohio St. 265.

A canal company building a dam and other works by the assent of the owner of land afterwards deeded to the company is not liable to a grantee from the same owner, for injuries resulting therefrom, if the work was done with care and skill, and kept in proper repair and of sufficient strength to resist all ordinary and reasonably to-be-anticipated strains. *Morris Canal & Bkg. Co. v. Ryerson*, 27 N. J. L. 457.

Injunction will not lie to prevent a canal company from raising the head of a dam to the injury of a mill owner, if there is an adequate remedy at law in an action for damages. *Bruce v. Delaware & H. Canal Co.* 19 Barb. 371.

A state superintendent of public works, whose duty is to remove flush-boards from dams holding back the waters of a lake for use in feeding a state canal during the period of closed navigation, may be required to do so by injunction in case he fails to perform his duty voluntarily. *Wright v. Shanahan*, 149 N. Y. 495, 44 N. E. 74, affirming 61 Hun, 264, 16 N. Y. Supp. 785.

Equity will protect a canal company from being required to defend itself on the same claim of right in several suits, by directing that one of the suits be brought to trial, and that the others stand until the result of that one is known. *Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 135.

A bill has no equity, and is multifarious, which is brought by a canal company which is defendant in suits alleging unlawful flowage and in others alleging unlawful diversion, which set forth the several defenses in each case arising from the erection and use of its canal, but where it does not appear that the cause of complaint was the same in each case. *Ibid.*

A bill of peace is not allowable when the several suits at law sought to be enjoined do not all dispute a general right in the complainant, in which the defendants are interested, of such a character that its existence may be finally determined in a single issue. *Id.* 31 N. J. Eq. 730.

Flowage by works.

A public canal company acting under legislative authority is not liable for flowing adjoining land, unless it result from its negligence. *Whitehouse v. Birmingham Canal Co.* 27 L. J. Exch. N. S. 25.

The unauthorized flooding of an owner's lands by the waters of a canal renders the canal company liable in damages for the actual injury done. If the remaining land has been enhanced in value to a greater extent than the injury by having a water front valuable for wharves and commercial facilities, then only nominal damages can be recovered. *How v. Chesapeake & D. Canal Co.* 5 Harr. (Del.) 245.

A purchaser of land, a portion of which was

overflowed by the waters of a canal at and prior to his purchase, cannot recover damages therefor where his grantor was paid a certain sum of money in full satisfaction for flooding such portion and of all damages done to the land by the flooding, and signed a written agreement to convey title to such land to the canal company upon demand, upon the faith of which the company entered into possession and flooded the land, although a deed thereto was never executed, and such land was not reserved from the purchaser's deed. *Ibid.*

Obstructing drainage.

A company authorized to construct a canal through a swamp cannot, without payment of compensation, obstruct natural drains and inundate adjacent lands, in the absence of an express provision in its charter authorizing it. *Mabire v. Canal Bank*, 11 La. 83, 30 Am. Dec. 710.

In *Pinnix v. Lake Drummond Canal & Water Co.* (N. C.) 43 S. E. 578, in which defendant, a canal company, in widening and deepening its canal, had piled sand and mud upon its banks so that they were washed down into its sweat and lead ditch, and over onto adjoining land to its injury, the company contended that it was not liable for the injury unless the work was done negligently; but the court said that one is just as liable for doing an unlawful act as for negligently doing a lawful act. Piling large quantities of mud and sand upon the banks of the canal without providing means to prevent its falling upon adjoining land was negligence; while throwing mud and sand directly upon such land was an unlawful act which no amount of skill could justify.

If a canal company builds the embankment of its canal in such a manner and to such a height as to collect the surface waters from the basin of a creek and discharge them on a lower owner in a body, it will be liable for the injury which they occasion. *Kearney Canal & Water Supply Co. v. Akeyson*, 45 Neb. 635, 63 N. W. 921.

The city council of Savannah has power to pass a resolution demanding the abatement of a nuisance caused by the maintenance of an embankment by a canal company obstructing drainage of a portion of the city, by the construction by the company of an additional culvert within a specified time, and, in default thereof, declaring that the same shall be constructed by the city at the cost of the company. *Savannah v. Savannah & O. Canal Co.* 9 Ga. 281.

The owner of a canal constructed across the lower end of another's farm, thus damming up the natural outlet or ditch for his surface water, which canal is so much higher than the surrounding land as to cause its percolating water to run down upon the farm, is liable in permanent damages under the North Carolina statutes. *Mullen v. Lake Drummond Canal & Water Co.* 130 N. C. 496, 41 S. E. 1027.

The rule that flood water from a river coming into another water course cannot be obstructed by an adjoining proprietor to the injury of other proprietors is limited to natural water courses, and does not apply to flood water flowing into a canal. *Nield v. London & N. W. R. Co.* L. R. 10 Exch. 4, 44 L. J. Exch. N. S. 15, 23 Week. Rep. 60.

Insufficient banks.

Constructing the bank of a canal so insecurely that water leaks through and injures adjoining property is within a statute giving a claim against the state for injuries resulting from the use or management of the canal. *Hearcock v. State*, 105 N. Y. 246, 11 N. E. 638. 61 L. R. A.

A canal company will be liable for injuries caused to land of abutting owners by water flowing from the canal by reason of the maintenance of the embankments in such a manner that the water necessary for the operation of the canal flows over or leaks through the embankment causing such injury. *Kearney Canal & Water Supply Co. v. Akeyson*, 45 Neb. 635, 63 N. W. 921.

A canal company acquires no prescriptive right or title to overflow land by the waters of its canal, caused by the giving or wearing away of a berme bank that once had confined the waters, where no other right or title to flow the land exists except such as resulted from its failure to repair the bank, and the gradual washing away of the same, of which a portion remained as it was constructed until within less than ten years, and the company never claimed any title or right to overflow the land, and made no use thereof for any purpose. *Peterson v. McCullough*, 50 Ind. 35.

Where, by reason of the construction of a state canal feeder through coarse gravel, water leaks therefrom and overflows adjoining land so as to render it unfit for cultivation, the owner is entitled to compensation for loss of the use of the land until the water is removed, including the cost of removal of earth taken by the state from a ditch dug to draw the water and piled on the land, and the amount necessarily expended in reclaiming the land and fitting it for cultivation after it has been drained. *Sayre v. State*, 123 N. Y. 291, 25 N. E. 163.

The construction of a dam for a feeder for a state canal in such a way as to expose porous gravel on one side of the reservoir through which water percolates onto the land of adjoining owners is negligence for which a recovery can be had against the state, under a statute authorizing recovery in case of injury through the use or management of canals, or resulting from the negligence or conduct of any officers of the state having charge thereof. *Reed v. State*, 108 N. Y. 407, 15 N. E. 735.

When a canal corporation has negligently permitted water to escape from its basin it will be liable for damage thereby, although the injury was proximately caused by a lawfully constructed sewer which led the water out of its natural course. *Delaware & H. Canal Co. v. Goldstein*, 125 Pa. 246, 17 Atl. 442.

A canal company, although acting under an act of Parliament, is liable for negligence; hence, it is liable to a mill owner for a leakage from the canal into the mill which it might have prevented, although it resulted from the working of a mine beneath the canal and mill causing the surface of the ground to subside. *Evans v. Manchester, S. & L. R. Co.* L. R. 36 Ch. Div. 628, 57 L. T. N. S. 194, 57 L. J. Ch. N. S. 153, 36 Week. Rep. 328.

But it has been held that a canal company is not liable to one whose cellar is flooded by water percolating from the canal, in the absence of negligence on the part of the company or want of skill or care in the construction or maintenance of the canal. *Cuddeback v. Delaware Canal Co.* 20 N. Y. Week. Dig. 454.

One whose land is flooded by a canal company by its negligence may have his action at law, and need not proceed under the compensation clause of a statute under which the canal was operated, as that only refers to injuries resulting in the due and proper execution of the powers under the act. *Cockburn v. Erewash Canal Co.* 11 Week. Rep. 34.

The state is liable for damage inflicted upon crops by the overflow of the canal due to the negligent failure of the man in charge of the waste weir in a canal feeder to control the

water during a heavy, but not extraordinary, storm. *Shannahan v. State*, 57 App. Div. 239, 68 N. Y. Supp. 131.

The damages for injury caused by leakage from a state canal will include the expense of the necessary repair to the injured buildings, as well as the loss of rental value. *Connor v. State*, 152 N. Y. 49, 46 N. E. 1145.

The owner of rice lands, who is prevented from cultivating them by the overflow thereof by water from a canal, is entitled to recover the loss or damage resulting from the nonuse of his outlay for mules, implements, etc., provided he did not know at the time of such outlay that his land was submerged so that it could not be cultivated. *Savannah & O. Canal Co. v. Bourquin*, 51 Ga. 378.

The proprietors of a navigation are not relieved from liability for the flooding of land resulting from the bursting of a delph or cut maintained by it for the purpose of carrying off certain water by the fact that the persons charged with the duty of keeping open a channel into which the delph emptied had neglected to do so; and thereby penned back the water into the cut, causing the banks to burst, where the proprietors of the navigation knew of such negligence, and neglected to keep their banks of proper strength to resist the water. *Harrison v. Great Northern R. Co.* 3 Hurlst. & C. 231, 33 L. J. Exch. N. S. 260, 10 Jur. N. S. 992, 10 L. T. N. S. 621, 12 Week. Rep. 1081.

Damages may be allowed against the state for injuries caused by a break in the retaining wall of a state canal through the negligence of a lock tender, under a statute giving the board of claims the right to hear and determine all claims against the state for damages sustained from the canals or from their use or management, or resulting from the negligence or conduct of any officer of the state having charge thereof, or resulting or arising from an accident or other matter or thing connected with the canals. *Sipple v. State*, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657.

A town upon which the duty of repairing bridges is imposed may maintain a claim against the state for injuries to the bridge by a break in a state canal, under a statute giving the right to maintain such claims for the negligent management of the canals. *Bidelman v. State*, 110 N. Y. 232, 1 L. R. A. 258, 18 N. E. 115.

But in *Higgins v. Chesapeake & D. Canal Co.* 3 Harr. (Del.) 411, it is held that a canal company, duly authorized by law to construct its canal, is not liable for damages to adjoining lands resulting from a mere accidental break in its canal which human foresight and vigilance could not have anticipated, and against which proper prudence and judgment could not be expected to provide.

The payment by the state of damages for a flooding of land by opening the canal during a high flood does not constitute such a "taking" as to vest title in perpetuity in the state. *Scott v. Nickum*, 193 Pa. 371, 44 Atl. 437.

A canal corporation is liable to indictment for the maintenance of a nuisance when it permits the water to leak through a bank and become stagnant on adjoining lands. *Delaware Div. Canal Co. v. Com.* 60 Pa. 367, 100 Am. Dec. 570.

A canal company is under no obligation to build levees along its canal where such duty was not assumed in its charter, and has not been imposed upon it by law. *New Orleans v. Carondelet Canal & Nav. Co.* 42 La. Ann. 6, 7 So. 63.

A city is not entitled to build expensive levees along a canal, and recover their cost from the canal company, on the ground that, if the levees had not been built, the waters of the 61 L. R. A.

canal would have escaped and damaged others. *Ibid.*

Waste water.

The flowage of land by the discharge of water from the waste weir of a canal constructed under and in accordance with legislative authority amounts to a taking of property for public purposes without compensation. *Hooker v. New Haven & N. Co.* 14 Conn. 146, 36 Am. Dec. 477, Reaffirmed in 15 Conn. 312.

A prescriptive right to the outflow of water through an opening in a canal, maintained more than twenty years for the purpose of supplying the canal with water as a reserve, into a swamp and from it over the adjoining lands, confers no right to increase such outflow, either intentionally or by negligence, so that it will cause the water to escape from the swamp in such quantity as to submerge the land of an adjacent proprietor, which had not been theretofore overflowed. *Savannah & O. Canal Co. v. Bourquin*, 51 Ga. 378.

Where the water discharged from one of the waste weirs of a canal constructed under and in accordance with legislative authority flowed upon the land of another, the canal company is not relieved from liability for the injury by reason of the fact that the waste weirs had been approved by the canal commissioners, and operated with prudence and care by the canal company. *Hooker v. New Haven & N. Co.* 14 Conn. 146, 36 Am. Dec. 477, Reaffirmed in 15 Conn. 312.

Unsanitary condition of water.

A canal company authorized by statute to take water from a certain brook is liable to indictment if it continues to take it after it has become foul, thereby creating a public nuisance. *Reg. v. Bradford Nav. Co.* 34 L. J. Q. B. N. S. 191, 6 Best & S. 631, 11 Jur. N. S. 769, 13 Week. Rep. 892.

A canal company is not relieved from liability by creating a nuisance in taking into the canal the foul and corrupt water of a beck by the fact that a statute passed at the time the water of the beck was pure authorized the canal company to take it for canal purposes. *Ibid.*

In *Atty. Gen. v. Bradford Canal*, L. R. 2 Eq. 71, 35 L. J. Ch. N. S. 619, 15 L. T. N. S. 9, 14 Week. Rep. 579, the fact that the defendant had appealed from a judgment finding it guilty of creating a nuisance by taking into the canal the polluted waters of a beck was not deemed by the court sufficient ground for refusing to grant an injunction against the continuance of the nuisance, where the court did not doubt the justice of the decision at law.

The delay of the public in proceeding to restrain a canal company from taking into its canal the polluted waters of a beck, during which time the company has expended money in building barges and boats, and has increased its capital on the face of noninterference, will not deprive the public of its right to equitable relief where, during such period of noninterference, the nuisance has been growing and increasing in extent, and the remedy asked does not extend to restraining the operation of the canal, but merely the taking into it of the polluted water. *Ibid.*, Affirming 14 L. T. N. S. 248.

A canal company will be restrained from pumping foul water into its canal, although it pumps it from a beck pursuant to statutory authority, and which has subsequently been made impure by the act of others. *Ibid.*

The court, in granting a perpetual injunction restraining a canal company from using the polluted waters of a beck, will delay the execu-

tion of the injunction to enable the parties to comply with it without putting them to unnecessary inconvenience and expense. *Ibid.*

One taking water from a canal, not as a riparian proprietor, but merely by the sufferance and consent of the owners of the canal, has no right of action against a third person who, by reason of a similar sufferance and consent, pollutes the water of the canal. *Laing v. Whaley*, 4 Jur. N. S. 930, 3 Hurlst. & N. 673, 27 L. J. Exch. N. S. 422, 6 Week. Rep. 750, *Reversing* 2 Hurlst. & N. 476.

Other injuries.

Canal trustees, a body corporate created by law, holding title to a canal in trust for the mutual benefit of the state and its creditors, with a statutory right to sue and liability to be sued, may be sued by an individual for damages resulting from their negligence in the management of the canal, although one of the trustees is appointed by and represents the state, and the state has a contingent reversionary interest in the canal. *Moore v. Wabash & E. Canal*, 7 Ind. 462.

A grant of a right to construct a canal carries with it the corresponding or correlative duty to construct and maintain it in such substantial manner as not unnecessarily to annoy or injure others. *Delaware & H. Canal Co. v. Goldstein*, 125 Pa. 246, 17 Atl. 442.

A corporation which is chartered to open a canal, but which is not liable for repairs, nor to be the recipient of any toll, will not be held liable for damages resulting from the existence or use of such canal in the absence of charter provision. *Spring v. Russell*, 7 Me. 273.

A contractor for enlargement of a state canal will be liable for casting stone upon the adjoining property of private individuals while blasting for the prosecution of his work. *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258.

A person cannot, in digging a canal, blast rocks in such a manner that they fall upon the land of another, without being liable for the injury thereby caused. *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279.

In an action for damage for injuries caused by rocks thrown against plaintiff's house by defendant in blasting for a canal, evidence is not admissible that the work was done in the best and most careful manner. *Tremain v. Cohoes Co.* 2 N. Y. 163, 51 Am. Dec. 284.

A canal company which acquired by deed land occupied by a feeder with its adjuncts, an embankment, towing path, dam, overflowed land, and guard bank, with soil between it and a river, by private bargain with the ancestor of the owner of other adjoining lands, the consideration expressed being inclusive of damages to the grantor from the destruction of a river ford, cannot, when sued by a descendant of the grantor for injuries to other lands due to the construction and operation of its works, show that the consideration in such deed was beyond the value of the things conveyed in it, and was orally understood with the grantor to include all damages to any of his lands that might result from the construction of the embankment and dam; because the offered proof is not to show the true consideration of the grant, but to enlarge the grant itself, and, hence, is both to vary a deed, and to establish an interest in land by parol. *Morris Canal & Bkg. Co. v. Ryerson*, 27 N. J. L. 457.

When the remedies against a canal corporation provided in its charter are for the injuries resulting from the construction of its works, they do not exclude the common-law remedies for injuries from the abuse or neglect of its privileges. *Schuykill Nav. Co. v. McDonough*, 2 Phila. 290, 61 L. R. A.

A canal company constructing a canal by the side of an ancient public footway at a distance of about 24 feet from it is not bound to construct a fence between the footway and the canal, and is not liable for injuries to a person wandering away from the footway and falling into the canal, as such a canal is not sufficiently near to the roadway to be dangerous to a person using the road in the regular line. *Binks v. South Yorkshire R. & River Dun Co.* 3 Best & S. 244, 32 L. J. Q. B. N. S. 26, 7 L. T. N. S. 350, 11 Week. Rep. 56.

The fact that canal proprietors fall to take advantage of the provision of an act of Parliament under which they are operating, which provides that, in case they desire to prevent the working of the mine beneath the canal, they may pay to the owners the value of the same, does not make them liable for the drowning of the mine by percolation in the absence of negligence on their part. *Dunn v. Birmingham Canal Nav. Co.* L. R. 8 Q. B. 42, 42 L. J. Q. B. N. S. 34, 27 L. T. N. S. 683, 21 Week. Rep. 266, *Affirming* L. R. 7 Q. B. 244, 41 L. J. Q. B. N. S. 121, 26 L. T. N. S. 241, 20 Week. Rep. 573.

The proprietors of a canal constructed by them pursuant to an act of Parliament are not liable for the percolation of water into a mine as a result of the prudent and careful construction of the canal in conformity with the provisions of the act, unless made so by the act itself, and all common-law liabilities and remedies are superseded by the statute provided work be done pursuant to it and without negligence, and the persons injured are limited to such compensation and remedies as are provided for by the statute, and the rule laid down in *Rylands v. Fletcher* does not apply. It is only in case of negligence on the part of the proprietors that the common-law remedies and liabilities are restored. *Ibid.*

VI. Duty to patrons.

The proprietors of a canal are bound at common law to use reasonable care in making the navigation secure, and they are liable, independent of statute, for injuries to a boat resulting from its colliding with a sunken vessel, where the company had notice of and failed to remove the obstruction. *Lancaster Canal Co. v. Parnaby*, 11 Ad. & El. 223, 3 Perry & D. 162, 9 L. J. Exch. N. S. 338, 1 Railway Cas. 696, *Affirming* 3 Nev. & P. 523.

A canal company is liable to persons navigating or using the canal for injuries resulting from its negligence in failing to keep in a safe condition a bridge leading to the mooring place. *Shoebottom v. Egerton*, 18 L. T. N. S. 889.

It is actionable negligence on the part of proprietors of a canal to leave sunken piles at the entrance of and inside their canals, with no danger signals, no matter how long they have been there, nor how well known, or to leave with no danger signals a wrecked vessel lying on her beam-ends with her mast projecting into the channel; and one whose schooner is wrecked on such obstructions while he is in the exercise of reasonable care and diligence may recover damages. *Pajewski v. Carondelet Canal & Nav. Co.* 11 Fed. 313.

Proprietors of a canal who are required by the charter to maintain the canal wide enough to permit the passage of rafts which can pass in a river with which it is connected, are liable to the owner of a raft from whom they have received toll, for injuries caused by the insufficiency of the width of the canal, although it is not shown that the raft could have passed the river. *Riddle v. Locks & Canals*, 7 Mass. 169, 5 Am. Dec. 35.

A company which maintains a private canal open to the public on payment of tolls is not

liable for the loss of a boat and cargo which sunk when the boat struck a stone lying on the bottom of the canal, where the stone was not visible, its presence was unknown to the company, and it does not appear how it came to be in the canal. *Exchange F. Ins. Co. v. Delaware & H. Canal Co.* 10 Bosw. 180.

Although a statute creating a canal company does not require it to remove sunken vessels, the company operating the canal for its profit, and opening it for the public on the payment of tolls, is bound to take reasonable care to prevent danger to the navigation, and is liable for failure either to weigh up or give notice of the sunken vessel, whereby a boat navigating the canal is injured. *Lancaster Canal Co. v. Par-naby*, 3 Perry & D. 162, 1 Railway Cas. 696, 11 Ad. & El. 223, 9 L. J. Exch. N. S. 338.

The municipal corporation is liable for injuries to a boat while navigating a canal, caused by obstructions negligently placed therein by parties who were deepening such canal beyond the city limits, under a contract with such city which provided that the work should be under the immediate direction and superintendence of the city through the board of public works; such work being done by virtue of an act of legislature authorizing the same for the benefit of the drainage of the city and with the assent of the canal trustees. *Chicago v. Jeney*, 60 Ill. 383.

A municipal corporation is not liable for damage to a canal boat and the loss of its cargo caused by striking a rock in the bed of a canal which such municipality had been widening and deepening at that point, where the rock was precipitated into the canal after the work had been completed, from some point near the slope of the canal by a "slide" of which the city had no knowledge. It would be unreasonable to require the water of a canal to be drawn off periodically in order that the bed thereof might be inspected. *Byrne v. Chicago*, 80 Ill. 195.

A superintendent of canals, whose duty is to repair banks and remove obstructions, will be personally liable for injury resulting from his neglect of duty. *Adelt v. Brady*, 4 Hill, 630, 40 Am. Dec. 305.

A railway company having the management of a swing bridge over a canal is not liable for injuries sustained by a vessel on account of a failure to open the bridge in response to the vessel's signal, when, at the time, the requirements of the railway traffic compelled the bridge to be closed, which fact was communicated to the vessel by signal. *Turner v. Great Western R. Co.* 6 U. C. C. P. 536.

It was held that one contracting to keep a section of a state canal in repair is not liable to a private individual for injuries caused by his failure to comply with the contract. *Fish v. Dodge*, 38 Barb. 163; *Minard v. Head*, 38 Barb. 174.

But the court of appeals held that the negligence of a repair contractor on a canal to keep the section in a good, safe, navigable condition will render him liable to a person injured in navigating that portion of the canal through such negligence. *Johnson v. Belden*, 47 N. Y. 130, Affirming 2 Lans. 433, Following *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713.

One navigating a canal constructed in aid of the navigation of a river is bound to provide sufficient force to propel his boat, and put in charge thereof men of ordinary skill in their vocation; and, if aware of an obstruction to navigation, it is his duty to take steps to have it removed; and he is not at liberty to thrust his boat into a known danger and recover loss sustained; but, if preferring to put forward his boat, it is his duty to use ordinary care to pro-

vide himself with such force and means as are sufficient to overcome the obstruction. *Guthrie v. McConnel*, 2 Ohio Dec. Reprint, 157.

Under the provision of Laws 1870, chap. 321, exempting the state from liability resulting from the navigation of the canals, the state is not liable for the loss of a canal boat which grounded by reason of a break at the state dam while she was lying in a position tied outside another boat at the wharf, where her cargo was to be unloaded, since her navigation was not yet at an end. *Zorn v. State*, 45 App. Div. 163, 60 N. Y. Supp. 1037.

An action for damages for injury to barges by an overflow of a canal is a local, and not a transitory, action. *Moyer v. Chesapeake & D. Canal Co.* 12 Phila. 400.

Being otherwise free from blame, the navigation on Sunday, even in violation of a statute prohibiting unnecessary work on that day, of a ship canal is not such contributory negligence as will bar the navigator's recovery for injuries resulting from the negligence of the canal company in permitting too much water to flow into the canal and too little to flow out, whereby its banks were overflowed and destroyed and the navigator's boats detained and injured. *McArthur v. Green Bay & M. Canal Co.* 34 Wis. 139.

The failure of navigation commissioners to give notice to the lessees of a canal requiring repairs to be made does not make them liable to the owner of a barge which entered the canal while the lock was out of repair, and was prevented from getting out again by the falling in of the lock, as the duty to repair devolved upon the lessee, and the detention of the barge was not a damage naturally flowing from the failure to give the notice. *Walker v. Goe*, 4 Hurlst. & N. 350, 28 L. J. Exch. N. S. 184, 5 Jur. N. S. 737, Affirming 3 Hurlst. & N. 395.

VII. *Adjuncts to canal.*

Feeders.

A state owes no active vigilance to one on its property for his own convenience to have the covering of a feeder to a state canal in such condition that no injury shall result to him therefrom. *Donahue v. State*, 112 N. Y. 142, 2 L. R. A. 576, 19 N. E. 419.

The acquisition by the state of the right to use a creek for a feeder for a state canal by turning the water of the river through it does not give it a right to broaden and deepen the creek without making compensation to the owner of the land through which it flows. *Coleman v. State*, 134 N. Y. 564, 31 N. E. 902.

Reservoirs.

Power to take land for necessary storage reservoirs is an essential incident to the power to condemn land for a canal. *Delosier v. Pennsylvania Canal Co. (Pa.)* 9 Cent. Rep. 632, 11 Atl. 400.

Where a canal company adopts a recently constructed mill pond as part of its navigation, and uses it as a reservoir, paying the owner of the land flooded by it the damages thereby occasioned, the company having the right to discontinue the canal and to use the reservoir for furnishing water power, the discontinuance of the canal and the maintenance of the reservoir for the use of mills will not give the owner of the flooded land a right to additional compensation for such use. *Chase v. Sutton Mfg. Co.* 4 Cush. 152.

The legislature may authorize the appropriation of land within the state for a reservoir for a canal which runs along the border of the

state of its territory. *Re Townsend*, 39 N. Y. 171.

Basins.

A basin or reservoir formed by erecting a dam on a creek at the point where the latter intersects a canal with locks at each end, the land for which was appropriated for that purpose by the canal company and used as a feeder for the canal also for the passage of boats, constitutes a part of the canal, and not merely an incident. *Blair v. Kiger*, 111 Ind. 193, 12 N. E. 293.

It is not the duty of canal trustees to condemn and appropriate land at the confluence of two branches of a stream for the purpose of forming a basin at that place, where, by reason of the abandonment of the original plan to make that point the termination of such canal and fixing it at a different place, the reason and necessity for the basin cease; and the act of legislature describing such land, and expressly directing its appropriation, must be construed in connection with the authority, also conferred by statute upon the trustees, to make such changes and alterations in the plan of the canal as they deem expedient, so as not to reduce its capacity or materially change its location, or increase its cost, or prevent an adequate supply of water, the change in question not being in violation of the authority thus conferred. *People ex rel. Chicago v. Illinois & M. Canal*, 14 Ill. 292.

The state acquired no right in perpetuity to land on which a canal basin was constructed at the request of the owners of the land and exclusively for their benefit, and at the same time without disadvantage to the state, as there was no appropriation of the lot by the state for permanent use and occupation as part of its canal. *Pennsylvania & N. Y. Canal & R. Co. v. Billings*, 84 Pa. 40.

The acts of the canal commissioner in constructing on certain lots lying on the banks of the canal a basin and a channel through which waters are used in locking boats on the canal, conclusively determine that such basin and channel are necessary to the operation of the canal. *State v. Snook*, 53 Ohio St. 521, 42 N. E. 544.

Where, as a private enterprise, a basin was constructed by the owner of land abutting on a canal, and its waters were allowed to flood such basin, and the same was used for private and public canal use as a stopping place for boats, for loading and unloading, turning, etc., for thirty-five or forty years, but at no time did the owner show an intention to donate it to the state, and no demand was made on him by the state for its possession, or notice of intention to appropriate for canal purposes given, and no steps to acquire by statutory measures were taken,—the use and occupancy indicated above was not such an exclusive occupancy as is necessary to raise a presumption of appropriation by the state; and hence no title thereto is vested in the state. *Smith v. State*, 59 Ohio St. 278, 52 N. E. 638.

An act of the legislature authorizing the trustees of a canal to construct a canal basin at the confluence of the two branches of a river, and directing them to appropriate a certain block of land for that purpose, and to permit the owners thereof to receive another block belonging to the canal trustees in exchange, setting out the method of making the appraisals, etc., does not entitle the owners of the first block to maintain an action in equity to compel such trustees to take their land for the purpose of such canal basin, and to have the other block appraised and exchanged therefor, in the manner provided by the statute. *Illinois & M. Canal v. Dewes*, 11 Ill. 592.

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Connection of a private basin with a state canal cannot ripen into a prescriptive title where the officers are, under the statute, without power to grant such right. *Burbank v. Fay*, 65 N. Y. 57.

One whose property abuts on the berm bank of a cut extending from a canal, but who shows no easement or right therein, is not entitled to injunctive relief where the state authorities, in pursuance of legislative authority, propose to build a retaining way, and fill in the cut so as to close all access to it. *Lynch v. Partridge*, 36 Misc. 302, 73 N. Y. Supp. 469.

The court will not compel, by injunction, a canal company to remove a wall partially constructed by it across a bay situate on the canal, but which the company claims was not properly a part of it, as the court cannot compel it to undo anything that it has done; but it will, at the instance of the mill owner whose mill is located on the bay, restrain the canal company from proceeding further with the construction of the dam pending a trial at law of the mill owner's right. *Bradbury v. Manchester, S. & L. R.* 15 Jur. 1167.

But the state cannot, after permitting an individual to use a basin connected with its canal for a consideration, arbitrarily close the communication between the basin and canal while his boats are inside, so as to prevent his removing them, and destroy their value. *Putnam v. State*, 132 N. Y. 344, 30 N. E. 743.

In a grant to the state of all the land belonging to the grantor necessarily occupied by the site of a canal, "excepting therefrom ground for a basin," the exception excludes from the operation of the grant the ground subsequently taken for a basin, and leaves it in the same condition as if no grant had been made. *Robinson v. West Pennsylvania R. Co.* 72 Pa. 316.

A canal basin is not a legitimate incident of a railroad corporation having no authorized canal connection. *Plymouth R. Co. v. Colwell*, 39 Pa. 337, 80 Am. Dec. 322.

One who has purchased premises designated as fronting on a specified street may maintain an action against the grantor who excavates the street and changes it into a canal basin, thereby creating a nuisance, as well as violating his obligation of warranty. *Bruning v. New Orleans Canal & Bkg. Co.* 12 La. Ann. 541.

Laterals.

A court of equity will not require canal trustees to construct side cuts to the main canal where the statute transferring the canal to them for the benefit of state creditors does not render it imperative upon them to construct such side cuts,—especially as their construction would impair the usefulness of the main canal by exhausting a portion of the present insufficient supply of water, and would be injurious to both the state and her creditors, and there is no express or implied duty on the trustees to increase the supply of water by enlarging the size of the canal as originally constructed. *Wabash & E. Canal v. State*, 7 Ind. 180.

The owner of a lot lying under a grantor to the state of land and a right of way for a water or race way, given in consideration of, and conditioned on, its maintenance as a navigable channel, which was constructed without special authority by the canal commissioners for the purpose of obtaining water rents from the leasing of surplus water for the benefit of the canal fund, and connected with and supplied by the canal, but which, when constructed, formed no part of the canal, but was merely an incident for the benefit of the canal fund and such arrangement as could not be permanent in its character,—is not entitled to an injunction

to restrain the narrowing of such artificial channel and the bridging of it so as to destroy its navigability. *Erkenbrecher v. Cincinnati*, 2 Cin. Sup. Ct. Rep. 412, 13 Ohio Dec. Reprint, 981.

Bridges.

A canal company which, by crossing a highway, renders a bridge necessary, is bound to erect and maintain it. *Chesapeake & O. R. Co. v. Jennings*, 98 Va. 70, 34 S. E. 986.

A canal company has no right, in cutting its canal across highways, utterly to destroy them in the absence of such power in its charter in most full and unequivocal terms, but is bound to unite for the public accommodation the highway thereby destroyed, by a reasonably convenient thoroughfare over or under its canal. *Leopard v. Chesapeake & O. Canal Co.* 1 Gill, 222; *Kyler v. Allegany County*, 49 Md. 257, 33 Am. Rep. 249.

And the court further considered that it was the duty of the canal company to maintain a bridge erected over its canal, and that it would be liable for injury to travelers on the highway from the defective condition thereof, although the issue in the case was as to whether county commissioners were, by reason of the existence of the common-law liability of the canal company, relieved from liability impliedly imposed by a statute giving them control of all county roads and bridges, and empowering them to make repairs; and held that they were not, but saying that the commissioners would have their remedy over against the canal company for whatever damages were recovered against them. *Eyler v. Allegany*, 49 Md. 257, 33 Am. Rep. 249.

A canal company is bound to erect a bridge upon an order being obtained by an owner of land adjoining the canal from justices, adjudging such a bridge necessary, where a statute prescribes that it is to make such bridge over its canal as two or more justices shall "from time to time judge necessary, and appoint for the use of the owners or occupiers of the lands adjoining the canal." *Birmingham Canal v. Hickman*, 56 J. P. 598.

Where a statute made it the duty of a canal company to erect and maintain suitable bridges across cuts made by it in highways, such company is liable for the maintenance and repair of a bridge, although erected by a railroad company, when the latter was in the nature of a mere contractor for the erection of the bridge for the canal company. *Reg. v. Desjardins* Canal Co. 27 U. C. Q. B. 374.

A canal company charged with the duty of maintaining a bridge over its canal is bound to make it a proper one and suitable for traveling over in the place where it is located. *Manley v. St. Helens Canal & R. Co.* 2 Hurlst. & N. 840.

A canal corporation is not liable, under its charter, to maintain a bridge over a portion of its canal which was legally used for temporary purposes and then abandoned, when the charter makes it liable for the maintenance of only those bridges which it shall be required to erect over its canal. *Yost v. Schuykill Nav. Co.* 125 Pa. 152, 17 Atl. 256.

A canal company required by its charter to provide and keep in repair suitable bridges for the owners of intersected farm lands to pass over is under no obligation to its grantor, by private bargain of a strip of land for canal purposes running through his farm, to provide a bridge for him, without a covenant or reservation in the deed. *Brearley v. Delaware & R. Canal Co.* 20 N. J. L. 286.

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A canal company constructing a canal under authority of a public law for its own benefit upon condition that it would build suitable and convenient bridges where the canal crosses highways is bound to build and maintain bridges at such crossings; but, before it will be liable to highway commissioners for the damages sustained by their being obliged to build and maintain such bridges, the company must be given a reasonable time to perform the work. *Franklin County v. White Water Valley Canal Co.* 2 Ind. 162.

Although a canal charter provides that the corporation shall maintain suitable and convenient bridges, and it is held that this constitutes a contract with the state, it is a contract for the benefit of the public, for the breach of which one injured may maintain suit. *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. 290, 3 Am. Rep. 549.

A canal corporation is liable for any special injury caused by its negligence in the construction or maintenance of a bridge under the authority of its charter. *Ibid.*

Where a canal corporation, in consideration of its franchise, is bound to keep a road or bridge in repair, it is liable for any injury to a person arising from want of repair, whether the defect be apparent or latent, unless he be in default, or unless the defect arose from inevitable accident or the wrongful act of some third person, of which it had no notice or knowledge. *Ibid.*

A road in use by the public for over thirty years is a public road on which a canal company is bound to construct and maintain a bridge over its canal or canal bed, under a provision in its charter that, "whenever said canal shall intersect a public road, the said corporation shall be bound to build a safe and suitable bridge." *State ex rel. Habersham v. Savannah & O. Canal Co.* 26 Ga. 665.

The construction, under legislative authority, of a canal across a tract of public land which has been laid out into streets and blocks, but the streets in which have not been declared public highways, will not impose upon the canal company the duty of maintaining bridges at the designated streets, although a town is subsequently incorporated, embracing the locality, and the streets are declared public highways in the charter. *Oswego v. Oswego Canal Co.* 6 N. Y. 257.

Recovery over by county commissioners who have paid a judgment against themselves for personal injuries from the defective condition of a bridge constituting part of a public highway over a canal may be had against a canal company whose duty it was to construct and maintain such bridge, rendered necessary by the severing of the highway by the cutting of its canal through it, where the company had sufficient notice of the suit against the commissioners, and their primary responsibility by statute for its safe condition was only for the additional security and convenience of the public, and not in mitigation of the canal company's obligation. *Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 201, 40 Am. Rep. 430.

A canal company authorized by act of Parliament to make a river navigable, and to make and enlarge certain navigable cuts, and to build bridges or other works connected with the navigation, is bound to maintain and keep in repair a bridge constructed by it in place of a ford located at a point where the cut crosses the highway, and which the canal company had destroyed by deepening the cut, thereby rendering the bridge necessary. *Rex v. Lindsey*, 14 East, 317.

A canal company required by its charter to build and maintain bridges at all highways crossed by it is not bound to construct or repair

a bridge on a highway not in existence when the canal was made, but lawfully laid out since by the public authorities. *Morris Canal & Bkg. Co. v. State*, 24 N. J. L. 62.

A corporation which, for its own purposes, constructs a canal across a public highway, and erects a bridge for a public passage along the highway, will be bound to keep the bridge in repair, and liable for injuries caused by failure to do so. *Heacock v. Sherman*, 14 Wend. 58.

One constructing a canal for his own private use across a public highway is liable to the highway commissioners for the damages sustained by them in being obliged to build and maintain a bridge over such canal in order to render the highway passable. *Franklin County v. White Water Valley Canal Co.* 2 Ind. 162.

Where, upon agreement of a landowner to bear the expense, for the purpose of accommodating a canal which he is constructing, the location of a highway is changed, and he constructs the highway and bridge, he will be liable for the subsequent expense of maintaining the bridge. *Lowell v. Locks & Canals*, 104 Mass. 18.

The adoption by the state of a bridge which a canal company is required to maintain at the intersection of the canal with a public road as a part of a state road will relieve the company of further liability, and impose the charge of maintaining the bridge upon the public. *Union Canal Co. v. Pinegrove Twp.* 6 Watts & S. 560.

A canal company given general authority to purchase a canal already in existence, the property of a corporation, will take the canal free from the duty of maintaining bridges over it, if it was so held by the grantor, although its own charter requires it to maintain bridges over the canal constructed by it. *Lowell v. Locks & Canals*, 7 Met. 1.

A subsequent purchaser of a canal feeder, abandoned for canal purposes and used for private purposes, succeeding to all the rights of the state in that portion of the canal, takes it burdened with the duty, imposed by law upon the state, of maintaining bridges thereover at highway crossings. *Allen County v. Ft. Wayne Water Power Co.* 17 Ind. App. 36, 46 N. E. 86.

A purchaser of a state canal subject to all arrangements made by the legislature for the use of the works and to carry out the same, with all persons interested, is bound to keep up a bridge which has been maintained by the state. *Pennsylvania R. Co. v. Duquesne*, 46 Pa. 223.

Mandamus is the proper remedy to compel a canal company to construct a bridge over its canal or canal bed. *State ex rel. Habersham v. Savannah & O. Canal Co.* 26 Ga. 665.

A *mandamus* will be issued to compel a municipal corporation to take charge of, keep in repair, and open for the passage of boats pivot bridges built over a canal within the corporate limits by township commissioners, under a specific act of legislature authorizing their construction, and providing that, when constructed, they should be turned over to such municipality, who should maintain, repair (and, if pivot bridges were built), open such bridges for the passage of boats; the language of the act making it an imperative duty, and not leaving it to the discretion of such municipality as to whether or not it would assume the burden. *Ottawa v. People ex rel. Caton*, 48 Ill. 233.

The canal trustees of a state canal cannot be compelled by *mandamus* to build a bridge across the canal at a public highway crossing in the absence of a clear duty to do so, imposed by specific direction of law,—especially as that duty, both by statute and the common law, rests upon the respective counties; and the mere fact that the state built a number of bridges across the canal at the crossing of certain highways for

the public use does not render it obligatory upon her, or the trustees to whom her interest was transferred, to build bridges at every highway crossing. *People ex rel. Hoes v. Canal Trustees*, 14 Ill. 402.

A proceeding to compel a canal company to build a bridge over a river at a highway crossing rendered necessary by reason of a feeder dam constructed for the use of the canal on the river so as to destroy a ford, is not a local action which must be instituted in the county in which the subject of action arose, in the absence of statutory enactment so providing. *State ex rel. Dearborn County v. White Water Valley Canal Co.* 8 Ind. 320.

Equity will not restrain a canal corporation from a reasonable exercise of its discretionary authority to take land to improve transportation facilities and better secure the safety of persons and property, when the animus of its exercise of such powers is an engineering problem connected with the erection of an overhead street crossing under a contract between the municipal corporation and a neighboring railroad which owns its stock, and will occupy the old canal bed with its tracks. *Bigler v. Pennsylvania Canal Co.* 177 Pa. 28, 35 Atl. 112.

An injunction to restrain the construction of a bridge over a canal, and the obstruction of navigation thereby, will be refused where such bridge is constructed by permission of the municipal authorities within the limits of a city street at a point where the street crosses such canal, under a charter provision giving the railway the right to use streets by permission of such authorities, where the defendant is solvent and able to respond to any damages, and it is denied that there is any obstruction to the navigation of, or any irreparable damage to, such canal, which it is alleged the canal company has ceased to keep open for navigation. *Savannah & O. Canal Co. v. Suburban & W. E. R. Co.* 93 Ga. 240, 18 S. E. 824.

Landowners injured by the raising of the grade of different bridges over a canal cannot join in a suit to enjoin such acts. *Plum v. Morris Canal & Bkg. Co.* 10 N. J. Eq. 257.

Equity will not restrain the erection of a bridge over a canal by one empowered thereto when the proposed bridge will not impede navigation more than those already constructed by the canal company, as no irreparable injury is shown. *Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.* 11 Leigh, 42, 36 Am. Dec. 374.

A by-law of the Morris Canal Company requiring every rebuilt and new bridge crossing it to be 10 feet in the clear at its lowest part above high water, power to adopt it having been conferred in its charter, is binding on public authorities, except where circumstances render its application unreasonable. *Morris Canal & Bkg. Co. v. Hudson County*, 61 N. J. L. 129, 38 Atl. 816.

The act in relation to bridges over the Morris canal, of March 14, 1879, applies only to those bridges which the canal company is required to build at public highways and for farmers, and not to railroad crossings. *State, Lehigh Valley R. Co., Prosecutor, v. Dover & R. R. Co.* 43 N. J. L. 582.

A canal company having charter authority to adopt such by-laws as may be deemed necessary may require the bridges constructed over the canal to leave a clear space of 10 feet above high-water mark, which will be binding on the public authorities when the circumstances of the particular case do not render its enforcement unreasonable. *Morris Canal & Bkg. Co. v. Hudson County*, 61 N. J. L. 129, 38 Atl. 816.

The purchaser of a state canal stands in no higher position than any farm owner to prevent the construction over it of a railroad cross-

ing necessary to the exercise of a public franchise and constructed in a reasonable manner; but equity will restrain the erection of a bridge so near the water (3 ft.) as to greatly impede navigation. *Pennsylvania Canal Co. v. Philadelphia & R. R. Co.* 2 Pearson (Pa.) 354.

A railroad corporation is authorized to bridge a canal under its authority to build its line to such point on the canal as it may select. *Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.* 11 Leigh, 42, 38 Am. Dec. 374.

Where a water way was provided for and constructed under the authority of the board of public works, without special authority of the legislature, and, although connected with and supplied by a state canal, constituted no part of it, but was constructed to obtain water rents as a means of benefit to the canal fund, and its capacity to admit of navigation was merely an incident, such capacity for navigation may be abandoned by the same power that created the water way, although property rights may be injured in value by the noncontinuance of the same, and when such possibility of navigation is ended by the state abandoning such right, prohibitions against bridging, etc., contained in the dedication of the easement for the water way, entirely fall. *Erkenbrecher v. Cincinnati*, 2 Cin. Sup. Ct. Rep. 412, 13 Ohio Dec. Reprint, 981.

A provision in the charter of a canal company requiring it to maintain bridges where the canal intersects the farms of individuals does not apply where the right of way is acquired by deed. *Perry v. Pennsylvania R. Co.* 55 N. J. L. 178, 26 Atl. 829.

Where land is sold for the purpose of a canal without reservation, the law will not imply, in favor of the vendor, a way of necessity over or through such land, as it would be inconsistent with the purpose of the grant. *Seeley v. Bishop*, 19 Conn. 128.

No presumption of a grant for a bridge over a canal on land which has been condemned and paid for exists, although used for forty years. *Bass v. Roanoke Nav. & Water Power Co.* 111 N. C. 430, 19 L. R. A. 247, 16 S. E. 402.

An owner of land conveying to a canal company such portion and quantity of his land as may be covered, used, or occupied by its canal or the necessary works thereof does not thereby deprive himself of using a public highway which crosses the land granted, and is destroyed by the canal being cut through it without bridging it or otherwise uniting the severed portions, where it is the duty of the canal company to reconstruct and keep open the highway for the accommodation of the public; since the parties will be presumed, in the absence of proof to the contrary, to have understood and contracted with reference to their relative rights, powers, and duties respecting the subject-matter of the contract. *Leopar v. Chesapeake & O. Canal Co.* 1 Gill, 222.

A canal corporation bound to keep up a private bridge across its canal is not excused because the expense is increased by the location of a railroad on its berme bank. *Ammerman v. Wyoming Canal Co.* 40 Pa. 256.

A canal company has power to dedicate to the general public use a bridge constructed by it over the canal under a statute incorporating it, which required it to maintain bridges over the canal for the use of the owners and occupiers of adjoining lands. *Grand Sirey Canal Co. v. Hall*, 1 Mann. & G. 392, 1 Scott N. R. 264, 9 L. J. C. P. N. S. 329.

The purchaser of a canal and appurtenances under a foreclosure against the state acquires no interest in that part of a bridge over a river which at that point constitutes a part of the canal, used by the public as a part of a highway, but only in that part used as a towing

path to transfer towing horses across the river, and cannot prevent its being rebuilt by the county, after being washed away by a flood, upon its former location, making use of the stone in the piers and abutments of the old bridge for that purpose. *Shirk v. Carroll County*, 106 Ind. 573, 5 N. E. 705.

Landings.

The owners of a canal have the right of landing and of using the bank of the canal in a manner consistent with the rights of navigation. *Morgan v. Bass*, 14 Fed. 454.

The laying out by a canal company, pursuant to statute, of a landing place on the bank of the canal, does not deprive it of the title to the land, and a right to exclude the public therefrom, except when the canal is in operation. *Huntington v. Locks & Canals*, 9 Gray, 154.

The fact that the construction of wharves on the side of a canal on which the towpath is located would necessitate the carrying of goods across the towing path will not prevent the owner of adjoining lands from so doing where the use of the towpath is not interfered with, under a statute empowering the owner of any lands through which a canal should be made to erect any wharf adjoining the canal and to land goods upon such wharf or upon the banks lying upon the same, and providing that in so doing they do not obstruct or prejudice the navigation of the canal or any towing paths on the sides thereof; and the right to construct such wharves is not limited to those owning land on the side other than that on which the towpath is located. *Monmouthshire Canal & R. Co. v. Hill*, 4 Hurlst. & N. 421, 427, 28 L. J. Exch. N. S. 283.

A canal corporation disturbing an easement in a landing will be presumed to have done so lawfully, when it is not made a party to the suit, and the owner of the easement has acquiesced therein for years. *Mulvany v. Kennedy*, 26 Pa. 44.

A municipal corporation is not liable for negligence in the construction of docks on private property along a canal by commissioners appointed by the legislature, unless the legislature expressly so provides. *New York & B. Saw-Mill & Lumber Co. v. Brooklyn*, 71 N. Y. 580, *Affirming* 8 Hun, 87.

An act of Congress authorizing a state to construct a canal, and granting a right of way through a military reservation, cannot be construed as giving the state any control over private property used for wharves. The state can only acquire such property by grant or condemnation upon payment of just compensation. *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154.

Under a grant or condemnation proceedings, a canal corporation can acquire no greater riparian rights than are held by the maker of it, and although its franchise provides that it shall be seised of all its lands in perpetuity. *United States v. Morris*, 23 Wash. L. Rep. 745.

A municipal corporation must make a very strong case before equity will permit it to improve a street upon a pier of a canal company which will impair essentially the enjoyment and usefulness of the canal, where the company has enjoyed the property under the laws of the state for twenty years. *Morris Canal & Bkg. Co. v. Jersey City*, 11 N. J. Eq. 13.

Dam.

An agreement between canal commissioners as the riparian proprietors of one bank of a stream and the riparian proprietor of land on the opposite side, providing for the reconstruction of a dam by the latter, connecting with the canal lands, which dam had been accidentally washed

away by a flood, and which had theretofore, with the consent of the canal commissioners, existed for more than forty years, and by which the commissioners secured valuable privileges in relation to the diversion of water from the river into the canal, also the right to lease and use the surplus water over and above that needed for navigation for the purpose of water power, being a settlement of litigation between the parties regarding the water rights, is a valid agreement which such canal commissioners had the power to make. *Sanitary Dist. v. Adam*, 179 Ill. 406, 53 N. E. 743.

VIII. *Rights of owner.*

A franchise to construct locks around the bars at the falls on the east side of a river is exclusive, and infringed by a franchise permitting a company to construct a canal and locks around the falls, though such canal and locks are constructed on the opposite side of the river, and extend several miles in length. *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. 28.

One granted an exclusive privilege in respect to the construction and maintenance of a navigable channel, which monopoly is limited to a specified number of years, may, after the expiration of such period, exercise other privileges, such as the right of collecting toll, also conferred by the grant. *Grant v. Leach*, 20 La. Ann. 329, 98 Am. Dec. 403.

A grant of a franchise for a canal will not prevent the legislature from authorizing a railroad company to parallel it, and thereby impair or annihilate its profits. *Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.* 11 Leign, 42, 38 Am. Dec. 374.

An injunction will not be issued to restrain the construction of a railroad under authority of the legislature along the right of way of a canal, if the injury caused to the canal will be merely temporary, and can be compensated for in damages. *Hudson & D. Canal Co. v. New York & E. R. Co.* 9 Paige, 323.

The fact that the route of a proposed railroad cannot be traveled by engines without frightening the horses on an adjoining canal will not require an injunction against the construction of the road; that remedy will be reserved to stop the use of engines on the road if experience shows that they cannot be used without such result. *Ibid.*

Until the adoption of the Constitution of 1844 the legislature could irrepealably authorize a canal corporation to take such land and cause such flowage as were essential to the enjoyment of its franchise, subject, only, to subsequent proceedings for recovery of damages. *Lehigh Valley R. Co. v. McFarlin*, 31 N. J. Eq. 706.

The authority conferred by the New York statutes upon canal commissioners to enter upon and take possession of lands of an individual for the construction, or for the temporary use, of the canals cannot be delegated to a contractor for repairs, unless there is a special power of substitution. *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258.

The fact that the rights of a canal company are held for a quasi public use furnishes no insurmountable obstacle to the appropriation of such rights to the uses of the state for the preservation of the public health upon just compensation being made. *State, Van Relpen, Prosecutor, v. Jersey City*, 58 N. J. L. 262, 33 Atl. 740.

The city of New York has power to condemn for street purposes a private navigable canal or water way connecting with the harbor and to convert it into an ordinary highway for vehicle 61 L. R. A.

and pedestrian traffic. *Re' New York*, 64 App. Div. 604, 72 N. Y. Supp. 461.

Newark, New Jersey, has not the power, under the act of February 29, 1836, to lay out a street longitudinally over the Morris canal; nor can it have such power without making compensation. *State, Hyde, Prosecutor, v. Newark*, 28 N. J. L. 529.

Tolls.

Whether or not a canal company can lawfully demand compensation from a person whom it permits to pass over its canal, depends upon the language of its charter. It has no rights of property except those conferred by its charter, and can only exercise such rights of property clearly given it by and necessary to effectuate the objects of the act creating it. *Sturgeon Bay & L. M. Canal & Harbor Co. v. Leatham*, 164 Ill. 239, 45 N. E. 422.

A canal company has no right to take toll from passengers who pass through the canal, unless the right is expressly conferred by its charter. *Perrine v. Chesapeake & D. Canal Co.* 9 How. 172, 13 L. ed. 92.

One who constructs a canal under state authority, and dedicates it to public use, has no right to take toll thereon without authority from the legislature. *State v. Olcott*, 6 N. H. 74.

The opening for public use of a canal built for the accommodation of the public under a charter from the legislature is equivalent in law to a dedication of it to a public use; and no toll can be demanded unless it be authorized by the charter. *Olcott v. Banfill*, 4 N. H. 537.

An act of Parliament under which a canal company constructs a canal and receives tolls for its use, in case of ambiguity, will be construed against the company and in favor of the public. *Stourbridge Canal v. Wheeley*, 2 Barn. & Ad. 793; *Barrett v. Stockton & D. R. Co.* 2 Mann. & G. 134, 2 Scott N. R. 337.

The act of 89 Viet. chap. 28, relating to rates of tolls on canals, does not prevent canal companies from charging a lower proportionate rate of tolls for goods carried a long distance than for goods carried a short distance, nor from carrying at a lower rate for a particular individual in consideration of a large guarantee of minimum toll. *Strick v. Swansea Canal Co.* 16 C. B. N. S. 245, 10 L. T. N. S. 460, 12 Week. Rep. 711.

The fixing by its charter of the toll to be charged by a canal company does not prevent it from contracting to take a less rate. *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 21 Pa. 131.

A contract as to the rate of tolls on a private canal will be enforced. *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250.

Where the state grants to a city a franchise to construct an artificial channel, and the city contracts with individuals to construct the same, who are to receive as compensation bonds of the city, and they are authorized to collect tolls to be applied to the payment of the bonds, an act passed by the legislature after the completion of the canal, repealing the act incorporating the city, does not affect the right of such individuals to collect tolls for the purpose of discharging the bond. The legislature has power to alter or repeal an act chartering a municipal corporation, but this power cannot be exercised to the injury of creditors of such a corporation or persons holding contracts with it. *Morris v. State ex rel. Gussett*, 62 Tex. 728.

A canal company cannot collect tolls from tugs carrying no passengers or freight, but engaged merely in towing vessels having passengers

or freight on board, where such company is authorized by its charter to collect tolls and charges only "upon all boats, vessels, steamboats, and other craft used for the transportation of freight and passengers." *Sturgeon Bay & L. M. Canal & Harbor Co. v. Leatham*, 164 Ill. 239, 45 N. E. 422, Affirming 62 Ill. App. 386.

In the absence of contract a tugboat is not liable for the payment of tolls due from the vessels which she has in tow for passing through a channel or canal constructed by private enterprise, the proprietor of which is entitled to collect tolls. *The Fox*, 15 Fed. 689, 4 Woods, 199.

Under a statute authorizing the reduction of canal rates whenever it appears to the sessions that the clear profits exceed the percentage limited by statute, the sessions cannot reject charges and expenses stated in the annual count of disbursements for new works, such as a reservoir and steam engine which the company deemed necessary, and which were erected for the support and improvement of the original line of canal; though, if such new works had been merely colorable and erected for purposes collateral to the navigation, such charges would have been rightly rejected. *King v. Glamorganshire Canal Co.* 12 East, 157.

An expense incurred in widening and deepening a canal after its completion is part of the expense attending the supporting, maintaining, and using of said navigation within the meaning of a statute providing for the reduction of toll whenever the profits after deducting such expenses exceed a stated per cent per annum. *Rex v. Glamorganshire*, 7 Barn. & C. 722.

Where commissioners of navigation reduce the tolls under a statute providing that when their income should reach a certain point they should be reduced so that they would not, together with certain dividends, exceed the annual charges, they are not thereby deprived of the right to again raise the toll when necessity requires it. *Goody v. Penny*, 9 Mees. & W. 687, 11 L. J. Exch. N. S. 289.

The receipt by a canal owner of toll on logs towed through the canal, without stipulation that toll shall be paid upon the steamboat or tug by which they are towed, precludes the right of collecting toll on such steamboat. *Destrehan v. Louisiana Cypress Lumber Co.* 45 La. Ann. 920, 13 So. 230.

Where an act of Parliament provided that a canal company should not take higher rates of tonnage than should for the time being be taken by a designated company, the canal company cannot collaterally attack, but is bound by, a resolution of such company reducing its tolls. *Monmouthshire Canal Nav. Co. v. Kendall*, 4 Barn. & Ald. 453.

A canal act imposing a toll at a specified rate upon all coal navigated upon any part of the canal from a designated place or from any place within 2 miles thereof, such toll cannot be imposed upon coal loaded at a place more than 2 miles away, although conveyed upon a part of the land within 2 miles of the designated place. *Britain v. Cromford Canal Co.* 3 Barn. & Ald. 139.

Where a canal act gave a higher rate of tonnage for light goods than for heavy goods, it will be construed, in determining whether goods are light or heavy goods, according to the usage of the country at the time of the passage of the act. *Staffordshire & W. Canal Nav. Co. v. Trent & M. Canal Nav. Co.* 6 Taunt. 151.

Empty boats passing through a canal cannot be subjected to toll under a statute providing that no boat of less burden than 20 tons could pass any of the locks without paying tonnage equal to a boat of 20 tons, where, prior to the passage of the act, empty boats had not been

subjected to toll, as the act was merely intended to put smaller boats upon the same footing as those of 20 tons' burden. *Leeds & L. Canal Co. v. Hustler*, 1 Barn. & C. 424, 2 Dowl. & R. 556.

Congress is without power to abolish or limit the tolls on the Louisville & Portland canal, the stock of which is owed by the government, so as to impair the rights of the holders of bonds secured by a mortgage on the canal franchise and revenues; since it would be a legislative attempt to destroy vested rights and take private property for public use without due compensation. *United States v. Louisville & P. Canal Co.* 4 Dill. 601, Fed. Cas. No. 15,633.

One sued for toll for passing through a canal cannot defend on the ground that the canal is not of the capacity required by the charter of the corporation. *Quincy Canal v. Newcomb*, 7 Met. 276, 30 Am. Dec. 778.

Equity will restrain the owners of a canal affected with a public interest from either exceeding the rates prescribed by the charter under which it was constructed, or from charging unreasonable and excessive tolls. *New York Co. v. Consolidated Rosendale Cement Co.* 37 Misc. 746, 76 N. Y. Supp. 469.

Damages for obstructing the use of a canal will be refused when the canal is not open for traffic. *Fairbanks v. Queen*, 24 Can. S. C. 711.

Injury to property.

A person may be guilty of wilfully and maliciously breaking a wastewell of a canal in violation of a statute forbidding the same, although the canal had been abandoned and generally dismantled, and the defendant took the stone from the wastewell with the intention of paying for it. *State v. Doig*, 2 Rich. L. 179.

In a prosecution for malicious trespass in cutting the banks of a reservoir belonging to a canal evidence showing that the canal had been abandoned for navigation purposes, and that the reservoir had ceased to be of any value as a feeder to the same for the purpose of navigation and hydraulic power, being the only two uses for which the trustees of the canal had an easement, and that the reservoir caused sickness in the neighborhood, is admissible for the purpose of showing absence of malicious intent. *State v. Bush*, 29 Ind. 110.

A canal company bound by act of Parliament to keep its banks in good repair cannot recover of an adjoining landowner for excavating his land whereby the banks fell in, unless the banks were in good repair when they fell in. *Staffordshire & W. Canal Navigation v. Hallen*, 9 Dowl. & R. 286, 5 L. J. K. B. 154, 6 Barn. & C. 317, 30 Revised Rep. 333.

Where, by an act of Parliament, a canal company was bound to repair the banks of a canal, it must construct and maintain banks adequate to keep the water in its channel, not only while the adjoining land shall remain in the state it was in when the canal was made, but when it shall be applied to those purposes to which it might have been applied by proprietors before the canal was made; and the owner of the adjoining land is not liable for digging clay pits therein, and thereby causing the canal banks to give way, unless the digging of the pits would have caused the injury, even though the bank of the canal had been in good repair. *Ibid.*

Cutting through an embankment of a public canal to obtain a water supply may be enjoined. *Atty. Gen. v. Cohoes Co.* 6 Paige, 183, 29 Am. Dec. 755.

A municipal corporation has the power to pass an ordinance imposing a penalty upon the owners of boats for wilfully or negligently injuring bridges within the corporate limits while navigating the waters of a canal under the authority

conferred by its charter to establish, erect, and keep in repair bridges within the corporate limits, to impose fines for forfeitures and penalties for the breach of any ordinance, to adopt all ordinances necessary and proper for the regulation of the police of the city, and to carry into execution the powers conferred by its charter. And a previous act of legislature conferring the power on the canal board of trustees to establish such rules, by-laws, and regulations in relation to transportation on the canal, the conduct of boats and rafts, and the general police of the canal, as are usual or might be found necessary, in so far as the same is repugnant to the power conferred upon the municipal authorities by its charter, must give way to, and be controlled by, it. *Korah v. Ottawa*, 32 Ill. 121, 83 Am. Dec. 255.

It is negligence on the part of the master of a canal boat if a bridge was injured by such boat while its rudder would not work in the ordinary way so as to be able to guide the boat under proper circumstances, if he knew, or by the use of ordinary prudence might have known, of its condition before undertaking to navigate the boat. *Ibid.*

The fact that the owner or master of a canal boat was not on board at the time the same ran into and injured a bridge, caused by negligence in handling such boat, will not relieve him from liability under an ordinance of the city within whose limits such bridge was located, imposing a fine upon the owner or master of a boat for wilfully or negligently injuring a bridge within its limits, inasmuch as his crew were on board and were under his immediate command, he being on the towpath. As commander of the boat it was his duty to have been on board, or to have intrusted it to the management of a careful and competent person. *Ibid.*

When demurrer is made to a declaration averring that a municipal corporation filled its canal to the injury and damage of the canal company and those having occasion to use the canal, the prima facie acts of trespass will stand without excuse or justification, and the plaintiff will be entitled to damages to his mill. *Cumberland & O. Canal Corp. v. Portland*, 62 Me. 504.

In an action for a continuing nuisance created by wrongfully filling a canal, the damages recovered must be limited to such as had been sustained at the date of the writ, and not measured according to the diminution in the value of the property. *Cumberland & O. Canal Corp. v. Hitchings*, 65 Me. 140.

A person obstructing a canal will not be relieved from liability by the fact that a street has been dedicated to the public across the canal, and will render it useless, where the street has not been fitted or prepared for use. *Charleston Rice Mill Co. v. Bennett*, 18 S. C. 254.

The statute of limitations begins to run from the date of the filling, when a penalty has been incurred under a canal company's charter for filling its canal, the offender not being responsible for its continuance when it was made a part of a public highway. *Cumberland & O. Canal Corp. v. Hitchings*, 67 Me. 146.

A canal corporation cannot recover from a municipal corporation which has caused a portion of its canal to be filled up the penalty prescribed in its charter, when "any person shall wilfully, maliciously, or contrary to law, take, remove," or otherwise injure any part thereof under pain of forfeiture or indictment, on the ground that the corporation cannot be guilty of malice. *Cumberland & O. Canal Corp. v. Portland*, 58 Me. 77.

Equity will restrain a railroad company from
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obstructing any part of a state canal which constitutes a public highway. *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372.

But a mere crossing of a canal by a railroad involves no destruction or serious impairment of the canal franchise; no taking thereof for exclusive use. *State, Lehigh Valley R. Co., Prosecutor, v. Dover & R. R. Co.* 43 N. J. L. 528.

Where various acts of Parliament tacitly sanctioned and recognized the erection of a drawbridge over a canal, it must be assumed to have been lawfully erected, although certain formalities required by statute were not complied with. *Desjardins Canal Co. v. Great Western R. Co.* 27 U. C. Q. B. 363.

A declaration is defective which charges a railway company with neglect and refusal to open a drawbridge over a canal and so permit vessels to enter and leave, but does not allege that the bridge was not at such times being actually used by the railroad company for the passage of its trains. *Ibid.*

A railroad company which, by negligently running an engine into an open drawbridge crossing a state canal, obstructs navigation, will be liable for the loss to boatmen who, having commenced their voyages before the obstruction occurred, are compelled to wait at the bridge until the obstruction is removed. *Briggs v. New York C. & H. R. R. Co.* 30 Hun, 291.

The Shult St. Marie canal board have such a control over the canal and its approaches as to be authorized to remove unlawful obstructions; but in so doing they act at their peril, and become wrongdoers if they interfere with private property lawfully existing. *Ryan v. Brown*, 18 Mich. 198, 100 Am. Dec. 154.

A municipal corporation is liable for injuries to a mill owner by back water caused by the obstruction of a canal by the fall therein of a bridge owing to a defect in the plan arising from the carelessness and unskillfulness of the city engineer acting in subordination to and under the direction of the city council. *Dayton v. Pease*, 4 Ohio St. 80.

The drawing off of the water of a canal for the purpose of removing the materials of a bridge which had fallen therein, and the consequent suspension of the operation of a mill on such canal, are as clearly the necessary result of the fall of the bridge for which the city maintaining it is liable to the mill owner as the stoppage of its operations by the backing of water upon it by the obstruction of the canal. *Ibid.*

Where the owners of adjacent lands construct a canal over them, agreeing that each of them and the persons holding under them shall have the right to pass upon the canal with vessels, the grantee of one cannot drive piles in the canal so as to render navigation more difficult. *Page v. Young*, 106 Mass. 313.

An injunction will not be granted to restrain an alleged injury to the right of navigating the basin of a canal where its exercise has been long before effectually prevented by the acts of others than defendants, for which neither they nor their grantors were responsible, and the damages which would be suffered by the threatened acts would be merely nominal, and especially where the right is doubtful. *Erkenbrecher v. Este*, 1 Cin. Sup. Ct. Rep. 368.

An injunction will not be issued to restrain an encroachment on a canal if it does not materially interrupt the water way; the injury, if a public nuisance, being remediable by indictment, and, if a private one, by an action at law. *Morris Canal & Bkg. Co. v. Fagin*, 22 N. J. Eq. 430.

The provision of a charter imposing the duty upon a canal company of keeping its canal open

and in good condition does not, in the absence of a provision therein expressly creating a liability in favor of any individual injured by a breach of such duty, bring a right of action for damages to one unable to ship lumber through the canal because of the breach thereof, within a statute providing that all suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years. *Savannah & O. Canal Co. v. Shuman*, 98 Ga. 171, 25 S. E. 415.

Tax.

The state may tax the use of a canal or navigation franchise which it has granted, by imposing a tax on the tonnage carried, it being compensation for the grant. *Com. v. Philadelphia & R. R. Co.* 62 Pa. 286.

The exemption from taxation, given in its charter, of all the property of the Morris Canal Company used for actual and necessary purposes of canal navigation, does not extend to a house and lot where its assistant superintendent resides. *State, Morris Canal & Bkg. Co., Prosecutor, v. Cleaver*, 46 N. J. L. 467.

The public benefits anticipated from a canal company are sufficient consideration for its exemption from taxation. *Carondelet Canal Nav. Co. v. New Orleans*, 44 La. Ann. 394, 10 So. 871.

Undermining.

Under statute, if a canal company would prevent the owner of a mine from working it within 20 yards of a tunnel, it must pay the value of the minerals. *Birmingham Canal Co. v. Dudley*, 7 Hurlst. & N. 969, 9 Jur. N. S. 24; *Birmingham Canal Co. v. Swindell*, 7 Hurlst. & N. 980, note.

Under a canal act which gave the canal company power to prevent working mines within 10 yards of the canal upon making compensation to the owner of the minerals, the canal company can stop all dangerous working, even though it be at a greater distance than 10 yards from the canal, but only upon making compensation as provided by the act as to a less distance. *Midland R. Co. v. Checkley*, 36 L. J. Ch. N. S. 380, L. R. 4 Eq. 19, 16 L. T. N. S. 260, 15 Week. Rep. 671.

Where a canal is injured by the operation of a mine, the canal company is without a right of action against the mine owner for such injury, where such company had neglected to purchase the mine under a statute authorizing it to stop the operation of the mine upon paying compensation to the owners. *Wyrley & E. Canal Nav. Co. v. Bradley*, 7 East, 368, 8 Revised Rep. 642.

A provision in a statute authorizing the construction of a canal, which declares that it shall be lawful for the owner of mines and quarries over which the canal may be constructed to work all such mines and quarries, provided that in so doing no injury be done to the navigation, and anything therein contained to the contrary notwithstanding, when construed in connection with another section of the statute which provides that, if the canal company is not willing to permit the operation of the mines, it shall purchase the same of the mine owners,—does not make mine owners liable for the damages done to the navigation by the operation of the mines, where the navigation company has not purchased them; but they are liable only for damages arising from an improper and unusual mode of operation. *Dudley Canal Nav. Co. v. Graselbrook*, 1 Barn. & Ad. 59, 8 L. J. K. B. 361.

Where a statute which authorizes the con-

struction of a canal near a mine makes the mine owner liable if he causes injury to the canal, he cannot escape liability on the ground that the canal company failed to take advantage of the provision of the statute which authorized it to purchase the minerals lying near the canal in case the mine owner desired to work the mine at that point. *Knowles v. Lancashire & Y. R. Co.* L. R. 14 App. Cas. 248, 59 L. J. Q. B. N. S. 39, 61 L. T. N. S. 91, 64 J. P. 108, affirming L. R. 20 Q. B. Div. 391. The court distinguished this case from the *Dudley Case*, 1 Barn. & Ad. 59, 8 L. J. K. B. 361, on the ground that the statutes in the two cases differed.

Although a statute authorizing the construction of a canal does not authorize the company to purchase the land, it will be presumed, in the absence of a provision to the contrary, that, where the statute authorizes compensation to landowners, its intention is to give the canal company a right of support for the canal so as to prevent the landowners from working their mines beneath it; though the court said that, if the statute had not provided for compensation, it would have been a strong argument against the legislature having intended that the right of support should accompany the right to make and maintain the canal. *London & N. W. R. Co. v. Evans* [1893] 1 Ch. 16, 62 L. J. Ch. N. S. 1, 2 Reports, 120, 67 L. T. N. S. 630, 41 Week. Rep. 149, Reversing [1892] 2 Ch. 482.

Jurisdiction.

The fact that the statute gives canal commissioners jurisdiction over that part of a navigable river extending for 1,000 feet above and below dams and locks erected for the use and benefit of the canal does not extend their control over the entire river. *Canal Comrs. v. East Peoria*, 179 Ill. 214, 63 N. E. 683.

Canal commissioners cannot maintain a bill in equity in their official name as canal commissioners to enjoin the commission of a public nuisance to the navigable portion of a river outside of their jurisdiction and control. *Ibid.*

IX. Abandonment and transfer.

The question whether appropriation of land for canal purposes involves the fee, or only an easement (see *supra*, II. c), has its chief importance in determining the effect of an abandonment of the enterprise, or an attempt to transfer the property to another, or devote it to a new use.

Sale or lease by private corporation.

The owner of a canal, holding it subject to the right of a public to navigate it under certain regulations, has no right to sell such canal or any part thereof in a way that would interfere with the full performance of its obligations, unless authorized by statute. *New York Cement Co. v. Consolidated Rosendale Cement Co.* 70 App. Div. 285, 78 N. Y. Supp. 531.

The state may authorize a canal company to surrender its charter and confer its property upon another company, with the proviso that the latter shall pay its debts. *Smith v. Chesapeake & O. Canal Co.* 14 Pet. 45, 10 L. ed. 347.

Under the North Carolina statutes, a sale of the real property of a navigation corporation must include a sale to the same party of the corporation franchises, that the public convenience may be subserved by retaining the facilities intact while changing ownership. *Gooch v. McGee*, 83 N. C. 59, 35 Am. Rep. 558.

A canal company granted by its charter the power to lease without limitation or restriction may lease its entire corporate property and rights, and subrogate others to all its corporate

powers and privileges. *Gubernator v. New Orleans*, 20 La. Ann. 106.

Where the sale of a canal is made by virtue of a statute, which omits any permission to sell the franchises under which it has been operated as a public way, and makes no direct provision that the property shall be sold subject to the obligations of the owner toward it, but, on the contrary, gives permission to discontinue it, or sell it in parts if desired, the purchaser takes it as private property, and is not bound to keep it open as a public way as required by the act which created it. *New York Cement Co. v. Consolidated Rosendale Cement Co.* 76 App. Div. 285, 78 N. Y. Supp. 531.

Where a city, which has been granted a franchise by the state to construct a water channel and collect tolls, grants the franchise to an individual, and it is provided by a city ordinance that the grantee shall have the right to collect tolls in the name of the city, the refusal of the city to permit the use of its name as plaintiff by the grantee, in an action for the collection of tolls, cannot defeat the right of the grantee to collect the tolls; but he may maintain the action in his own name. *Morris v. The Leona*, 62 Tex. 35.

One entering into the possession of a canal, and receiving the tolls under a demise which was never executed, holds under a license revocable at any time; and, although never having been disturbed, and having received the tolls for the entire period, has not held under the right stipulated for in the indenture, and is not liable on the covenants therein expressed to pay a gross sum for such right. *Swatman v. Ambler*, 8 Exch. 72, 22 L. J. Exch. N. S. 81.

A lease of a canal with its appurtenances will not be annulled on the ground that the lessee has constructed but 9 basins instead of 16 as he contracted to do, where the dimensions of the 9 equal those prescribed for the 16, and the interests of commerce have not suffered. *State v. Taylor*, 28 La. Ann. 460.

A manufacturing corporation which succeeds to the franchise, "subject to all the duties and liabilities," of a corporation authorized to construct a canal around falls in a stream in which the public has rights of floatage is subject to all the limitations upon the powers of the canal corporation, including a negative limitation not to build a dam which would interfere with the public right of floatage in such stream. *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 290, 13 L. R. A. 826, 21 Atl. 1090.

Transfer by government.

A constitutional provision that state canals shall not be sold applies only to the canals while they continue to be such, and not to cases where, as the result of natural causes, they are of no further use to the public. *People v. Stephens*, 13 Hun, 17.

The grantee of a state canal is bound so to maintain and manage it that it can be used with reasonable safety and convenience by the public, and he is liable for a failure to exercise reasonable and ordinary care. He is neither a common carrier nor an insurer. *Pennsylvania Canal Co. v. Burd*, 90 Pa. 281.

When a purchaser of a state canal is only required to keep and put it in as good repair and operating condition as it had been in at any time during its ownership by the state, he is not liable for failure to make improvements or to correct errors of the state in the manner of construction. *Pennsylvania Canal Co. v. Manning*, 87 Pa. 240.

A grantee of state canals authorized to alter, enlarge, and improve them and make a slack-water navigation, may maintain the works, as 61 L. R. A.

thus enlarged, in full operating condition. *Freeland v. Pennsylvania R. Co.* 66 Pa. 91, 5 Am. Rep. 329.

The purchaser of a state canal could take only such land as had been taken by the state for its works, and he obtains no right to land covered by a basin opened with the commissioners' consent for the convenient making and repairing of boats, and used by the public in connection therewith. *Western Pennsylvania R. Co. v. Sharp*, 4 Walk. (Pa.) 257.

Under a deed relinquishing and transferring to a city, to which the use of a portion of a canal for water purposes was previously granted, whatever interest remains in the state in the "bed" of that portion of the canal, conveys the whole canal, including the lands used for the support and maintenance of the canal, the towpath, and berme bank, as well as the bottom of the canal, and not merely so much as lies between high-water mark, occupied by the water of the canal between the banks thereof. *Paige v. Cherry*, 17 Ohio C. C. 579, Affirmed in 52 Ohio St. 644, 44 N. E. 1143.

Under a statute providing for the sale of a state canal, and enacting that immediately after the purchaser shall take possession he shall keep the canal in good repair and operating condition, he is liable for losses sustained by boatmen if he does not commence the repair within a reasonable time, and is not responsible for unavoidable accidents by sudden storms or floods if he makes the repairs as soon as reasonably practicable. *Pennsylvania R. Co. v. Patterson*, 73 Pa. 491.

Where the Constitution prohibits disposing of any portion of the state canals, and a statute provides that no basin on the canal shall be constructed without written permission from the canal commissioners, it will be presumed after the lapse of many years that the use of a basin was begun under permission, so that no title by prescription has been acquired. *Burbank v. Fay*, 5 Lans. 397.

A sale and conveyance by the state of a certain portion of a canal "with the water power and appurtenances thereunto belonging, including its banks, margins, towpaths, side cuts, feeders, basins, right of way, drains, water power, structures, and all the appurtenances thereunto belonging,"—passes title to land lying contiguous to the canal, set apart by the state for the use of the canal or its occupation and enjoyment, or essential to its use and enjoyment viewing the canal as a whole, although such land may not be essential to the complete enjoyment of the isolated portion conveyed, where, although the state, by the sale of the canal, abandoned it as a proprietor, yet the course of legislation showed an intent to encourage its completion and use as an entirety, and there is nothing to show that the purchasers of the several parts were not to take all that was essential to the use and enjoyment of the whole as a canal. *Indiana Cent. Canal Co. v. State*, 53 Ind. 575.

A state is estopped from denying that land lying contiguous to a portion of a canal, and set apart by its authorized agents for the use of the canal, is essential to the enjoyment of that portion of the canal, so as to pass with a conveyance of the latter, in the absence of notice to the purchaser, prior to the sale, that such dedication had been revoked, and title thereto passed by the deed to the canal without reference to the question whether or not it was essential to the full enjoyment of that portion. *Ibid.*

It was the right and duty of the governor and auditor of a state, authorized by a statute to sell and convey a canal with all its appurtenances, and which property could not be pre-

cisely identified by reference to such statute, to point out and identify to the purchaser the particular property to be included in the sale; and their act in pointing out any particular property as being a part of the canal to be sold will be prima facie evidence that it was such; but this presumption may be rebutted by evidence that the same was not a part of the property which said officers were authorized to sell, and, in such case, the purchaser would not take title thereto, although the state did not rescind the contract and place him *in statu quo*. *Ibid*.

Purchasers of a state canal are not liable for consequential damages who take subject to claims or other demands against the commonwealth, and without having greater liability for injuries caused in the performance of its charter duties, as such damages cannot be recovered in cases of public improvements unless the recovery is expressly authorized. *West Branch & S. Canal Co. v. Mulliner*, 68 Pa. 357.

No adverse possession can bar the grantee of a state canal from recovering land originally taken therefor by the state, unless maintained for twenty-one years after date of such grant, as time does not run against the state. *Pennsylvania Canal Co. v. Harris*, 101 Pa. 80.

Neither the organization of a coal company for the purpose of entering into a contract with canal trustees to keep a canal in repair and fit for navigation, and advancing money necessary for that purpose in consideration of receiving the tolls and revenues of the canal, nor the contract when entered into, is void as being against public policy, where the canal was not self-sustaining, and the trustees were not able to keep the same in repair for want of funds. *Weaver v. Wabash & Erie Canal*, 28 Ind. 112.

A purchaser of a state canal takes subject to all the obligations incurred by the state, but the means of enforcing its fulfilment may be greater, as he is liable to an action at law if in default, whereas the state was not. *Com. ex rel. Cass v. Pennsylvania R. Co.* 51 Pa. 351.

A purchaser of state canals is liable only for existing obligations against the state under the statutes when he takes subject to any and all claims for damages or other demands against the commonwealth if established. *Delaware Div. Canal Co. v. McKeen*, 52 Pa. 117.

The tolls on a state canal that the legislature has directed to be paid to a railroad company as inducement for the construction of its road constitute a charge against the subsequent grantee of the canal, since he takes subject to the contracts and agreements of the state with respect thereto. *West Branch Canal Co. v. Elmira & W. R. Co.* 55 Pa. 180.

A state having by law agreed with a railroad company to pay it the tolls derived from traffic which it brings to the canal, subsequent purchasers of the canal take them with full knowledge of the laws, and, whether this be called a contract or arrangement, they are bound to carry it out in perfect and entire good faith. *Williamsport & E. R. Co. v. Com.* 33 Pa. 288.

The purchaser of an abandoned canal bed through which water is flowing to the mill of another cannot obstruct that flow when it was obtained under a perpetual grant from the state, and enjoined upon the corporation purchasing the canal by its charter. *Beaver Falls Water Power Co. v. Wilson*, 83 Pa. 83.

Where lots are conveyed to the state "in aid of the canal funds of said state," on a portion of which the canal commissioner constructed a basin and channel, through which water is used in locking boats on the canal, and the surplus for hydraulic purposes, the state is prohibited by the act of February 7, 1826 (24 Ohio Laws, 58), § 2, from selling or conveying such portions of the lots, and a deed from the state of all 61 L. R. A.

of the lots will be void as to such portion. *State v. Snook*, 53 Ohio St. 521, 42 N. E. 544.

The state having taken the fee in all the land necessary for the permanent use of its canals, the grantees of the canals acquired a like title, which did not revert upon the abandonment of the canal. *Williamsport v. Pennsylvania R. Co.* 8 Pa. Co. Ct. 850.

Abandonment.

One who transfers to a corporation the right to open a canal across his land is entitled to receive back the property free from the servitude, where thirty years have passed without the privilege being availed of, and the corporation, by using the premises for railroad purposes, has rendered the construction of the canal impracticable. *Marigny v. Pontchartrain R. Co.* 15 La. Ann. 427.

Where a statute authorizing the construction of a canal is silent as to the time within which it is to be completed, it will not be implied that it was to be completed within a reasonable time. *Thicknesse v. Lancaster Canal Co.* 4 Mees. & W. 482, 8 L. J. Exch. N. S. 49.

A state which, by acts of its legislature, throws obstacles in the way of the completion of a canal which it authorized individuals to construct, cannot claim a forfeiture of the grant on account of the noncompletion of the canal within the time provided. *State ex rel. Belden v. Burgess*, 23 La. Ann. 225.

Failure of a canal company for twelve months to keep in repair sections of its canals which it has leased, but has not abandoned, is not justified by a statute authorizing it to abandon, lease, or sell any portion or portions of its canal, so as to relieve it from forfeiture of its charter for such failure, under a provision of the charter that if, after the completion of the canal, the corporation shall for twelve months fail to keep it in repair, it shall cease to exist and its charter be forfeited. *State ex rel. Atty. Gen. v. Pennsylvania & O. Canal Co.* 23 Ohio St. 121.

That its canal would not be remunerative if kept open and in a navigable condition is no excuse for the failure of the canal company to perform its imperative duty under its charter to so maintain it, where it still retains its franchises. *Savannah & O. Canal Co. v. Shuman*, 91 Ga. 400, 17 S. E. 937.

One who sustains special damage by being obliged to ship lumber by a more circuitous and expensive route owing to the unnavigable condition of a canal which it is a canal company's imperative duty under its charter to keep open and in a navigable condition may compel the performance of that duty by mandamus. *Ibid*.

A canal corporation cannot lose title to land legally taken for its purposes when unused for less than the prescriptive period. Abandonment cannot be inferred from its inactivity. *Union Canal Co. v. Young*, 1 Whart. 410, 30 Am. Dec. 212.

The charter of a navigation company is forfeited where its canal is filling up, its harbor dangerous, its works abandoned, and a less depth of water is maintained in the canal than that called for by its charter, so that the object of its incorporation has failed. *State v. New Orleans Nav. Co.* 7 La. Ann. 679.

The charter of a navigation company required to keep 8 feet of water in its canal at low tide will not be forfeited, although the water is occasionally of less depth in consequence of extreme low stages of the lake with which it connects. *Ibid*.

The rights of a state in a canal are not lost by nonuser, as no neglect is chargeable against

the state. *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372.

The character of a quasi-public highway pertains to the canal only, and when it is abandoned that character does not attach to the bed. *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23.

The legislature may authorize a canal company to abandon its canal without incurring liability to those damaged thereby. *Fredericks v. Pennsylvania Canal Co.* 109 Pa. 50, 2 Atl. 48.

A canal corporation failing to maintain navigation in accordance with the requirements of its charter is not liable therefor in a suit by an individual showing no further damage, except in degree, than that suffered by every person desiring to use the canal, as such damage is not special. *Saylor v. Pennsylvania Canal Co.* 183 Pa. 167, 38 Atl. 598.

After the lawful abandonment of a public canal, subsequent acts of repairing will not nullify the abandonment. *Fredericks v. Pennsylvania Canal Co.* 16 Phila. 605.

A grant to a canal company by the state, through the legislature, of the right to abandon a portion of its canal, not only waives any forfeiture which would be incurred if abandoned without such permission, but also releases it from other duties owing to itself alone, so as to discharge the canal company from its charter obligation to build and keep in repair bridges across public highways intersected by that portion of its canal, since its duty as to such bridges is one owing only to the public or state in the observance of which no one but the public is interested, and such obligation is not within the proviso that such abandonment shall not be construed to release the company from any liability or contract incurred or entered into, nor defeat the rights of any person or persons, company or corporation,—clearly intended only for the protection of private rights, and therefore no action by county commissioners can be maintained to recover for the expense incurred in tearing down and removing such neglected bridges, and filling up the canal where that is crossed by the highways. *Pennsylvania & O. Canal Co. v. Portage County*, 27 Ohio St. 14.

The execution of a grant by the state pursuant to an act authorizing a city to enter and occupy as a public highway and for sewerage and water-course purposes that part of a canal running through it, constitutes an abandonment by the state of that portion of the canal as a part of its public canals. *Hubbard v. Toledo*, 21 Ohio St. 379.

A proprietor of lands crossed by a canal which the state has contracted with the Federal government to maintain cannot take advantage of a default of the state in this particular, when he was not a party to the contract. *Walsh v. Columbus, H. Valley & A. R. Co.* 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393.

Equity will not, at the instance of the canal company, restrain the erection of a railroad on the towpath and lock of a canal when no rights of the canal corporation will be violated, the canal having been abandoned for purposes of navigation for the preceding twelve years, and without intention of resumption. *Schuylkill Nav. Co. v. Pottsville & M. R. Co.* 17 Phila. 648.

A landowner through whose property a canal has been constructed cannot maintain a bill to obtain a declaration that the corporation has ceased to exist. *Briggs v. Cape Cod Ship Canal Co.* 137 Mass. 71.

A grant by the general government to a state of lands, the proceeds of which are to be used for constructing a canal, which, when "completed or used," shall be, and forever remain, a public highway for the use of the government, free of toll, does not require the maintenance of the canal forever, but merely provides that it

shall be free to the government while it is used as a canal. *Vought v. Columbus, H. Valley & A. R. Co.* 58 Ohio St. 123, 50 N. E. 442, Affirmed in *Walsh v. Columbus, H. Valley & A. R. Co.* 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393; *Vought v. Columbus, H. Valley & A. R. Co.* 176 U. S. 481, 44 L. ed. 554, 20 Sup. Ct. Rep. 398.

The lien of a mortgage on mill property operated by water from a state canal will include a right to damages for injury to the property by the abandonment of the canal. *Bank of Auburn v. Roberts*, 44 N. Y. 192, Affirming 45 Barb. 407.

When the state acquired the land needed for a canal in fee simple, a cessation of that use will not revert the title in its grantor. *Halderman v. Pennsylvania C. R. Co.* 50 Pa. 425; *Robinson v. West Pennsylvania R. Co.* 72 Pa. 316.

The state acquired for public use the absolute title to the land appropriated for the Chenango canal, and, upon abandonment of the canal, the title did not revert to the former owner, but may be granted by the state to individuals for private purposes. *Birdsall v. Cary*, 66 How. Pr. 358.

The land acquired for the purposes of the Wabash & Erie canal, and along which it was operated, did not cease to belong to the state of Indiana after the abandonment of the canal; and a purchaser deriving title from the state is entitled to recover possession of the property or compensation therefor. The court said: "I must assume, I think, that the original owners of the land had become absolutely divested, in favor of the state, of all interest whatever in the property. *Mason v. Lake Erie, E. & S. W. R. Co.* 9 Biss. 239, 1 Fed. 712.

The abandonment of a state canal produces no reversion of the land to its former owners. *Genesee Valley Canal Co. v. Slaughter*, 49 Hun, 35, 1 N. Y. Supp. 554.

But the abandonment of land which has been used for the purpose of a state canal will cause it to revert to the original owner where compensation was not made for the taking, except for the injuries that would accrue beyond the benefit which was supposed to result to the landowner from the erection of the canal on his property. *People v. White*, 11 Barb. 26.

But the court of appeals held that a state is not liable for damages, where, after taking land for a public canal for which no damages are paid because the benefits are found to equal the injuries, it abandons the canal and releases the land covered by it to a municipality for a street; since the damages assessed included all future prospective and contemplated losses which might be incurred. *Whitney v. State*, 96 N. Y. 240.

The public becomes reinvested with the right to use a highway taken for canal purposes, where the canal is abandoned upon its construction, and a grantee of the state acquires no title therein. *Kennedy v. Indianapolis*, 11 Biss. 13, Fed. Cas. No. 7,703.

The abandonment of a canal which a city had permitted to be constructed on a strip of land dedicated by the original proprietor for a public street does not cause the title to such strip to revert to the original dedicator, where the city had filled up the canal and constructed a street thereon, for which purpose it is now used and maintained, and the owners of lots abutting thereon, purchased from the original dedicator, had improved the same by the erection of buildings and other improvements thereon fronting upon such street. *Shanklin v. Evansville*, 55 Ind. 240.

The abandonment of a canal in a public street occupied and used for a canal, and in which the state, by the act of appropriation and use, ac-

quired a fee-simple title, revives the original easement of the public in such strip as a street, and the same attaches thereto as an active and existing estate in the land, which the owner of the fee can neither obstruct nor destroy. *Logansport v. Shirk*, 88 Ind. 563.

When private property has been taken by a canal corporation under powers of eminent domain, if that use ceases it returns or reverts to the owner of the soil from which it was taken. *Jessup v. Loucks*, 55 Pa. 350.

Change of use.

The public authorities have power to authorize a change of use of lands appropriated for canal purposes to highway or railroad purposes. *Richards v. Cincinnati*, 31 Ohio St. 506.

Land appropriated by the state for canal purposes may be changed from such use to that of a public highway, with water pipes and sewerage as incidents thereto, by conveyances to a city for that purpose under legislative authority, without thereby creating an abandonment of the premises so as to revert to the owner of the bed of the canal, since no substantial change is thereby made of the public use from that for which the property was originally appropriated; and such owner, not claiming any right as an adjoining proprietor, cannot complain of the change of use. *Malone v. Toledo*, 28 Ohio St. 643.

A municipal corporation to which the state had deeded certain state canal lands "for public highway and sewerage purposes," permitting a railroad company to occupy wholly a portion thereof for railroad purposes, will be deemed to have abandoned such portion, and the same will revert to the state. *State ex rel. Richards v. Pittsburgh, C. C. & St. L. R. Co.* 53 Ohio St. 189, 41 N. E. 205.

The grant by the state to a municipal corporation, for the use and purposes of a street, of an abandoned canal, will confer the fee upon the municipality. *De Witt v. Elmira Transfer Co.* 134 N. Y. 495, 32 N. E. 42.

The damages assessed for land taken for a canal will not cover additional damages occasioned by the construction of a railroad along the abandoned canal route. *Gordon v. Pennsylvania R. Co. (Pa.)* 6 Rep. 727.

Upon the conversion of a canal into a railway under statutory authority, the easements whereby the canal company had procured its waters cease, and do not pass to the railroad company, although the statute provided that, in case any portion of the canal navigation, or its reservoirs, lands, or works used therewith, should, in consequence of the stopping up of the canal, be no longer required, they might be sold by the company. *National Guaranteed Manure Co. v. Donald, & Hurst & N.* 8, 28 L. J. Exch. N. S. 185, 7 Week. Rep. 185.

In an action by a railroad company to appropriate certain land upon a part of which the berme bank of a canal was situated, the one owning the fee-simple title to the soil of such bank is entitled to recover damages for the additional easement of the railroad. *Lafayette, M. & B. R. Co. v. Murdock*, 68 Ind. 187.

Land which was flowed by the tides was granted to a canal company by the state for use as a canal basin. In 1849 the charter of the canal company was repealed, and the use of the basin ceased, but the tide did not flow thereon, it being shut off by the lock which the state in the act repealing the charter authorized a city to maintain, and by such act the possession of the land which had been used as a basin was restored to the state. A river ran through the basin, and the plaintiff claimed as riparian owner the land along the river which was formerly

covered by the waters of the basin. The state since the repeal of the canal charter had exercised no ownership over the land in question, and had asserted no claim thereto. In 1845 and 1848 acts were passed by the legislature of the state authorizing the city to grant the right to establish a depot or lay rails "over land covered by public waters" and public land and waters. It was held that the acts of 1845 and 1848, having been passed before the repeal of the canal charter, could not be construed as authorizing the city to grant to a railroad company the use of the land in question, and that such company had no right to use the land as against the plaintiff as riparian owner. *Prior v. Comstock*, 17 R. I. 1, 19 Atl. 1079.

Landowners who are not parties to an agreement between the United States and a state to which lands have been granted in aid of the construction of canals, that such canals shall be and forever remain free public highways for the benefit of the United States, but making no provision for the benefit of such landowners, are not entitled to an injunction to restrain the abandonment thereof and lease of the lands under legislative authority to a railroad company for railroad purposes, on the ground that there is an impairment of the obligation of the contract between the United States and the state, although investments and improvements have been made in reliance upon the observation of such obligation. *Vought v. Columbus, H. Valley & A. R. Co.* 58 Ohio St. 123, 50 N. E. 442. The court further said that there was no impairment of the obligation created by the provision of the act that the canals shall be and remain forever free public highways for the benefit of the United States "when completed and used," as the latter provision does not require them to be so maintained for all time irrespective of their utility, but only so long as they are kept up and used, there being no express provision requiring their maintenance for all time; but that the United States is not now objecting, and that it will be time enough to consider the matter when it does.

Where a private canal company, under the act under which it was incorporated, could acquire only an easement in lands appropriated by it for canal purposes, and not the fee-simple title, and an abandonment of said canal would have caused said easement to become extinguished and a reversion thereof to the owners of the freehold, such company could convey no better title in a subsequent sale of the canal to the state; and where the state, by an act of legislature, afterwards abandoned said canal, but only as part of a transaction to convey said easement to a railroad company for use as a railroad, such easement was not thereby extinguished, but passed to the purchaser subject to the duty of making compensation to the owners of the freehold for the additional burdens imposed by the new use and such damages as might result therefrom; and the owners of the freehold can enjoin said railroad company from entering upon said easement until condemned and paid for according to the above rule. *Ibid.*

An injunction will not be granted to restrain the abandonment of a canal and leasing thereof to a railroad company at the suit of persons having contracts for the use of the water thereof, either for mill or street-sprinkling purposes, on the ground that there is an impairment of the obligation of their contracts, as the agents of the state have no power to make a contract for the use of the waters thereof requiring the maintenance of such canal after it has become useless for the purpose of navigation; but such contracts terminate with the use of the canal. *Ibid.*

While, under a deed from the state to a mu-

nicipal corporation of certain state canal lands "for public highway and for sewerage purposes," the laying of a single track thereon by a railroad company by permission of the city is not inconsistent with its use as a street, and will not work an abandonment by the city; such permission gives the railroad company no rights. *State ex rel. Richards v. Pittsburgh, C. C. & St. L. R. Co.* 53 Ohio St. 189, 41 N. E. 205.

The owner of land across which an easement has been acquired for canal purposes is not, on the subsequent change of the use from canal to railroad purposes, entitled to damages on account of the loss of the convenience of watering farm stock at the canal, nor for the loss of the convenience of navigating the canal for his own private uses, where such conveniences were enjoyed, if at all, as a matter of sufferance by the canal company, and not as a matter of right against it. *Hatch v. Cincinnati & I. R. Co.* 18 Ohio St. 92.

A change of use of a perpetual easement in lands for canal purposes to a use for railroad purposes by an amicable condemnation of the canal company's rights by a railroad company, does not prevent such utter contrariety of uses as to work an abandonment of the easement and the consequent reversion to the owner of the fee, so as to entitle him to compensation for the value of the land on which the canal was located and taken by the railroad company; but he is entitled only to the value of such land as it may have taken which was not embraced in the appropriation made by the canal company, for such additional burdens as may have been imposed by the change of use upon the land so originally appropriated, and for damages done or accruing to his adjacent land by reason of the additional appropriation, if any, and of the change of structure and of use from those of a canal to those of a railroad, in so far as such damages are peculiar to himself as a proprietor, and not common to the public at large. *Ibid.*

A forfeiture of the franchise of a canal company by accepting a new charter conferring power to use the water for manufacturing purposes, and by nonuser thereof for navigation, cannot be enforced by an owner of the adjoining property with a contingent right of reversion in the land of the corporation, but only by the sovereign state. *Bass v. Roanoke Nav. & Water Power Co.* 111 N. C. 439, 19 L. R. A. 247, 16 S. E. 402.

A contingent claim to a reversion in respect to the real estate of a corporation in case of its dissolution, which is dependent on the action of the sovereign in insisting upon a forfeiture of the charter, is a mere expectancy which can be defeated by legislation authorizing a sale of the property under judicial decree, or granting the privileges of the old corporation, or even additional privileges, to a new corporation which becomes its successor. *Ibid.*

Under the act in relation to the Blackstone canal, of 1849, which provides for the discontinuance of said canal as a navigable highway, and for an assessment of damages in favor of landowners against mill owners who may desire to keep sections of it open for the uses of their mills, no one is entitled to claim damages for the keeping open upon his land of a section of the canal, who is restricted from closing it up by a reservation in the deed under which he claims title. *Ballou v. Harris*, 5 R. I. 419.

Under a statute changing a navigation company into a manufacturing company with power to maintain its dams at the same height they are when the statute is passed, if the corporation raises its dams higher than they then exist it will be liable for the forage under the mill acts. *Comins v. Turner's Falls Co.* 142 Mass. 443, 8 N. E. 329.

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The franchise of a public canal corporation cannot be sold on execution. The franchise, being an incorporeal hereditament, cannot be seized under execution. *Gue v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635.

X. Repair and improvement.

A person in possession of a mill upon a canal, claiming title under a deed which was made to him under order of court and binds him to repair the canal, cannot excuse himself from the liability to repair upon the ground that the order of court was defective, and the deed therefore passed no title. *Woburn v. Henshaw*, 101 Mass. 193, 3 Am. Rep. 333.

When a canal corporation has enlarged its works under color of its charter, its exercise of its franchise can only be questioned by the commonwealth. *Farnham v. Delaware & H. Canal Co.* 61 Pa. 265.

A license to enlarge a canal will not relieve the licensee from liability for injuries caused by want of skill or care in doing the work. *Selden v. Delaware & H. Canal Co.* 29 N. Y. 634.

A superintendent of a public canal will be individually liable if, in order to restore navigation in the canal, as he is required to do by statute, he destroys a boat which prevents the closing of a lock gate so as to permit the refilling of a levee, merely because that mode of procedure is the most convenient, speediest, or cheapest method of effecting the result. *Hicks v. Dorn*, 42 N. Y. 47, Affirming 1 Lans. 81.

A superintendent of repairs on a public canal, whose statutory duty is to keep in repair the section of the canal committed to his charge, is liable personally for injuries caused by workmen employed in making repairs. *Shepherd v. Lincoln*, 17 Wend. 250.

A canal commissioner is not personally liable for failure to make repairs which rest in his discretion. *Griffith v. Follett*, 20 Barb. 620.

If the charter of a canal company provides a method for compensating property owners injured by the construction of its works, the same provisions will apply to an enlargement of the works after they are completed. *Farnham v. Delaware & H. Canal Co.* 61 Pa. 265.

Under the New York statutes, a contractor for canal repairs is required to pay all damages arising to the state or to any individual by his negligence, default, or misconduct. *French v. Donaldson*, 57 N. Y. 496, Affirming 5 Lans. 203.

An oral license to enlarge a canal will justify all that is done under it, although it gives no right to maintain the enlarged work. *Selden v. Delaware & H. Canal Co.* 29 N. Y. 634.

A parol license to enlarge a canal will authorize an increase in depth as well as in width; and such increase may be effected by excavating the bottom or raising the banks. *Ibid.*

The officers of a canal company will be enjoined from interfering with improvements thereon made by officers of the United States under a congressional appropriation, where the work will benefit both the United States as sole stockholder and the holders of bonds secured by a mortgage on the canal revenues which will not be interrupted by the work. *United States v. Louisville & P. Canal Co.* 4 Dill. 601, Fed. Cas. No. 15,633.

A canal company having power to construct and maintain a canal of suitable dimensions to be determined by the corporation has power to enlarge the canal wherever, in its judgment, the traffic requires it; and in so doing it may increase the height of dams in streams which are a part of its waterway, and the only remedy of the mill owners on the stream will be a pro-

ceeding for the payment of the damages. *Bruce v. Delaware & H. Canal Co.* 19 Barb. 371.

Charter authority to a municipal corporation to pass ordinances to prevent lumbering the basins, slips, etc., in any manner whatever, and to prevent and punish the casting of logs or floating matter in the rivers, canals, slips, and basins in the city, except that it shall not interfere with any laws of the state in relation to the canals, will include power to require the removal of logs or lumber from a feeder of the state canal within the city limits. *People ex rel. Parsons v. Bryan*, 46 Barb. 355.

Canal trustees are not liable to an individual for the damages sustained by him through their failure or neglect to repair the canal or keep it in navigable order, in the absence of proof of some special damages to himself not common to others having the right to navigate the canal. *Moore v. Wabash & Erie Canal*, 7 Ind. 462.

Canal trustees are liable to the owner of a boat for the amount of toll paid by him in advance for the privilege of navigating their canal during a season where they failed to keep the canal in such condition as to enable him to use it with safety to his boat and cargo. *Ibid.*

In an action against a municipal corporation to recover for injuries to land on a canal caused by the widening and deepening of the canal, alleged to have been done under the direction or authority of such municipality, the court will take judicial notice of an act of legislature authorizing such municipality to widen and deepen the canal for its own benefit, but cannot judicially know that it had determined to do the work, however well known the fact may be to its citizens; nor can they take cognizance, without proof, of what ordinances and contracts it may have adopted and made on that subject, nor that its agents or employees acted within the scope of their duties in that respect. *Chicago v. McGraw*, 75 Ill. 566.

An individual cannot maintain an action against a canal company for damages caused by their failure to construct the canal according to the requisition of the charter, or their omission to keep the canal in repair, if his injury be such only as he suffers in common with all others. *Quincy Canal v. Newcomb*, 7 Met. 276, 39 Am. Dec. 778.

XI. Riparian rights.

The owner of land through which a canal was constructed cannot recover damages for loss of certain privileges connected therewith in the way of water for stock, drainage to lands, and easy means of approach from one portion to other portions of the land, by the abandonment of the canal and its sale to a railroad company for use for railroad purposes, where the title acquired by the state by the original condemnation proceedings in the lands occupied by the canal was a fee-simple title, and not a mere easement, although the aforesaid rights, privileges, and benefits were taken into consideration and charged to such owner in estimating the damages to be allowed him for the construction of the canal over his land. *Frank v. Evansville & D. R. Co.* 111 Ind. 132, 12 N. E. 105.

Owners of lands abutting on a canal, incidentally benefited by the water it affords or its facilities for drainage, have no property interest in these incidental benefits, and are not entitled to an injunction restraining the abandonment of the canal. *Vought v. Columbus, H. Valley & A. R. Co.* 58 Ohio St. 123, 50 N. E. 442, 61 L. R. A.

A person making improvements and investments upon the assumption that a contract existed providing for the perpetual maintenance of a certain canal, to which contract such person is neither party nor privy, cannot insist upon its observance for his own benefit, or recover from either party for damages resulting to him by reason of its nonobservance. *Ibid.*

The owner of land bordering on a canal cannot recover from a city for injuries to his land caused by widening and deepening such canal claimed to have been done under the direction or authority of the city, where the evidence merely shows that the work on the canal, resulting in the injuries complained of, was done by persons under a contract with the city and pursuant to its terms, without introducing the contract or any of its terms in evidence, or any ordinance of the city regarding the work, so as to enable the court to determine whether or not the acts committed by such persons were expressly authorized by the city, or that they were done bona fide in pursuance to a general authority to act for it on the subject, or that in either case the same were adopted or ratified by the corporation. *Chicago v. McGraw*, 75 Ill. 566.

XII. Prescription.

If the state enters into possession of land for canal purposes under an unconstitutional statute claiming to be the owner of the fee, there will be sufficient claim to title to ripen into title by adverse possession. *Eldridge v. Binghamton*, 120 N. Y. 309, 24 N. E. 462, *Affirming* 42 Hun, 202.

The appropriation by the state of a strip of land in a public street, and the construction thereon of a canal, and its use for that purpose for many years, vest a fee-simple title thereto in the state, notwithstanding no damages were ever assessed, paid, or tendered the owners of abutting lots or the public therefor. *Logansport v. Shirk*, 88 Ind. 563.

No adverse possession can exist of the bank of a canal, so as to become the foundation of a title, while the state is using the canal for the purpose for which it was constructed, under the statute providing that the people will not bring an action for real estate unless they have received the rents and profits thereof within the space of twenty years. *Genesee Valley Canal Co. v. Slight*, 49 Hun, 35, 1 N. Y. Supp. 554.

Continuous, adverse, and exclusive possession for twenty years of the land constituting an abandoned public canal, and filling up the channel, and rescuing the property at great expense and in good faith from becoming a public nuisance, are sufficient to vest in the possessors a title by prescription as against one asserting a mere private proprietary interest in the land by virtue of a master's sale under a decree foreclosing the lien on such canal of state creditors; since, by its abandonment, it lost its public character, and became subject to acquisition by prescription. *Collett v. Vanderburgh County*, 119 Ind. 27, 4 L. R. A. 321, 21 N. E. 329.

Land adjoining the bank of a canal, overflowed by a pond formed by the water thrown from the channel of the canal, not used as a reservoir or basin of the canal, is not appurtenant to the canal itself so as to vest the fee-simple title thereof in the owner of the canal, but only vests a mere easement to overflow the land. *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580.

H. P. F.

Christian SMITH

v.

H. C. INGRAM *et al.*, *Appts.*

(130 N. C. 100.)

1. Assignees of one who has taken a deed to real estate with covenant of warranty which does not include assigns cannot rely on the covenant to prevent the original grantor from reclaiming the land because of the invalidity of his grant; at least they cannot if there was no assignment of the benefit of the covenant to them.
2. The law of the place where the land is located, respecting the privy examination of a married woman, and not that of her residence, will govern in determining the validity of her deed of real estate.
3. A void deed cannot estop the grantor from reclaiming the land granted.

On Rehearing.

4. When the deed of a married woman fails because of failure to subject her to private examination, as required by statute, it is ineffectual for all purposes, and cannot be relied on as an estoppel or ground for recovery in any subsequent controversy.
5. A married woman who has undertaken to convey real estate without the formalities prescribed by law is not estopped from reasserting her title to the property by placing the grantee in possession, and permitting him to make valuable improvements.

(Clark, J., dissents.)

(March 25, 1902.)

APPEAL by defendants from a judgment of the Superior Court for Montgomery County in favor of plaintiff in an action brought to recover certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Adams, Jerome, & Armfield, for appellants:

The deed, having been executed by the wife with the written assent of her husband, as required by article 10, § 6, of the Constitution, is so far valid as to estop the plaintiff from claiming the land in the face of her deed.

Zimmerman v. Robinson, 114 N. C. 49, 19 S. E. 102; *Alexander v. Davis*, 102 N. C. 17, 8 S. E. 768; *Newhart v. Peters*, 80 N. C. 166.

The covenant of warranty contained in the deed is a personal contract which the *feme* plaintiff was competent to make under the laws of South Carolina, and she is estopped by her covenant of warranty.

11 Am. & Eng. Enc. Law, 2d ed. pp. 402,

NOTE.—As to effect of covenants of married women, and their estoppel by deed or mortgage, see *Wadkins v. Watson* (Tex.) 22 L. R. A. 779, and *note*.

As to what law governs in determining married woman's capacity to make contract, including contracts as to real estate, see *note* to *Ruhe v. Buck* (Mo.) 25 L. R. A. 178; also, in this series, *Polson v. Stewart* (Mass.) 36 L. R. A. 771; *Freeman's Appeal* (Conn.) 37 L. R. A. 452; *Walling v. Christian & C. Grocery Co.* (Fla.) 47 L. R. A. 608; and *Thompson v. Taylor* (N. J.) 54 L. R. A. 585. 61 L. R. A.

415; *Rawle, Covenants for Title*, § 251, *note*; *Tiedeman, Real Prop.* § 856.

As to such personal covenant the *lex loci contractus* prevails.

Wood v. Wheeler, 111 N. C. 231, 16 S. E. 418; *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138; *Cole v. Raymond*, 9 Gray, 219.

Under the laws of South Carolina the wife was fully empowered to make any contract with reference to her separate real estate, and the doctrine of estoppel applies to married women in that state.

Orenshaw v. Julian, 26 S. C. 283, 2 S. E. 133; *Rigby v. Logan*, 45 S. C. 651, 24 S. E. 56; *Basford v. Pearson*, 7 Allen, 504.

The personal part of the contract may be valid though no estate passes by the deed.

Long Island R. Co. v. Conklin, 29 N. Y. 587; 11 Am. & Eng. Enc. Law, 2d ed. p. 402; *Brown v. National Bank*, 44 Ohio St. 269, 6 N. E. 648.

A married woman is estopped by her covenant of warranty in all cases where she is competent to contract, according to the law of the place of the contract.

Harris, Contracts by Married Women, § 318, p. 269; *Kolls v. DeLeyer*, 41 Barb. 208; *Richmond v. Tibbles*, 26 Iowa, 474; *Nash v. Spofford*, 10 Met. 192, 43 Am. Dec. 425; *Brown v. Manter*, 21 N. H. 528, 53 Am. Dec. 223; *Shaw v. Galbraith*, 7 Pa. 111; *Long Island R. Co. v. Conklin*, 29 N. Y. 572; *Herman, Estoppel*, pp. 1105, 1108; *Basford v. Pearson*, 7 Allen, 504.

Equity will not permit a married woman to take refuge under a plea of coverture for the purpose of committing a fraud.

Hodge v. Powell, 96 N. C. 64, 60 Am. Rep. 401, 2 S. E. 182; *Burns v. McGregor*, 90 N. C. 222; *Boyd v. Turpin*, 94 N. C. 137, 55 Am. Rep. 597; *McLeod v. Williams*, 122 N. C. 454, 30 S. E. 129; *Danner v. Berthold*, 11 Mo. App. 351.

Mrs. Smith is a citizen of another state, and our courts are only open to citizens of other states through the law of comity.

Miller v. Black, 47 N. C. (2 Jones, L.) 342.

We will not sacrifice justice to comity.

Moye v. May, 43 N. C. (8 Ired. Eq.) 131.

Defendants will not be compelled to resort to an action upon the covenant of warranty as against a nonresident, and more especially against an insolvent nonresident.

Richardson v. Williams, 56 N. C. (3 Jones, Eq.) 116; *Green v. Campbell*, 55 N. C. (2 Jones, Eq.) 446.

On rehearing.

A covenant of warranty is a purely personal contract.

N. C. Code, § 1334; *Tiedeman, Real Prop.* § 856; *Rawle, Covenants*, § 251, *note*; *Furman v. Elmore*, 2 Nott & M'C. 189.

A married woman is estopped by her covenant of warranty.

Zimmerman v. Robinson, 114 N. C. 48, 19 S. E. 102.

If the warranty be made to a man and his heirs without the word "assigns," yet the assignee, or any tenant of the land, may rebut. 2 Co. Litt. 385b.

The ancient doctrine of rebutter was simply a clumsy application of the modern doctrine that there is an equitable assignment of the warranty to a subsequent grantee without naming assigns.

Doe ex dem. Taylor v. Roe, 11 N. C. (4 Hawks) 116, 15 Am. Dec. 512; *Herrin v. McEntyre*, 8 N. C. (1 Hawks) 410.

The covenants for quiet enjoyment and of warranty run with the land, and any assign or grantee in the future may sue any one or more of the covenantors, whether immediate or remote, and the assignee with warranty, or without warranty, can maintain, even though he be a purchaser on foreclosure sale, the action for breach of these covenants.

McCall, Real Prop. p. 200; *Markland v. Crump*, 18 N. C. (1 Dev. & B. L.) 94; 4 Kent, Com. 472; *Rickets v. Dickens*, 5 N. C. (1 Murph.) 343, 4 Am. Dec. 555; *Washb.* Real Prop. p. 502.

A deed is a contract of the state in which it is executed as to all personal covenants therein as to which a personal action for damages might be sustained, including: (1) The covenant of warranty of title; (2) the covenant for further assurance and quiet enjoyment.

22 Am. & Eng. Enc. Law, 2d ed. p. 1338; *Jackson v. Hanna*, 53 N. C. (8 Jones L.) 188; *Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. 302; *Green v. Campbell*, 55 N. C. (2 Jones, Eq.) 448; *Richardson v. Williams*, 56 N. C. (3 Jones Eq.) 116; *Polson v. Stewart*, 167 Mass. 212, 36 L. R. A. 771, 45 N. E. 737; *Basford v. Pearson*, 7 Allen, 504; *Brown v. National Bank*, 44 Ohio St. 269, 6 N. E. 648.

The words in the deed, "to have and to hold to the said Lindsay Hursey, his heirs and assigns," constitute a covenant for quiet enjoyment which will estop the plaintiff.

Midgett v. Brooks, 34 N. C. (12 Ired. L.) 147; *Herrin v. McEntyre*, 8 N. C. (1 Hawks) 411.

The deed being for the separate estate of the plaintiff, and its free execution, with the written assent of her husband, as required by article 10, § 6, of the Constitution, being admitted, is valid to pass her title to the land.

Scott v. Battle, 85 N. C. 184, 39 Am. Rep. 694; *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418; *Dembitz, Land Titles*, p. 1030; *Womack v. Womack*, 8 Tex. 397, 58 Am. Dec. 119; *Urquhart v. Womack*, 53 Tex. 616; *Clayton v. Frazier*, 33 Tex. 91; *Jaques v. Methodist Episcopal Church*, 17 Johns. 548, 8 Am. Dec. 447; *Bein v. Heath*, 6 How. 228, 12 L. ed. 416.

Messrs. Douglass & Simms, for appellee:

"When the proof or acknowledgment of a conveyance, power of attorney, or other instrument concerning the interest of a married woman in land, is taken as in this chapter directed, no clerk of the superior court shall adjudge such conveyance or other instrument to be duly proved or acknowledged unless the private acknowledgment of such married woman is taken according to the laws of this state, and a cer-

tificate thereof attached to the deed or other instrument."

N. C. Code, § 1246, subsec. 6.

When the husband of a *feme covert* does not join in a conveyance of her land, and she is not privily examined as to her voluntary assent to the deed, the attempted conveyance is an absolute nullity, and the vendee has no lien on the land, or right of action against the woman personally for the purchase money paid by him.

Scott v. Battle, 85 N. C. 184, 39 Am. Rep. 694; *Askew v. Daniel*, 40 N. C. (5 Ired. Eq.) 321; *Green v. Branton*, 16 N. C. (1 Dev. Eq.) 500; *Holmes v. Holmes*, 86 N. C. 205; *Clayton v. Rose*, 87 N. C. 106; *Burns v. McGregor*, 90 N. C. 222; *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998; *Williams v. Walker*, 111 N. C. 608, 16 S. E. 706.

Where a married woman having a separate estate in land makes a contract in another state, her capacity to make the contract, and its validity, are to be determined by the law of the state in which the land is situated.

Armstrong v. Best, 112 N. C. 63, 25 L. R. A. 188, 17 S. E. 14; *Johnston v. Gawtry*, 11 Mo. App. 322.

Capacity or incapacity as to acts done in a foreign country, where the person may be, will be recognized as valid or not, in the forum of his domicile, as they may infringe or not its interests, laws, and policies.

Bank of Louisiana v. Williams, 46 Miss. 618, 12 Am. Rep. 319; *Central Land Co. v. Laidley*, 32 W. Va. 134, 3 L. R. A. 826, 9 S. E. 61.

The wife cannot subject her separate real estate, or any interest therein, to any lien, except by deed in which the husband joins, with privy examination, as prescribed by law; and she will not be allowed to do indirectly what the law prohibits her from doing directly.

Thurber v. LaRoque, 105 N. C. 303, 11 S. E. 460; *Hanover Nat. Bank v. Howard*, 118 N. C. 274, 23 S. E. 1005; *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418.

Messrs. McIver & Spence and *J. A. Spence* also for appellee.

Furches, Ch. J., delivered the opinion of the court:

On the 21st of January, 1878, the plaintiff was the owner of the land in controversy, lying and being in Montgomery county, North Carolina, containing 133 acres, which she agreed to sell to one Lindsay Hursey for \$130. The plaintiff, Christian Smith, was at that time a married woman, being the wife of J. L. Smith, and has so remained the wife of said J. L. Smith until since the commencement of this action. In pursuance of said contract and agreement to sell, she and her said husband made and executed a deed sufficient in form to convey said land to said Hursey in fee simple, with a covenant of warranty of title to said Hursey, but not to his heirs, nor to his assigns. The said Hursey thereafter took possession of said land, and claimed to hold

the same under this deed from the plaintiff and her husband, J. L. Smith, and the defendants claim under and by means conveyances from the said Lindsay Hursey. The plaintiff and her said husband were residents and citizens of the state of South Carolina at and before the date of said transaction, and the plaintiff is still a resident and citizen of said state. Said deed was probated according to the laws of South Carolina, but not according to the laws of this state, in that no privy examination of the plaintiff was ever taken. It was shown and admitted that under the laws of South Carolina at that time a married woman might sell and convey her own land, by and with the consent of her husband, without privy examination. And it is admitted, and the deed shows, that the husband joined the plaintiff in making and executing said deed. This action was commenced on the 16th day of September, 1895, for possession of said land, and for damages for the wrongful detention thereof; and defendants answer, and deny the plaintiff's right to recover, admit they are in possession of said land, and plead the deed of the plaintiff and her said husband, of the 21st of January, 1878, to the said Lindsay Hursey, under whom they claim title, as an estoppel. And defendants contend that by reason of this deed, and the covenant of warranty therein contained, the plaintiff is estopped to claim title to said land, and that she cannot maintain this action. Defendants say that as the plaintiff could convey her land under the laws of South Carolina, and as she was a resident and citizen of South Carolina, and as the contract of sale and deed to Hursey were made in South Carolina, it was a South Carolina contract, and the deed conveyed the land to Hursey; or, if this is not true, that the warranty is a personal contract that the plaintiff was authorized to make by the laws of South Carolina; that it is binding upon her, and might be enforced there, and will be enforced here; that, this being so, the plaintiff is estopped, and cannot maintain this action. But upon a careful examination of authorities, we find that neither of the contentions of the defendants can be sustained.

Lord Coke says warranty is a covenant real, attached to the land, and runs with the estate, whereby the grantee, upon being ousted by title paramount, may vouch the grantor, and compel him to render other lands of equal value. 2 Co. Litt. chap. 13, §§ 697 *et seq.* In *Southerland v. Stout*, 68 N. C. 446, the grantor conveyed to McQueen with general warranty, "which warranty the plaintiff acquired as incident to the estate derived from him,—a covenant which runs with the estate." Thus it appears that where there is a general warranty to the grantee, his heirs and assigns, it is attached to the land, and runs with the estate, and the heir or assignee may vouch. But it is a covenant real, and extends no further than the terms of the covenant carry it. My Lord Coke again says: "If a man doth

warrant land to another without this word [heirs], his heirs shall not vouch; and regularly if he warrant land to a man and his heirs, without naming assigns, his assignee shall not vouch." Co. Litt. 384b, 385b. So it is seen that, if the estate had passed to Hursey under the deed of plaintiff and her husband, the defendants, who are the assigns of Hursey, would have no interest in it, and could not have vouched the plaintiff. Warranties are now treated as personal covenants. This is so under the statute of Anne, the Revised Code (chap. 43, § 10), and § 1334 of the Code, and was made so by these statutes and judicial construction, because real actions had been abolished, and actions of ejectment had been substituted in their stead, and there was no one to vouch. But the action of covenant can only be had where the party could have vouched under an action real. *Southerland v. Stout*, 68 N. C. 446; *Rickets v. Dickens*, 5 N. C. (1 Murph.) 343, 4 Am. Dec. 555. And when suits are brought on such covenant, and the grantee had been evicted from the whole of the land, the measure of damage was the amount paid for the land. *Williams v. Beeman*, 13 N. C. (2 Dev. L.) 483, approved in *Markland v. Crump*, 18 N. C. (1 Dev. & B. L.) 94, 27 Am. Dec. 230; *Nichols v. Freeman*, 33 N. C. (11 Ired. L.) 99; and many other cases. The defendants having no right to vouch if this had been an action real, they have no right to sue on the covenant, and no right to defend under it. They have no privy or connection with the warranty, which was to Hursey alone. They have no interest in it, and can take no benefit under it, even if Hursey could have done so. And we now propose to show that this transaction was absolutely void, and no estate passed to Hursey under the deed of the 21st of January, 1878, and that the plaintiff incurred no obligation that can be enforced in law or equity.

The general rule is that executory contracts are governed by the law of the jurisdiction where they are to be executed, and, if they are repugnant to the established policy of that jurisdiction, they cannot be enforced. An executory contract may be made in this state to be executed in New York, and it will be considered a New York contract, and subject to the laws of that state. But if such executory contract is made here, and no place is named as to where it shall be executed, it is presumed that it was to be executed here,—a North Carolina contract. And this doctrine applies only to executory contracts, and not to property. But there are well-known exceptions to that rule. There are contracts which are localized by the subject-matter of the contract, as this one is. All contracts and deeds for the sale and conveyance of land are local, and belong to the jurisdiction where the land lies, and will not be enforced when they are in violation of the laws and settled policy of this state. In other words, such contracts and conveyances are made by the law contracts and

conveyances of the state where the land is. The law of constructive jurisdiction or contractual jurisdiction has never applied to contracts for or conveyances of land. And when the plaintiff made this sale and conveyance to Hursey, she made it as a citizen of North Carolina; that is, she was as much subject to the laws of this state as if she had been living here and made it here. Hursey was as much bound to take notice of the fact that she was a married woman as if she had been living here. This doctrine is well stated in Story, Conf. L. 8th ed. §§ 38, 474, note *a*; Wharton, Conf. L. §§ 278, 305, 331,—and sustained by *Merooney v. Atlanta Bldg. & L. Assn.* 116 N. C. 382, 21 S. E. 924, and *Armstrong v. Best*, 112 N. C. 59, 25 L. R. A. 188, 17 S. E. 14, and in *The Kensington*, 183 U. S. 263, 45 L. ed. 190, 22 Sup. Ct. Rep. 102. But the direct question has been passed upon, and, it seems to us, settled, by this court, in *Jones v. Gerock*, 59 N. C. (6 Jones, Eq.) 190. It seems to us this question is settled, treating it as we must, under the authorities cited and many others; and it is a North Carolina transaction, unless we overrule the statute (Code, § 1256) and the many decisions of this state with regard to the execution of deeds by married women, and that the defendants can take no benefit under the transaction of plaintiff with Hursey. In *Clayton v. Rose*, 87 N. C. 106, the court uses this language: "In *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694, it is held that a *feme covert's* deed, not executed in the prescribed mode, is wholly inoperative. Abiding by these decisions, we do not propose to reopen the question." The case of *Scott v. Battle*, which has been cited with approval in more cases, in all probability, than any other case since it was filed, in 1881, is so full and complete in support of this opinion that we can hardly undertake to quote from it without doing injustice to the learned judge who wrote it. But it holds that at common law there was but one way by which a married woman could convey her land, and that was by fine and recovery; that our statute has provided another way,—more simple and less expensive,—by deed, in which the husband joins, and by privy examination of the wife. "But unless the terms prescribed in the statute are strictly complied with, she stands as at common law, and the deed is absolutely void." It is not claimed that this statute has been complied with, or attempted to be complied with, in this case, and it is therefore absolutely void. And it would seem "that the same reasoning must be a full answer to the defendants' demand upon the plaintiff for the restoration of the purchase money, which she has received and used." And "in no case will the law imply a promise on her part and everyone who deals with her is held to do so with a knowledge of her disability." The court then disposes of the case of *Daniel v. Crumpler*, 75 N. C. 184, and, in effect, overrules it, and then proceeds to quote from *Askew v. Daniel*, 40 N. C. (5 Ired. Eq.) 321, as follows:

"That a deed of a *feme covert*, until she is privily examined by the proper authorities, is mere blank paper,—so utterly void that, even if it contains a stipulation in her own behalf, she cannot have the benefit thereof." In *Green v. Branton*, 16 N. C. (1 Dev. Eq.) 504, the court says that "a *feme covert* can be bound as to her land in only two ways: First, by her deed executed jointly with her husband, with her privy examination thereto; and, secondly, by the judgment of a competent court; and, that if her deed be not executed as required by law, it is an absolute nullity, under which no equity whatever can be set up." Again the court says: "Upon principle, too, it seems impossible to conceive that the law will ever permit that to be done indirectly which it forbids to be done directly, or that it will give its countenance to a doctrine which must subvert its whole theory in regard to the contracts of married women. To do so would be equivalent to saying that a *feme covert* cannot, by express deed, unless privately examined thereto, cannot convey or charge her lands, and yet by a mere contract to sell, and the acceptance of the purchase money, create such a lien upon it as the courts of equity will enforce by a sale against her will." In the case of *Towles v. Fisher*, 77 N. C. 444, the court says: "No one can reasonably rely upon the contract of a married woman, or on a representation which at best is in the nature of a contract, and by which he must be presumed to know that she is not legally bound; and it is only in the case of a pure tort, altogether disconnected with a contract, that any estoppel against her can operate." The case of *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418, is a case in our own court directly in point as to the invalidity of the deed from plaintiff to Hursey. The defendant in that case was a married woman, and a resident and citizen of South Carolina. She made a mortgage to a citizen of North Carolina upon lands in North Carolina. The mortgage was executed in South Carolina, where she lived, and was probated according to the laws of that state, as this deed was; and this court held that it was utterly void.

Having shown that this deed is utterly void, it cannot be used as an estoppel; and, in addition to the authorities already cited, we cite the following from 11 Am. & Eng. Enc. Law, 2d ed. p. 393: "No question of estoppel by deed can arise where the instrument is absolutely void." And in note 1 to this text it is shown that this is the law in England, Alabama, Arkansas, California, the District of Columbia, Indiana, Kentucky, Massachusetts, Minnesota, Missouri, North Carolina, Washington, and Wisconsin. And *Miller v. Bumgardner*, 109 N. C. 412, 13 S. E. 935, is cited in this note, showing that this is the law in North Carolina. There the deed of a married woman, properly executed by her and her husband, except for the fact that she had never been privily examined thereto, was offered as an estoppel; and this

court held that it was no estoppel against her. Again, on the same page of 11 Am. & Eng. Enc. Law, it is said: "Where the deed is invalid, the mere fact that it contains covenants of warranty will not make it operative by way of estoppel; for, to make a warranty binding, there must be some estate conveyed to which the warranty may be annexed." "A deed void, as being given in contravention of a statute, works no estoppel. . . . Thus, a married woman will not be estopped by a deed not executed in the mode provided by statute." But if the "*feme covert* retain and have actually in hand the money paid her as the consideration for her imperfect and disaffirmed contract, her vendee would be permitted to recover the same at law; or, if she had converted it into other property, so as to be traceable, he might pursue it in its new shape by a proceeding *in rem*, and subject it to the satisfaction of his demand. But if she has consumed it [as it is admitted the plaintiff has in this case], the party paying it is without remedy; and this because of the policy of the law, which forbids all dealings with *femes covert*, unless conducted in the manner prescribed by the statute, and which throws the risk in every such case upon the party that deals with her." We hold, therefore, that the plaintiff is not personally liable to a charge for the money paid her by Hursey, nor is her land in controversy subject to a lien thereon.

It seems to us that *the judgment of the court below is fully sustained, and it is affirmed.*

Douglas, J., concurring:

I concur in the opinion of the court with reluctance, on account of the great and unmerited hardship it inflicts upon so many individuals; but I am forced to concur because, in my opinion, it is the law. We have no implied warranties as to real estate, and as express warranty is a covenant real, running with the land, it can never arise when the deed creating it is absolutely void. If the warranty could operate at all, it could only be by estoppel *in pais*. An estoppel may at times prevent a person from denying the validity of an act which he might lawfully have done, but not an act which he could not do. In other words, an estoppel can never be used to evade the law by validating an act forbidden by law. I have given to the law of married women, as laid down in the opinions of this court, the repeated assent of my deliberate judgment, and cannot now undertake to reverse a long line of decisions on account of the exceptional hardships of an individual case.

Clark, J., dissenting:

In 1878 the plaintiff (now a *feme sole*), being then a married woman residing in South Carolina, united with her husband in the conveyance of the land in question, which has since become valuable; the town of Star being built thereon. She now seeks to recover the land. The deed was exe-

cuted to one Hursey, his heirs and assigns, and contains a covenant of warranty of title to said Hursey, who has since conveyed by deed with warranty to these defendants and others, who have improved the property, which was stated on the argument to be now worth some \$40,000. The deed by plaintiff and husband recited the receipt of the purchase money,—some \$130,—the payment of which is not denied. In South Carolina the wife was then, and is now, fully empowered to make any contract with reference to her separate estate, and the doctrine of estoppel applies to married women. *Orenshaw v. Julian*, 26 S. C. 283, 2 S. E. 133; *Rigby v. Logan*, 45 S. C. 651, 24 S. E. 56. In that state a married woman can convey realty, or make any contract, not only without privity examination, but without the joinder or assent of her husband. 2 Rev. Stat. 1893, pp. 47–49, §§ 101, 102, 108; Rev. Stat. 1873, §§ 104, 105, 111; Id. chap. 100, §§ 1–3. The privity examination not having been taken according to the requirements of our statute, and the land lying in this state, the deed was improperly admitted to registration here; and as, until recently, the statute of limitation did not run against married women, the long undisturbed possession by her grantee and these defendants did not ripen into what was a just and honest title. But while the deed was not legally registered here, the contract of conveyance and the contract of warranty of title were valid in South Carolina, where made, and, being valid there, are valid everywhere else. The personal contract is enforceable everywhere, if valid where made. 11 Am. & Eng. Enc. Law, 2d ed. pp. 402, 415; *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418; *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138. We have express authority that a covenant of warranty by a married woman which is good as a personal contract, because competent according to the law of the place of contract, is good and enforceable as a personal contract though the deed was void as a conveyance in the state where the land lay. *Long Island R. Co. v. Conklin*, 29 N. Y. 587; 11 Am. & Eng. Enc. Law, 2d ed. p. 402. In *Basford v. Pearson*, 7 Allen, 504, a deed was executed by a married woman residing in Massachusetts for land lying in New Hampshire. It was properly executed according to the laws of Massachusetts, but not according to the laws of New Hampshire. The court held that the married woman was estopped by her covenant of warranty, and says: "The covenant may be good and valid and effectual against the party making it, if he is duly authorized to contract in that manner, although the deed in which it is contained might not be sufficient under the law of another state to convey lands there situate." And such is the universally recognized law. A married woman is estopped by her covenant of warranty in all cases where she is competent to contract according to the law of the place of contract. *Harris, Contracts by Married Women*, § 318, p. 267; *Kolls v. De Leyer*, 41 Barb. 208;

Richmond v. Tibbles, 26 Iowa, 474. In *Zimmerman v. Robinson*, 114 N. C. 49, 19 S. E. 102, Avery, J., says: "The right, with the concurrence of her husband, to execute conveyances as if she were a *feme sole*, has been held to empower her to create a lien upon her separate real estate (*Alexander v. Davis*, 102 N. C. 17, 8 S. E. 708; *Newhart v. Peters*, 80 N. C. 166); and, if the courts are to allow her deed to operate to any extent as if she were not under coverture, it must be conceded that the power to convey carries with it, by implication, as an incident, the liability to estoppel by the covenants usually contained in conveyances." In *Armstrong v. Best*, 112 N. C. 59, 25 L. R. A. 188, 17 S. E. 14, the married woman was domiciled in this state, and made, while temporarily in Maryland, a contract valid there, but invalid here. It was held, when sued in this state, that, being resident here, she would receive the protection of the disability imposed by our law; but the court was careful to approve the general rule laid down in *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138, that the "validity of a contract [of a married woman] is to be determined by the law of the place where the contract is made, and, if valid there, it is valid everywhere," and further cites with approval *Robertson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, 11 S. W. 38, which held that, where a married woman domiciled in Kentucky made a contract valid there, recovery could be had thereon in Tennessee, though the same contract made by a married woman domiciled in Tennessee would be void. That case is on all fours with this.

Upon the authorities above cited from our own Reports and the uniform decisions of other states, the contract made by the plaintiff in South Carolina, having been valid there, is valid here. The deed of conveyance is invalid here, because forms requisite to authorize its registration here are lacking. But the contract of conveyance (not contract to convey) is valid, and, when the plaintiff seeks to disregard it and take back the land, her valid contract that she "has conveyed" is a complete answer to her in a court of equity; and the defendants claiming under a deed from Hursey are privies thereto. Certainly, when the plaintiff has made an admittedly valid contract that, in consideration of receipt of the purchase money, she has conveyed to Hursey, and has put him in possession, and has acquiesced in that possession since 1878, she cannot be allowed by a court of equity to put him and his grantees out, and recover, by violating her valid contract, \$40,000 worth of property, when she has stood by so many years and allowed others to build upon it and add great value thereto. If the plaintiff had put Hursey into possession with a valid contract, reciting that she had conveyed and would warrant the title, and acknowledged receipt of the purchase money, she could not, under the present system, combining law and equity, recover possession because she had 61 L. R. A.

not executed a deed; and the defendants are in no worse condition because a defective deed was superadded. This is not the case of such a contract made by a married woman domiciled here, as to whom the contract would be invalid. Nor do the cases as to one purchasing with notice of our statutes of disability as to married women apply; for here the purchaser knew that the law of South Carolina rendered valid the conveyance and the contract contained in the deed. The conveyance became ineffectual in this state by reason of our registration laws requiring proof of her assent by a privy examination, but, by all the authorities, the contract of conveyance being valid there, when she seeks to recover the land in our courts by reason of the defect in the deed a court of equity will refuse her the possession of the land in violation of her valid contract that she has conveyed it and received the purchase money. The cases as to enforcing an executory contract of a married woman have no application. The deed is defective for the nonobservance of the mode of proof of execution of the deed which is required by our statutes, and which governs the registration of titles to realty in our state; but the contract that she has conveyed and acknowledged receipt of the purchase money is an executed contract, as is also the contract of warranty.

A second ground which also defeats the plaintiff's recovery is that the execution of the contract, the receipt of the purchase money, the putting Hursey in possession, and the standing by while defendants (in privy with Hursey) have held possession ever since 1878, and built upon and improved the property, constitute an estoppel *in pais* against this plaintiff, who was competent to contract, and is estopped by matter *in pais* in South Carolina as fully as if she had remained a *feme sole*, or as if she were a man. Even if domiciled in this state, a married woman is, by virtue of chapter 617, Laws 1901, responsible for buildings put upon her own land by her consent. When her conduct would be a complete estoppel upon her had she sued in her own forum, she cannot be relieved from that estoppel by suing in ours.

There is still a third defense. She contracted with Hursey, by a perfectly valid and binding contract, that she would warrant and defend this title. Had she sued in South Carolina, that would be binding on her; and she cannot shake off and vitiate such personal contract, which our authorities hold to be valid here when valid there, by suing in our courts. To this the technical objection is made that, such contract being to Hursey without the addition of the words "heirs and assigns," it does not run with the land, and therefore the defendants do not take benefit under it. By the statute of Anne (Rev. Code, chap. 43, now § 1334 of the Code), warranties are now held personal covenants, and a warranty which would prevent the plaintiff from recovering the realty from Hursey would prevent her getting it back from these defendants, who

hold under him. This is not an action by the defendants against the plaintiff for breach of her contract with their grantor, but, sued by her to recover the *rem*, the title of which she had warranted by a contract which she was competent to make, they set up that warranty to Hursey, under whom they hold, as a defense; being in privity with him, and entitled to the protection of such defenses as would have prevented a recovery against him had he remained in possession. "Covenants which run and rest with the land lie for or against the assignee at common law, though not named. . . . *Bally v. Wells*, 3 Wils. 25. . . . Covenants that do not run with the land may be assigned in equity to enforce them by action in the name of the covenantee to use of assignee. 1 Smith, Lead. Cas. 179; *Willard v. Tayloe*, 8 Wall. 571, 19 L. ed. 501. . . . If this covenant had not passed with the estate in the land, . . . his conveyance would have operated as an equitable assignment of his [grantor's] interest in it, and of his right to enforce it in his name to her." *Hagar v. Buck*, 44 Vt. 290, 5 Am. Rep. 368. "For a covenant which runs and rests with the land, an action lies for or against the assignee at the common law, . . . although the assignee be not named in the covenant, . . . citing *Cro. Eliz.* pt. 1, p. 553; and see 1 Rolle, 359; *Cro. Car.* 221." *Bally v. Wells* (1769) 3 Wils. 25. To same effect, *Willard v. Tayloe*, 8 Wall. 571, 19 L. ed. 501. In *Coleman v. Bresnahan*, 54 Hun, 622, 8 N. Y. Supp. 158, it is said: "Equity, for the purposes of justice, repudiates the distinction between covenants which do and do not run with the land." In *Columbia College v. Lynch*, 70 N. Y. 449, 26 Am. Rep. 615, it is said: "Whether it was a covenant running with the land, or a collateral covenant, or a covenant in gross, or whether an action of law could be sustained upon it, is not material, as affecting the jurisdiction of a court of equity." In *Wead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 153, the court says: "Our conclusion is that, where the covenantee takes possession and conveys, the covenant of warranty in the deed to him will pass to his grantee." *Doty v. Chattanooga Union R. Co.* 103 Tenn. 564, 48 L. R. A. 160, 53 S. W. 944, is a recent case where the subsequent grantee of the land was held liable on a covenant in the conveyance, though the covenant did not refer to "assigns." In *Miller v. Texas*, 4 P. R. Co. 132 U. S. 691, 33 L. ed. 487, 10 Sup. Ct. Rep. 206, it is held that where, as in this case, the *habendum* is to the grantee, his heirs and assigns, this is not restricted by a more limited warranty following, and the grantor and his heirs are estopped to set up an adverse claim against the grantee. In the more or less distant past there was a highly technical distinction resting upon feudal reasons, long since extinct, between covenants running with the land and not running with the land. As stated in several of the above cases, this distinction is 61 L. R. A.

not recognized by courts of equity, when to do so would work injustice. It certainly should not be allowed that effect (even if the defendants' case depended upon that one proposition) in a case like this, where the plaintiff was equally competent by the *lex loci contractus* to make a valid contract of conveyance, a valid contract of warranty, and a valid deed, and where she received the purchase money, put her grantee in possession, stood by for seventeen or eighteen years without objection, allowed the defendants to improve the property, and now, when it has become worth probably \$40,000, seeks to get it back, with this enormously increased value, in spite of her enforceable contract to warrant the title. Had she sued in her own courts, this would have been a valid defense; and when she comes into our courts her contract made in South Carolina is equally valid against her here as in South Carolina, though the deed proves invalid because not executed with the formalities as to proof of execution required by our statute as a prerequisite to registration. The defense is in equity, not at law, and a contrary result would be so unjust as to shock the moral sense.

It must also be noted that, though the deed is invalid because proof of its execution is not as required by our statute, the contract of the married woman, even if she had been resident in this state, is valid to affect either her real or personal estate (having been made with assent of her husband) by the very terms of our statute (Code, § 1826).

If there is any precedent anywhere which can be construed to countenance the plaintiff's recovery, there is no better time to repudiate it than now. A precedent so mischievous and subversive of every element of natural justice should not be left standing, upon which to ask the judgment of a court which will work such an injustice. In the very recent case of *Thompson v. Taylor*, 66 N. J. L. 253, 54 L. R. A. 585, 49 Atl. 544, that court holds, reversing the supreme court of that state, that where a married woman, domiciled in New Jersey, executes a note to her husband, invalid in New Jersey, which is taken by her husband, with her acquiescence, to New York and there indorsed by him and delivered, this became a New York contract, and, such contract being valid in New York, the liability of the wife will be enforced in New Jersey. This case is much stronger than ours, and is a full discussion by a very able court, showing how completely the doctrine of the legal nonentity and legal incapacity of women is now discredited, even in those states whose laws still retain some trace of it.

Precedents, even when unbroken, and admitted, are not to be preferred or continued when they work a patent and undeniable wrong.

Upon the facts found, judgment should have been entered for the defendants.

A petition for rehearing having been filed,

Walker, J., handed down the following response on June 11, 1903:

This is a petition to rehear the above-entitled case, which was decided at February term, 1902, and is reported in 130 N. C. 100, ante, 878, 40 S. E. 984.

On the 21st day of January, 1878, the plaintiff, being the owner of the land in controversy, which is situated in this state, joined with her husband in the execution of an unsealed paper writing, by which they professed to convey the said land for a consideration paid to her by one Lindsay Hursey, who afterwards conveyed to the defendant A. Leach. The other defendants claim their shares in the land by mesne conveyances from Leach. At the time of executing the paper writing to Hursey, the plaintiff and her husband were citizens of the state of South Carolina, and were domiciled in that state, and Hursey was a citizen of this state, and domiciled therein. The paper writing was proved by witnesses, there being no acknowledgment of it, or privy examination of the wife. There was a general covenant of warranty in the deed. By the Constitution and laws of South Carolina in force at the time the paper writing was executed, a married woman could purchase and convey real property as if she were unmarried, and her deed to the same could be proved by witnesses without privy examination, and, when thus proved and registered, was binding upon her. The plaintiff's husband died since this suit was brought.

It may be assumed that, if the lands had been situated in South Carolina, the paper writing executed by the plaintiff to Lindsay Hursey was valid and effectual for the purpose of passing the land to the latter, and, further, that the plaintiff, according to the laws of that state, would be bound by the covenant of warranty. But as the land is situated in this state, the transfer of it must be governed by our law. It seems to be conceded that the title to the land did not pass by the mere force and operation of the deed as a conveyance, but the defendants contend that the plaintiff is estopped by the deed, and especially by the covenant of warranty, to claim the land, as her covenant is valid and binding on her under the laws of South Carolina, where she resided and had her domicile at the time she entered into it.

There is a marked difference between the validity of a covenant of warranty where the question is whether the covenantor is liable in damages for a breach of the covenant, treated as a mere personal contract, and its validity for the purpose of creating an estoppel against the covenantor to claim the land which he has sold and conveyed, and the title to which he has warranted. In the one case the remedy is by an action on the covenant, which sounds only in damages; and in the other the covenant is considered, not as passing the estate, if we speak with technical accuracy, but as concluding the party who has affirmed that he had the title at the time of the conveyance, and has agreed to warrant and defend it, from afterwards disputing that fact, or from

asserting a title in opposition to the one he professed to convey; but, while the estoppel may not have the legal effect of transferring the title to the covenantee, it indirectly accomplishes that result. Whatever may be the rule with reference to the law governing the validity of a covenant, considered as a personal contract, for the breach of which damages may be recovered,—whether it is the law of the place where the property with reference to which the covenant is made is situated, or the law of the place of the contract,—we need not decide in this case, for it is sufficient for the purpose of this appeal to hold, as we must, that, if the covenant is to be regarded as an estoppel affecting the title, it must be governed by the law of the state where the property is situated, and in this case by the law of this state. Minor, Conf. Laws, § 185; *Riley v. Burroughs*, 41 Neb. 296, 59 N. W. 929; *Hill v. Shannon*, 68 Ind. 470; *Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. 302. Referring to this very question of the effect of a covenant of warranty, the court, in *Larendon's Succession*, 39 La. Ann. 952, 3 So. 219, says: "The rights and obligations arising under acts passed in one state, to be executed in another, respecting the transfer of real estate in the latter, are regulated, in point of form, substance, and validity, by the laws of the state in which such acts are to have effect." The rule as said by the court to apply also to the determination of liability upon the covenant for damages.

If the question of estoppel is to be decided by the law of this state, as we hold it must necessarily be, it follows that it cannot have the effect, either directly by passing the estate, or indirectly by concluding the plaintiff, or preventing her recovery in this case. A ruling which would give to the covenant the force and effect the defendants contend it should have, would be in flagrant violation of the spirit and letter of our law in regard to the transfer of real property by married women. We will always, in comity, enforce the laws of another state, when the rights of the parties should be determined according to the place where the contract was made, or where the transactions out of which those rights arose took place; but we cannot enforce the laws of a foreign jurisdiction when they conflict with our own laws in a matter concerning property situated in this state. If we should say that the covenant works an estoppel which concludes the plaintiff, and thereby divests her of the title to the property, we would decide, in effect, that she had done indirectly what she could not do directly. "The wife cannot subject her separate real estate, or any interest therein to any lien, except by deed in which the husband joins, with privy examination as prescribed by law, and she will not be allowed to do indirectly what the law prohibits her doing directly." *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460. In *Drury v. Foster*, 2 Wall. 34, 17 L. ed. 782, the court says: "To permit an estoppel to operate against her [a married woman] would be a virtual repeal of the statute

which extends to her this protection, and also a denial of the disability of the common law, that forbids the conveyance of her real estate by procreation. It would introduce into the law an entirely new system of conveyance of the real property of *feme covert*."

The defendants cannot avail themselves of the covenant, because it was not made directly with them, but with Hursey, and there has been no assignment of the covenant by him to them. It is true that a covenant of warranty is in the nature of a real covenant, and runs with the land, even though the word "assigns" is not mentioned therein. *Wiggins v. Pender* (N. C.) 44 S. E. 362. But the defendants can take nothing by this principle, as the deed of the plaintiff was absolutely void, and the land, or, more properly speaking, the title or estate, did not pass; and, of course, the covenant cannot be said to have passed to the defendant with the land. The covenant of warranty is incident to the estate, and, as the defendants acquired no estate, it follows that they derived no advantage in any way from the covenant. *Kercheval v. Triplett*, 1 A. K. Marsh. 493. If it is a binding covenant at all, it is nothing more than a covenant in gross, or one detached from the land, and could not have passed to the defendants, except by an assignment. When the deed of a married woman fails as a conveyance because of the nonjoinder of her husband, or for any other reason, it is ineffectual for all purposes, and cannot be relied upon as an estoppel or ground for recovery in any subsequent controversy. *Herman, Estoppel*, § 581. In *Lovell v. Daniels*, 2 Gray, 168, 61 Am. Dec. 448, the court, discussing this question, says: "She can make no valid contract in relation to her estate. Her separate deed of it is absolutely void. Any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, was seised in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them, nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith and for full consideration, cannot affect her interest in the estate, or that of the husband and children." See also *Pierce v. Chase*, 108 Mass. 254. In *Harden v. Darwin*, 77 Ala. 481, it is said by the court: "It has been uniformly held that a married woman is not estopped from asserting the invalidity of a conveyance of her property, not executed in the mode required by the statute, though she has received a valuable consideration, and her vendee has been let into possession, and that a court of equity will not enforce it against her, as an agreement to convey." *Louisville, St. L. & T. R. Co. v. Stephens*, 96 Ky. 401, 29 S. W. 14, 49 Am. St. Rep. 303. The covenant binds the covenantor to warrant and defend the title which passes by the deed, and to answer in damages if

the title fail or prove defective. It relates to the title or estate of the covenantor, which he undertakes to convey, and not to the validity of the deed by which it is transferred. The purchaser is presumed to know that a married woman is not bound by a deed without her privy examination, and, if he takes a conveyance imperfectly executed or acknowledged by her, it is his own misfortune, if not his fault. *Towles v. Fisher*, 77 N. C. 437. We think the principles laid down in this court in *Williams v. Walker*, 111 N. C. 604, 16 S. E. 706, are conclusive against the defendants in this case. While the precise question we are discussing was not involved in that case, it affords a perfect analogy for our guidance, and is sufficient in all respects to sustain our decision on this rehearing. In the case of *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 285, 38 Am. Dec. 722, it was held by this court that a conveyance which failed to pass the land, and was merely void, could not operate as an estoppel, and this must needs be so.

The defendants further contend that plaintiff is estopped by her act in permitting Hursey and the defendants to take possession of the land and make valuable improvements thereon. We have not been able to find anything in the record upon which they can base this contention, but, if there were facts sufficient for that purpose, we would be unable to agree with the defendants. A married woman is no more estopped by her acts *in pais* than by her covenant of warranty. This court has said that no one can reasonably rely upon the acts and representations of a married woman,—at least, those which are contractual in their nature,—as he must know that she is not bound thereby, and "it is only in the case of a pure tort, altogether disconnected with the contract, that an estoppel against her can operate." *Towles v. Fisher*, 77 N. C. 438; *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694; *Williams v. Walker*, 111 N. C. 604, 16 S. E. 706; *Carolina C. R. Co. v. McCaskill*, 94 N. C. 746.

We have examined with care the authorities to which our attention has been called, and do not think that they support the contention of the petitioners as to the estoppel arising from the covenant of warranty. We make special reference to two of them. In the case of *Long Island R. Co. v. Conklin*, 29 N. Y. 587, the question as to the valid execution of the deed was not raised, but the point was whether the words of the deed were sufficient to operate as a conveyance of the property; and the court held that, if they were not, resort could be had to the covenant of warranty, as containing sufficient words for that purpose. The grantor was *sui juris*. In *Basford v. Pearson*, 7 Allen, 504, there was no reference to an estoppel, as the action was brought to recover damages for a breach of the covenant. The question in our case is not whether Mrs. Smith is liable for damages upon the covenant, but whether she is estopped from claiming the land.

We have given this case most anxious

thought and consideration, not only because of the interesting and important questions involved, but because of the great hardship and apparent injustice the defendants may suffer as the result of our decision, based upon the application of fixed legal principles to their case.

Whether the defendants can have equitable relief is a question not now before us for adjudication. Such relief has been granted in a case closely resembling this in its facts and circumstances. In that case the court fully recognized the invalidity of a deed executed by a married woman, and based its decision upon the ground that the right to equitable relief, or to compensation for improvements, to the extent that they had enhanced the value of the land, did not involve the enforcement of a contract, either directly or indirectly, but simply denied to her the use and enjoyment of property for which she had paid nothing, and which she acquired by the repudiation of her deed. *Preston v. Brown*, 35 Ohio St. 18. Whether this is a correct principle, and the case just cited and others of a like tenor are in accord with our decisions, and should be followed by us, is a question which, if it should ever arise, we will leave open for future consideration, and entirely free from any expression, or even intimation, of opinion by us.

However much we may regret the unfortunate situation of the defendants, we cannot grant them any relief, as the matter is now presented, without abrogating well-settled legal principles, and violating the plain provisions of our statute, the enforcement of which is obligatory upon us.

After careful examination of the case, we can find no error in the former decision of this court.

Petition dismissed.

Clark, Ch. J., dissenting, refers, without repeating them, to the views expressed in the dissenting opinion at the former hearing (*Smith v. Ingram*, 130 N. C. 108-115, ante, 882, 40 S. E. 984), and to the opinion of the court in *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418, and *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138; also to what is said in the concurring opinion in *Vann v. Edwards*, 128 N. C. 426-435, 39 S. E. 66, and the dissent (concurring in by two members of the court) in *Williams v. Walker*, 111 N. C. 613, 16 S. E. 706. There are some decisions of this court as to the rights of married women which are hard to be reconciled with the liberal provisions of § 6, art. 10, of the Constitution, which has been owing, doubtless, to the fact that the judges who occupied this bench in the years first succeeding its adoption had been thoroughly imbued with the common-law ideas as to the incapacity of married women, and the failure of the legislature to change the language of one or two provisions in statutes which had been passed in conformity with the former Constitution, but which are repugnant both to the spirit and the letter of the present Constitution. 61 L. R. A.

This has not escaped the notice of the court in *Hanover Nat. Bank v. Howell*, 118 N. C. 273, 23 S. E. 1005; *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890, and other cases, and has been discussed in the dissenting opinion in *Weathers v. Borders*, 124 N. C. 615-619, 32 S. E. 881, and *Walton v. Bristol*, 125 N. C. 426, 432, 34 S. E. 544, to which reference is made without repeating what is there said.

By chapter 78, Laws 1899, the general assembly took married women out of the class of incompetents, and from the companionship of "infants, idiots, lunatics, and convicts," in which they had been placed by the statute of limitations (Code 1883, §§ 148, 163); and a further approximation to the Constitution was made by chapter 617, p. 859, Pub. Laws 1901. *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890. The Constitution (art. 10, § 6), in its terms, would take them out of the class of those *non sui juris* in all respects, as has been done in England, where the conception of these disabilities first arose, and in so many of the states of this Union,—among them, South Carolina, where this contract was made.

The majority of the court being of opinion that the plaintiff should recover back this land, it would seem elementary justice and equity that she should pay for the betterments placed thereon (*Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460), and, indeed, should render compensation for the enhanced value of the land (*Carolina C. R. Co. v. McCaskill*, 98 N. C. 526, 4 S. E. 468; *Preston v. Brown*, 35 Ohio St. 18), though these matters are not now before us. Certainly, this should be so here, for the plaintiff received the money for the land under a contract made while residing in a state where she was *sui juris*, and liable upon her contracts, as if a *feme sole*. Upon her repudiation of the conveyance, she should not profit by her breach of contract, but should be held liable for the damage caused thereby, like all others who are *sui juris*. She sold the land, living where she had full right to do so, and received the agreed price, \$130; her husband joining in the deed. She now wishes to recover the town of Star, which has been built upon it, with all the houses built upon it, and the enhanced value given to the land, upon the technical ground that her privy examination was not taken, when, as a matter of fact, the sale was her free act and deed, and she has acquiesced in such sale since 1878, when it was made. There is not a tittle of evidence, nor any suggestion, even, that she did not understandingly and wittingly make the sale of her own will; and it was the law at the place of contract that she could make this sale even without the consent of her husband, though this was had. Should she recover the land under these circumstances, she should account for betterments and enhanced value, and receive back the land, deducting these additions, and return the \$130. *Burns v. McGregor*, 90 N. C. 222.

TENNESSEE SUPREME COURT.

Mayor, etc., of KNOXVILLE, *Appt.*,
v.
KNOXVILLE WATER COMPANY.

(107 Tenn. 647.)

1. It is not legally practicable to notify an alderman of a special meeting of the board to be held on the evening of the day on which the call is issued, where at the time of the call he is absent from the state and beyond reach; and failure to give him notice will not affect the validity of the meeting.
2. Publication of an ordinance in a Sunday newspaper is not insufficient, under a statute making it evidence when printed and published, where such publication is not forbidden by statute or public policy, and, by reason of its larger circulation, publication in such paper is the most effective notice that can be given.
3. To authorize an irrevocable contract by a municipality as to the rates to be charged consumers for water furnished by a water company, legislative power to make it must be unquestionable.
4. A provision in a charter of a water company that the municipality "shall have power by ordinance to regulate the price of water" gives the municipality the continuing right to regulate the charges, limited only by a condition that such rates shall not be unreasonable or oppressive.
5. It is not unreasonable to give a municipality whose inhabitants are to be supplied by a water company the right to regulate the rates, since the question of the reasonableness of the regulation is always open to judicial investigation.
6. That a municipal corporation has an option to purchase a plant for water supply at a certain date will not invalidate its regulation of rates to be charged by the owner, on the theory that they may be fixed so low as to destroy the value of the plant, since the owner may resort to the courts for protection.
7. A contract by a municipality as to the rates to be charged by a water company which is chartered for a term of years does not prevent its altering such rates from time to time, where the charter provides that it shall in no way interfere with the police or general powers of the municipality, which shall have power by ordinance to "regulate" the price of water.

(November 2, 1901.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Knox County in favor of defendant in an action brought to recover a penalty for violating a municipal ordinance fixing water rates. *Reversed.*

The facts are stated in the opinion.

NOTE.—As to establishment and regulation of municipal water supply, including right of municipality to fix rates, and the validity of long-term contracts for a water supply, see note to *State ex rel. Hallauer v. Gosnell* (Wis.) 61 L. R. A. 33.

As to legislative regulation of water rates, see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 181.

61 L. R. A.

Messrs. R. L. Oates, Pickle & Turner, and J. W. Caldwell, for appellant:

The state, by direct enactment of its legislature, or by authority delegated by the legislature to counties or municipalities, may regulate public utilities, and the rates to be charged for public service by corporations or individuals rendering any service to the public.

Munn v. Illinois, 94 U. S. 133, 24 L. ed. 86; *Winchester & L. Turnp. Road Co. v. Croxton*, 98 Ky. 739, 33 L. R. A. 177, 34 S. W. 518; *Railroad Commission Cases*, 116 U. S. 307, 347, 352, 29 L. ed. 636, 649, 651, 6 Sup. Ct. Rep. 334, 388, 1191, 348, 349, 391; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633; *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363.

The city, by contract, has not surrendered, and cannot surrender, this right; and, having contracted at one time for a particular schedule of rates, it does not thereby exhaust its power to regulate.

Huron Waterworks Co. v. Huron, 7 S. D. 9, 30 L. R. A. 848, 62 N. W. 975; *Ogden City v. Bear Lake & River Waterworks & Irrig. Co.* 16 Utah, 440, 41 L. R. A. 305, 52 Pac. 697; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 624, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *New York v. Miln*, 11 Pet. 139, 9 L. ed. 662; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319; *Winchester & L. Turnp. Road Co. v. Croxton*, 98 Ky. 739, 33 L. R. A. 177, 34 S. W. 518; *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

Publication is not necessary to the validity of an ordinance.

Com. v. Davis, 140 Mass. 485, 4 N. E. 577; *Re Smith*, 65 Barb. 283; *Elmendorf v. New York*, 25 Wend. 693; *Stuhr v. Hoboken*, 47 N. J. L. 148.

Whatever may be the purpose and effect of this publication, it is sufficient when made in a Sunday paper.

Shaw v. Williams, 87 Ind. 161, 44 Am. Rep. 750; *Kiger v. Coats*, 18 Ind. 153, 81 Am. Dec. 351; *Hanover F. Ins. Co. v. Shrader*, 89 Tex. 35, 30 L. R. A. 498, 32 S. W. 872, 33 S. W. 112; 20 Enc. Pl. & Pr. p. 1197; *Mattheus v. Ansley*, 31 Ala. 20; *State v. California Min. Co.* 13 Nev. 203; *State v. Lorry*, 7 Baxt. 95, 32 Am. Rep. 555; *Swann v. Swann*, 21 Fed. 299; *Amis v. Kyle*, 2 Yerg.

31, 24 Am. Dec. 463; 17 Enc. Pl. & Pr. p. 102; *Schued v. Hartwitz*, 23 Colo. 187, 47 Pac. 295; *Sawyer v. Cargile*, 72 Ga. 290; *Hastings v. Columbus*, 42 Ohio St. 585; *Kingsbury v. Buckner*, 70 Ill. 514; *Eason v. Witcofskey*, 29 S. C. 239, 7 S. E. 291; *Lake v. Hurd*, 38 Conn. 540; *Sangster v. Noy*, 16 L. T. N. S. 157; *Wolton v. Gavin*, 16 Q. B. 48; *Lucas v. Larkin*, 85 Tenn. 355, 3 S. W. 647.

The validity or invalidity of an act done upon Sunday does not rest upon religious or moral grounds, or upon public policy, but solely upon the question as to whether it violates the provisions of the law, either statutory or common.

Swann v. Swann, 21 Fed. 299; *Moseley v. Vanhooser*, 6 Lea. 286, 40 Am. Rep. 37.

If the meeting is a special one, the general rule, unless modified by charter or statute, is that notice is necessary, and must be personally served, if practicable, upon every member to be present.

1 Dill. Mun. Corp. § 286; 1 Beach, Pub. Corp. § 271; 15 Am. & Eng. Enc. Law, pp. 1034, 1035; 1 Thomp. Corp. §§ 707, 708; 2 Cook, Corp. § 596.

Where a member of such board is absent from the state, and beyond the reach of actual notice, such notice is not necessary.

State v. Kirk, 46 Conn. 395; 2 Cook, Corp. § 1119; *Porter v. Robinson*, 30 Hun, 209; *Re Union Hill Silver Co.* 22 L. T. N. S. 400; 1 Dill. Mun. Corp. § 263; 5 Thomp. Corp. §§ 8176, 6479; 3 Thomp. Corp. § 3936; *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874; *Clark, Corp.* p. 491; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Rep. 207; *State v. Smith*, 48 Vt. 266; *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874.

Mr. Charles T. Oates, Jr., for appellee:

The ordinance of March 30th, 1901, was void, because of failure to notify all the members of the council of the special meetings at which it was passed.

London & N. Y. Land Co. v. Jellico, 103 Tenn. 320, 52 S. W. 995; 1 Dill. Mun. Corp. §§ 263, 286; 15 Am. & Eng. Enc. Law, pp. 1035, 1080, 1081; 1 Beach, Pub. Corp. § 271; *Lord v. Anoka*, 36 Minn. 176, 30 N. W. 550; *Beaver Creek Twp. Board v. Hastings*, 52 Mich. 523, 18 N. W. 250; *Mitchell County v. Horton*, 75 Iowa, 271, 39 N. W. 394; *Paola & F. River R. Co. v. Anderson County*, 16 Kan. 302; *People ex rel. Loew v. Batchelor*, 22 N. Y. 128; *Harding v. Vandewater*, 40 Cal. 77; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; 2 Cook, Corp. §§ 594, 596; *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248; *Bank of Little Rock v. McCarthy*, 55 Ark. 473, 18 S. W. 759; *Wiggin v. First Freewill Baptist Church*, 8 Met. 301; *Whitehead v. Hamilton Rubber Co.* 52 N. J. Eq. 78, 27 Atl. 897; *Hill v. Rich Hill Coal Min. Co.* 119 Mo. 9, 24 S. W. 223; *Pike County v. Rowland*, 94 Pa. 238; *Ang. & A. Priv. Corp.* §§ 492, 494.

The publication of the ordinance in a Sunday newspaper, on March 31st, 1901, was not a legal publication.

Knoxville Charter, § 28; *Horr & B. Mun. Pol. Ord.* §§ 52, 53; *Ormsby v. Louisville*, 61 L. R. A.

79 Ky. 197; *Dumars v. Denver*, 16 Colo. App. 375, 65 Pac. 580; *Sevall v. St. Paul*, 20 Minn. 511, Gil. 459; *Soammon v. Chicago*, 40 Ill. 146; *Sawyer v. Cargile*, 72 Ga. 290; *Schued v. Hartwitz*, 23 Colo. 187, 47 Pac. 295; *McLaughlin v. Wheeler*, 2 S. D. 379, 50 N. W. 834; *Shaw v. Williams*, 87 Ind. 158, 44 Am. Rep. 756; *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302.

The ordinance of March 30th, 1901, impairs the obligations of the prior contracts, made by the city with defendant company, and is, therefore, void.

U. S. Const. § 10, art. 1; Tenn. Const. § 20, art. 1; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 570, 44 L. ed. 892, 20 Sup. Ct. Rep. 736, 88 Fed. 720, 103 Fed. 711; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Old Colony Trust Co. v. Atlanta*, 83 Fed. 42; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140; *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723; *State ex rel. St. Louis v. Laclède Gaslight Co.* 102 Mo. 472, 14 S. W. 974, 15 S. W. 383.

It is competent for a municipal corporation effectually to renounce its right to regulate water rates.

Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720; 1 Dill. Mun. Corp. § 89, p. 115; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723.

The contracts of the city in this case exempt the water company from further regulation of rates.

Los Angeles v. Los Angeles City Water Co. 177 U. S. 570, 44 L. ed. 892, 20 Sup. Ct. Rep. 736, 88 Fed. 720, 103 Fed. 711; *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. 185; *Capital City Gas Co. v. Des Moines*, 72 Fed. 818.

The legislature cannot constitutionally delegate the power to fix prices at which water shall be sold in a city to the authorities of the city, which is itself a consumer, either in its municipal capacity, or through its inhabitants, without some provision for a judicial investigation of the reasonableness of the rates fixed by such authorities.

Agua Pura Co. v. Las Vegas (N. M.) 50 L. R. A. 224, 60 Pac. 208; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Holden v. Hardy*, 169 U. S. 390, 391, 42 L. ed. 790, 791, 18 Sup. Ct. Rep. 383;

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 610; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; *Brannon*, 14th Amend. 140 *et seq.*

Regulation without investigation is without due process of law.

Capital City Gaslight Co. v. Des Moines, 72 Fed. 838; *East Tennessee, V. & G. R. Co. v. Mahoney*, 89 Tenn. 318, 15 S. W. 652; *Hughes v. Marquet*, 85 Tenn. 127, 2 S. W. 20; *Chambers v. Chambers*, 92 Tenn. 710, 23 S. W. 67.

Wilkes, J., delivered the opinion of the court:

This suit arises out of an effort upon the part of the city of Knoxville to enforce an ordinance which affects the defendant water company, and, as it claims, seriously interferes with its operations, and unlawfully encroaches upon its franchises and vested rights. The water company has a valuable plant at Knoxville, which it has erected and operated under contracts and ordinances made by the city of Knoxville, and it has valuable franchises in the furnishing of water to the city and people. The relative rights of the city and water company, and their obligations one to the other appear to have been drawn into sharp controversy, when the city, on the 30th of March, 1901, passed and approved the ordinance in controversy in this suit, specifying a maximum rate to be charged to consumers by any firm or corporation in the city of Knoxville, and providing a high penalty for a violation of its terms and provisions, as set forth in its 3d section, to wit:

"Sec. 3. Be it further ordained, that it shall be unlawful for any person, company, firm, or corporation or their officers, agents, servants, or employees, supplying water to the inhabitants of the city of Knoxville to charge, demand, or collect for water so supplied, more than the rates hereinbefore set forth in § 1 of this ordinance; and it shall also be unlawful for any such person, company, firm, or corporation or their officers, agents, servants, or employees to cut off or otherwise interfere with the supply, or refuse to furnish a supply of water, to any consumer for failure to pay for same, provided such consumer tenders in lawful money, the charge for such water at the rates aforesaid, and any violation of the provisions of this section of this ordinance, shall be a misdemeanor, and upon a conviction thereof before the recorder, the offender shall be punished by a fine of not less than \$10.00 nor more than \$50.00 for each offense."

The defendant company continued to charge the rates provided in a contract and previous ordinance of October 30, 1899, which (with the exception of some rates in the Lonsdale-Beaumont ordinance) were slightly in excess of the rates and charges provided in said ordinance of March 30, 1901, and thereupon this suit was instituted, and the defendant was charged with unlawfully charging, demanding and collecting of W. K. McClure, for water furnished and to

be furnished him in the city of Knoxville, more than the rates fixed therefor by the ordinance of March 30, 1901. McClure was the agent for J. S. Gratz, who then lived in the city of Chicago, but was the owner of three houses and lots in the city of Knoxville, and outside of the tenth ward. In 1896 the defendant company made a contract with Gratz to supply water to the premises owned by him, which contract is as follows:

Knoxville Water Company.
Service No. 2,850.

Knoxville, Tennessee, Sept. 17, 1896.

The undersigned hereby applies to the Knoxville Water Company for a supply of water at premises No. 706 High street, owned by J. S. Gratz, occupied by tenants, to be used for domestic purposes only; and I hereby agree to use and pay for the same in accordance with the rates, rules, and regulations of the Knoxville Water Company as now or hereafter in force, and which are made a part of this contract; and I further agree that said company may enter upon any land owned by me, and in which I may have such right, and place therein, upon the terms provided therefor, all the pipes that may be used for furnishing such supply, and may cause the same to be inspected and repaired at any future time as occasion may require.

This contract was signed by J. S. Gratz, by his agent, W. K. McClure. The water in controversy was furnished to tenants living in the property owned by Gratz, for whom McClure was agent, and who, as such agent, represented the owner, Gratz, in renting the property; and the bills were rendered to W. K. McClure as agent, and paid by him in that capacity, but actually paid out of funds belonging to the owner, J. S. Gratz; and the bills so rendered for said water were in accordance with the rates prescribed by said contract and ordinance of October 20, 1899. The difference between the rates charged by defendant and paid by Gratz, through McClure, for the three premises to which the water in controversy was furnished, and what would have been paid under the ordinance of March 30, 1901, was \$1.15; that is, 50 cents, 42 cents, and 23 cents, respectively.

The first question presented is as to the validity of the ordinance of March 30, 1901, because of the manner of its passage by the city council. The charter of the city of Knoxville provides that no ordinance shall become a law without first having been read and passed at three several meetings; that is, at three several regular meetings of the board, or at three several regular meetings or valid "call" or "special" meetings, which the mayor, by said charter, is authorized to call. The regular meetings of the board of mayor and aldermen of the city of Knoxville are on the first and third Friday nights of each month. The ordinance of March 30, 1901, was passed on its first reading at a special meeting on March 9, 1901, on its second reading at a regular meeting on March 15, 1901, and on its third and final reading at a special meeting on March 30, 1901. The

mayor and eleven aldermen—that is, one alderman for each ward—constitute the board of mayor and aldermen of the city of Knoxville. At the special meeting of March 30, 1901, Alderman Cleage, representing the sixth ward, and Alderman Trigg, representing the fifth ward, were not present, and were not notified, and no effort was made to notify them, nor did they have any notice or knowledge of said meeting. Alderman Trigg had removed from the city, and notice to him, it is conceded, was not necessary. Alderman Cleage was not present at the meeting of March 30, 1901, was not notified of that meeting, and had no knowledge thereof. When Alderman Cleage was elected an alderman for the sixth ward of the city of Knoxville, he was then, as he was in March, 1901, residing with his mother on Broad street, in the Sixth ward of the city of Knoxville, but he was in the employ of the Southern Railway, with headquarters principally at Asheville. He was active in the discharge of his duties as an alderman, attended nearly all of the regular meetings, and such special meeting as he had notice of, and was usually informed by telegram of special meetings; and had attended as many as three special meetings in one week, coming more than 100 miles to do so. No effort was made to notify Alderman Cleage of either of these special meetings. On request for a finding of facts, the trial judge found that it was practicable to have given Alderman Cleage notice of these special meetings, and that it was practicable for him to have attended the meeting of March 9, 1901, and that no emergency existed for the passage of the ordinance in question at these special meetings.

The first assignment of error we consider is that the trial judge erred in holding that the mayor was bound to give Alderman Cleage notice of the special meetings of March 9 and March 30, 1901, these being the dates when the ordinance in question was passed on its first and third readings, and for failure to give such notice the ordinance is void. The contention is that said Cleage was out of the city and state, and not within summoning distance, and no personal notice to him of said meetings was practicable, and therefore the action of the council, without notice to him was not thereby invalidated. In support of this assignment authorities are cited. The fact that Alderman Cleage was not notified of the meeting, and that no attempt was made to notify him, fully appears, and is not controverted. The general rule is that every member of a municipal council is entitled to reasonable notice of special meetings, and that no important action can be lawfully done by such meeting unless such notice has been given, or unless the members not notified actually attend, and participate in the business of the meeting. *London & N. W. Land Co. v. Jellico*, 103 Tenn. 321, 52 S. W. 995. It is said that the rule is quite rigidly stated in that case, but that, conceding it to lay down the general doctrine, still there are exceptions to such general rule, and that one of these exceptions excuses notice when it is not prac-

ticable to give it; and for this proposition are cited in the printed brief: 1 Dill. Mun. Corp. 4th ed. § 286; 1 Beach, Pub. Corp. § 271; 15 Am. & Eng. Enc. Law, pp. 1034, 1035. Other authorities are cited as applicable to cases of private corporations and inferior municipal and school boards, which we think we need not consider. As bearing upon the main question, it is suggested that it has never been the custom in Knoxville to give notice to each and every one of the board of special meetings; that Cleage had virtually removed himself from the state, so that service upon him was impracticable; that in the case of *London & N. W. Land Co. v. Jellico*, 103 Tenn. 320, 52 S. W. 995, it appeared that the alderman who was not notified was in the building where the meeting was held, and the inference might be that he was purposely omitted from the notice, as he was hostile to the ordinance that was considered, and the meeting was at the instance of the persons interested in the passage of the ordinance; while in this instance, as afterwards developed, Alderman Cleage was in favor of the ordinance, and would have voted for it, if he had been present at the meeting. We pass over these and minor exceptions, and proceed to consider the merits of the first assignment. In 1 Dill. Mun. Corp. 4th ed. § 286, it is said: "If the meeting [of the council] be a special one, the general rule is, unless modified by the charter or statute, that notice is necessary, and must be personally served, if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote." In § 263 it is said: "A notice, when necessary, must, if practicable, be given to every member who has a right to vote, where the act is one to be done by a body consisting of a definite class or classes, and it must be given by or issued by order of someone who has the authority to convene a corporate meeting. But notice may be altogether dispensed with, or its necessity waived, by the presence and consent of every one of those entitled to it. It must be served personally upon every resident member, or left at his house. If temporarily absent, it may be left with his family, or at his house, or last place of abode. An order to serve all is not sufficient; all, if practicable, must be served. But, if the party entitled to notice has entirely quit the municipality, and has no family or home within its limits, notice is not necessary." In § 264 it is said, among other things: "Such great importance is attached to notice that it can only be waived by universal consent; but if every member of a select body be present at a regular or stated meeting, or at a special meeting, they may, if everyone consents, but not otherwise, transact any business, ordinary or extraordinary, though no notice was given, or an insufficient notice; but the unanimity of consent should plainly appear from their recorded declaration, acts, or conduct. . . . If this [the charter] imperatively requires a special notice, it cannot be waived, even by consent of all." In 1 Beach, Pub. Corp.

§ 265, it is said: "When a meeting is assembled for a special purpose, every member who has a right to vote is entitled to notice unless he has quit the municipality without retaining a home or leaving his family within its limits. . . . It must be personally served upon him, but in case of his temporary absence it may be left with his family or at his last place of abode." Again, § 271: "Every member entitled to be present at a special meeting is entitled to notice of the time and place thereof, which must be served upon him personally, if practicable, or unless some other mode of notice is prescribed by the statute or charter." For all these propositions, authorities are liberally cited. In 15 Am. & Eng. Enc. Law. p. 1035, it is said: "A meeting held at any other time than that fixed for a regular meeting under a resolution of the council or for a special meeting under the call of the mayor, is a legal meeting, if all of its members actually attend, and participate in its proceedings, and it is otherwise regular." In *Lord v. Anoka*, 36 Minn. 176, 30 N. W. 550, it was held that under the charter of the defendant a special meeting of the city council is not valid unless called by the mayor by written notice to each member of the council delivered to him personally, or left at his usual place of abode, or unless all the members—at least all who are not notified—are present at the meeting. And in *Beaver Creek Twp. Board v. Hastings*, 52 Mich. 528, 18 N. W. 250, it is said notice may be dispensed with or waived by the presence of everyone entitled to it. In *Paola & F. River R. Co. v. Anderson County*, 16 Kan. 302, holding that the acts of a board of county commissioners at a special meeting were invalid because all members were not notified, Mr. Justice Brewer said: "The statute providing for sessions of the county board is found in § 13, p. 256. of the General Statutes. That section, after providing for the meeting of the board in regular session, adds: 'And in special session on the call of the chairman at the request of two members of the board, as often as the interests of the county may demand.' This is the only statutory provision on the subject. It does not specify whether the call shall be verbal or in writing, how long prior to the meeting it shall be made, nor require a record to be preserved of it. And the same is true as to the request. But still it requires a 'call'; and a call of a meeting, in the legal sense of the term, is a summons to the parties entitled to meet, directing them to meet. It involves something more than a mere purpose in the mind of the caller, or an expression of that purpose, unheard, unseen, and unknown. It implies a communication of that purpose to the parties to be affected by it. How it shall be communicated is sometimes prescribed by the statute or by by-law. It is sometimes provided that it shall be by publication in the newspaper, sometimes by printed notice served personally or at the residence, and sometimes by mere oral personal service. But in some way or other notice must be given; and, if there be

no regulation as to the manner of notice, it must be personal. . . . This is no new question. It has arisen in respect to the sessions of common councils of cities, boards of directors or trustees of private corporations, the town meetings of New England, the meetings of members of corporations, boards of electors, etc. And there is but one uniform rule running through the authorities. In the case of *King v. Shrewsbury*, Cas. t. Hardw. 151, it was said by the court that, 'when the acts are to be done by a select member, notice must be given of the time of meetings. . . .' It was a saying of Lord Kenyon's that 'special notice must be given to every member who has a right to vote.'" In regard to county boards it said a special session of the board has no power to transact business unless it has been called in the manner provided by law, and notice of the meeting is in all cases essential. 7 Am. & Eng. Enc. Law, 2d ed. p. 979, note 2, citing, among other cases, *Pike County v. Rowland*, 94 Pa. 238, which holds that, if the meeting be special, notice is necessary, and it must be personally served, if practicable, upon every member entitled to be present. In *People ex rel. Loew v. Batchelor*, 22 N. Y. 129, it was held that the election of the clerk of the first district court was void because five absent aldermen had no notice of the convention. Mr. Justice Selden, for the court, said: "It is not only a plain dictate of reason, but a general rule of law, that no power or function intrusted to a body consisting of a number of persons can be legally exercised without notice to all the members composing such body." The case of *State ex rel. Hart v. Kirk*, 46 Conn. 397, is somewhat obscurely reported, but, as we read it, it appears that Wm. Kirk was elected street commissioner of the city of Bridgeport on the 8th of April, 1878. It appears that he had been previously elected to the same office, but the exact date does not appear. He insisted that he was legally elected on the 8th of April, but if that contention was not correct he was rightfully in office as a hold-over from his former election. It appears that at the first election one member of the board was not notified. The court held that a good reason was shown why actual notice was not given. The member absent was not only gone from the state, but his whereabouts appears not to have been known until afterwards. Notice in writing was left at the store of his son, where he was in the habit of visiting every day when in town. The court said no other notice could well have been given, and the law never required impossibilities. But in the same case it appeared that by the charter the mayor was *ex officio* a member of the board, and its chairman, and entitled to preside. He was not notified of the meeting, and it was held that the meeting was illegal, although he had no vote except in case of a tie, and it appeared that in the particular instance he would have had no vote. The report of the case, as furnished us, is not satisfactory, but it clearly appears that the mayor might have been notified, and was not, and the

meeting was adjudged illegal. While in the other case the member could not be found, and hence was not notified, though all was done that could have been done, and it was impossible to do more.

The finding of the trial judge which was asked for by the plaintiff as to Alderman Cleage contains, among other statements, not important in this connection, the following: "At the time of his election as an alderman of the city of Knoxville, and on March 9, 1901, and March 30, 1901, he was in the employ of the Southern Railway Company as law agent, with his headquarters at Asheville, in the state of North Carolina, and transacted his business principally in the states of North Carolina and South Carolina, and outside the limit of the state; his territory including about 500 miles of railroad. His duties require him to go in person over his territory investigating, reporting and adjusting claims for damages against said railroad company. That during the months of February, March, and April, he was more than usually busy in the discharge of his duties, but retained his home in the sixth ward of the city of Knoxville, and was active in the discharge of his duties as an alderman. That he attended nearly all the regular meetings of the council, and nearly all the special meetings of which he had notice. That it was impracticable for him to have been present on March 30, 1901, at the special meeting on that date, but it was not impracticable to have given him notice of that meeting. That it was not impracticable to have given him notice of the meeting of March 9, 1901, but it does not appear that it was impracticable for him to have attended that meeting. That there was no emergency for this ordinance to be considered at special meetings of March 9 and March 30, 1901, and as a public servant and official he had a right to have notice of these meetings; but notice was not given him, and therefore this ordinance of March 30th is invalid." There are various exceptions to the finding of the trial judge, but we think we need notice only one or two of them. In the 10th subdivision of the 3d assignment of errors it is said: "He [the trial judge] erroneously found that it was practicable to have given Cleage notice of the special meetings of March 9 and March 30, 1901, and that it does not appear to have been impracticable for him to have attended the meeting of March 9th. There was no evidence to support this finding. It was contrary to all the evidence on the subject. Cleage was beyond the limits of the city and state. His exact whereabouts were unknown to the officials of the city, and the facts and circumstances, as shown by Cleage, as well as his direct testimony to the fact, all show to the contrary of the court's finding on this question." This assignment that there is no evidence to support the finding of the trial judge requires us to go behind that finding, and look into the record, and see whether there is any evidence on which to base it. In this connection, it may be remarked that the question whether notice was

or was not practicable is one of mixed fact and law. It appears from the testimony in the record that each call for a special meeting on the 9th and 30th of March, 1901, was for a meeting to be held on the night of the same day the call was made; that is, on the night of March 9th and March 30th, respectively. It clearly appears from the evidence of Alderman Cleage that on both of these days he was beyond the limits of the state. He cannot identify particularly the exact place where he was on the 9th, but he was at some point on his territory, all of which was outside the limits of the state. He is very positive and definite that on the 30th of March, 1901, he was in North Carolina, at the extreme end of his territory, about 300 miles from Knoxville. We are of opinion that when a member of the council removes from the state, or is continuously absent from the state, and when he is shown to have been absent from the state and beyond reach on the occasion and at the time of the call, as appears in this case, it is not legally practicable to give him notice of called meetings. As to the necessity and urgency of such called meeting, the mayor must be the judge. In this case it appears that action was desired at the time in order to put the new ordinance in force before the beginning of another quarter, when current bills for water would be payable in advance. As to the sufficiency of this urgency it is not incumbent on us to determine. The charter provision is that the mayor may call special meetings whenever, in his judgment, the good of the city requires it. Tested by these rules, which make the question as to whether or not notice was practicable one of mixed law and fact, we think the evidence is that notice of these special or call meetings was not legally practicable to have been given to Alderman Cleage. Moreover, it appears that, if he had been notified of the call of March 30th as soon as possible after it was made, it would not have been practicable for him to have attended the meeting of that day, as he was about 300 miles from the city of Knoxville. This, however, we consider of no practical importance. The ordinance not being invalid because of the manner of its passage, we proceed to consider the other questions presented in the record.

It is further objected to this ordinance that it is invalid, and inadmissible in evidence, because it was published in a Sunday newspaper. It appears that the ordinance, by authority of the city, was published in the Sunday issue of the Journal and Tribune, a morning daily paper of the city of Knoxville, on March 31, 1901. It further appears that since 1866 Sunday editions of the daily paper have been published in this city, and that these editions are the largest and most important, have the largest circulation, and are the best advertising mediums of any of the daily issues of the papers. By the charter of the city of Knoxville (Acts 1885, Special Sess., chap. 8, § 28) it is provided: "This act is declared to be a public act, and may be read in evidence in all

courts of law and equity, and all ordinances, resolutions, and proceedings of the board of mayor and aldermen may be proved by the seal of the corporation, attested by the recorder, and, when printed and published by the authority of this corporation, the same shall be received in evidence in all courts and places, without further proof, when certified to by the recorder." This is the only requirement as to the publication of ordinances. We have been cited to quite a diversity and collection of authorities bearing more or less upon this feature of the case. It has been held in Tennessee that the acknowledgment of a deed by a married woman with her privy examination is valid, though made on Sunday. *Lucas v. Larkin*, 85 Tenn. 355, 3 S. W. 647. It is said contracts in Tennessee made on Sunday have never been held by our supreme court to be void. It is held by the Federal courts, construing Tennessee statutes, that they are valid. *Swann v. Swann*, 21 Fed. 299, Citing *Amis v. Kyle*, 2 Yerg. 31, 24 Am. Dec. 463. Also, notes to Shannon's Code, § 3029. As applied to newspaper publications which may be regarded as process, they are held void, just as any other judicial proceedings on Sunday are invalid, under the rule, both at common law and by statute above stated, that Sunday is *dies non juridicus*. 17 Enc. Pl. & Pr. p. 102. The leading case cited in support of this text is *Schwed v. Hartwitz*, 23 Colo. 187, 47 Pac. 295. This holds that the publication of a notice of a tax sale is in the nature of service of process, and, if it takes place in a Sunday edition of a newspaper, it is void. The same holding, upon the same ground, is made in the case of *Naucy v. Cargile*, 72 Ga. 290, which is another tax sale case. See note 2 to 24 Am. & Eng. Enc. Law, p. 577. But no other notice or publication made on Sunday, unless specially prohibited by statute, is void. In *Hastings v. Columbus*, 42 Ohio St. 585, it is held that the publication of a preliminary and other ordinances of street improvement, which were required to be made in a newspaper of general circulation, may be made in a paper published only on Sunday. This case is directly in point. "Where there is a stipulation between private parties that notice shall be given by publication for ten days, the publication on Sunday may be counted." *Kingsbury v. Buckner*, 70 Ill. 514, Cited in note 1 to 24 Am. & Eng. Enc. Law, p. 577. "In South Carolina it is held that a notice of escheat is not a 'process,' such as is meant in connection with Sunday as *dies non*, nor, when published in a newspaper on Sunday, is it served on that day. 'The statute forbidding the service of civil process on Sunday does not make such process void.'" *Eason v. Witcofskey*, 29 S. C. 239, 7 S. E. 291, Cited in note to 24 Am. & Eng. Enc. Law, p. 575. "Notice to a consignee, given on Sunday, of the arrival of a cargo, is valid." *Lake v. Hurd*, 38 Conn. 540. "And notice to quit is not invalid because given on Sunday." *Sangster v. Noy*, 16 L. T. N. S. 157; 24 Am. & Eng. Enc. Law, p. 579. "So, too, an enlistment made 61 L. R. A.

on Sunday is valid." *Wolton v. Gavin*, 16 Q. B. 48. The statute laws of the different states are so variant that we can derive but little aid from their holdings. It is further said the validity or invalidity of an act done upon Sunday does not rest upon religious or moral grounds, or upon public policy, but solely upon the question as to whether it violates the provisions of the law, either statutory or common. *Swann v. Swann*, 21 Fed. 299; *Moseley v. Vanhooser*, 6 Lea, 286, 40 Am. Rep. 37. It is the purpose of the publication of an ordinance like that in question to bring it to the attention of the public, and it appears that the publication in a Sunday newspaper is the most effective notice that could be given in the city of Knoxville. If it accomplished the very purpose intended by the requirement,—to publish the act,—and there is neither public policy nor forbidding statute to be contravened by the act of publication, it seems that no ground could be suggested why this publication is not good. We think this is the correct view, notwithstanding the very able and ingenious argument made by counsel, and backed up by many authorities of high respectability, among which may be cited *Ormsby v. Louisville*, 79 Ky. 197; *Dumars v. Denver*, 16 Colo. App. 375, 65 Pac. 580; *Newall v. St. Paul*, 20 Minn. 511, Gil. 459; *Scammon v. Chicago*, 40 Ill. 146; *Schwed v. Hartwitz*, 23 Colo. 187, 47 Pac. 295. Many of these cases could be distinguished, but, after all, there is a conflict of authority, arising largely from a difference in the Sunday laws of the several states. We are content with the conclusion we have reached as being the most practical, and at the same time free from any valid legal objection.

In order to properly appreciate the very serious questions presented on the merits, it is necessary to give a short *résumé* of facts bearing upon the history of the waterworks company, and its connection with and relation to the city of Knoxville. A condensed statement of these facts, as given by counsel, and which we find substantially correct, is as follows: By the charter of the city of Knoxville, as compiled from former acts, and as embodied in the acts of 1885 (Special Sess. chap. 8, § 18, subsec. 7), the board of mayor and aldermen is authorized by ordinance "to provide the city with water by waterworks, within or beyond the boundaries of the city, or provide for supplying the city with water otherwise." The Knoxville Water Company was chartered and organized under act 1877, chap. 104, amendatory of act 1875, chap. 142. Section 2 of that act provides that "such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town, or village, in which it is proposed to operate such waterworks, and such leave shall be certified by the mayor or recorder upon the application, and registered with it, but this act is in no way to interfere with the police or general powers of the corporate authorities of such city, village, or town, and such corporate authorities shall have

power by ordinance to regulate the price of water to be supplied by such company." It is insisted, and, as we think, correctly, that it has been settled that the state, by direct enactment of its legislature, or by authority delegated by the legislature to counties or municipalities, may regulate public utilities, and the rates to be charged for public service by corporations or individuals rendering any service to the public. This doctrine has been applied to elevators, telephones, gas companies, water companies, and other public or quasi public servants. The leading case on this subject is that of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. See also *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 177, and extensive note thereto, reviewing the various cases on the subject; *Railroad Commission Cases*. 116 U. S. 307, 347, 352, 29 L. ed. 636, 650, 651, 6 Sup. Ct. Rep. 334, 388, 1191, 348, 349, 391; *San Diego Water Co. v. San Diego* (Cal.) 62 Am. St. Rep. 261, and extensive note thereto, reviewing many cases on the subject, page 289; *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118; *Rogers Park Water Co. v. Fergus* (Ill.) 69 Am. St. Rep. 315, note [178 Ill. 571, 53 N. E. 363]; *Crumbley v. Watauga Water Co.* 99 Tenn. 420, 41 S. W. 1058; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 29 L. ed. 173, 4 Sup. Ct. Rep. 48; *Watauga Water Co. v. Wolfe*, 99 Tenn. 430, 41 S. W. 1060; *Rushville v. Rushville Natural Gas Co.* (Ind.) 15 L. R. A. 321, and note [132 Ind. 575, 28 N. E. 853]. That such power may be delegated to a municipality, see *San Diego Water Co. v. San Diego* (Cal.) 62 Am. St. Rep. 261, and extensive note; 15 Am. & Eng. Enc. Law, p. 1167.

On the 1st of July, 1882, an agreement was entered into between the city and the water company in regard to the erection by the latter of waterworks, and the supplying for a period of thirty years the city and its inhabitants with water, in which, among other things, it is stipulated by § 7 "said company will supply private consumers with water at a rate not to exceed 5c. per hundred gallons." This contract provides as follows: "(2) The city further obligates itself not to grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes or alleys, or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water, for the full period of thirty years from the 1st of August, A. D. 1883."

A further statement of facts is as follows: On April 18, 1891, an ordinance was enacted by North Knoxville constituting an agreement between it and Wheeler & Parks for the latter to supply said town and its inhabitants with water until June 3, 1913; and by § 9 of that ordinance it was provided that water to be furnished private consumers shall be charged for at "not exceeding the rates contained in the following schedule," and then sets out said schedule of rates. That contract was subsequently assigned to the Knoxville Water Company by

Wheeler & Parks, and the town of North Knoxville became consolidated with and incorporated into the city of Knoxville. On September 17, 1892, an ordinance was enacted by the city of West Knoxville constituting an agreement between it and the Lonsdale-Beaumont Water Company for the supplying of water to said town and its inhabitants by said company for a period of twenty years, in which it was provided, among other things, by § 9, that said company shall not charge consumers, during the continuance of the franchise granted by said ordinance "exceeding the following maximum annual rates," etc., and then sets out the schedule of such rates. Said contract was subsequently assigned by said Lonsdale-Beaumont Water Company to the Knoxville Water Company, and the town of West Knoxville became consolidated with and incorporated into the city of Knoxville. On October 20, 1899, an ordinance was passed by the city of Knoxville, then embracing the territory of North and West Knoxville, authorizing said Knoxville Water Company to take the assignment of said contract of the Lonsdale-Beaumont Water Company to supply water to the inhabitants of the territory of West Knoxville upon certain conditions, among which was that they should furnish to the inhabitants of such territory water at a maximum "rate not exceeding that fixed in the ordinance and contract of September 17, 1892," and further that they should supply to the inhabitants of the balance of the city of Knoxville water, "at a maximum rate, not exceeding that fixed by the contract of July 1, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company." On May 17, 1895, the city passed an ordinance regulating the supplying of water by meter, and fixed the rates and charges therefor to private consumers, and these rates were incorporated into the schedule of rates of the defendant in force on October 20, 1899. On July 27, 1900, the city passed another ordinance regulating and fixing the rates generally to be charged to consumers of water at a lower rate than that fixed by the schedule in force on October 20, 1899, and repealed all former ordinances in conflict therewith. Again, on March 30, 1901, the city reenacted this ordinance of July 27, 1900, with slight amendments, fixing the same schedule of water rates as those set out in the ordinance of July 27, 1900. The present suit arises under the last ordinance. The question of whether the rates fixed by the ordinance in question are reasonable has been pretermitted in the proof, and not considered in this case.

It is insisted that it has been held that, when the power to regulate rates for public service of a public corporation is delegated to a city, the city becomes invested with such power as a public trust, and cannot divest itself thereof by contract. *Huron Waterworks Co. v. Huron*, 8 S. D. 169, 30 L. R. A. 848, 65 N. W. 816; *Ogden City v. Bear Lake & River Waterworks & Irrig. Co.* 16

Utah, 440, 41 L. R. A. 305, 52 Pac. 697. Again, the state (and, of course, a city) cannot contract away its police power, or limit its exercise by contract, and this is conceded. *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 624, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *New York City v. Miln*, 11 Pet. 139, 9 L. ed. 662. But it is denied that such a case is presented in the one at bar.

The matter of controversy in this case will first be treated from the standpoint of a contract, outside of the operation of the police powers of the municipality. Treating the regulation of rates as a matter of contract, it has been held that a "charter specification of rates which it shall be lawful for a turnpike company to charge, subject to a certain increase or decrease, if necessary to keep the company's dividends within certain limits, does not constitute an irrevocable contract between the state and the corporation, but is merely an indication that such rates are supposed to be reasonable, without precluding the subsequent exercise of legislative power to change the rates." *Winchester & L. Turnp. Road Co. v. Croston*, 98 Ky. 739, 33 L. R. A. 177, 34 S. W. 518. See notes to this case for a general discussion. In the case of *Danville v. Danville Water Co.* 178 Ill. 299, 53 N. E. 118, 69 Am. St. Rep. 304, the court held: "The legislature has the power to regulate the rates at which water shall be supplied to the public by a water company, especially when such right is reserved by the statute under which such company was incorporated. Municipal corporations can exercise only such powers as are conferred upon them by their charters. All persons dealing with them must see that they have power to perform the proposed act. A statute empowering a city to authorize a private corporation to construct waterworks and to contract for a supply of water for a period not to exceed thirty years, gives no power to the city to bind itself by fixing a rate which it must pay for such supply for such entire period, and an ordinance fixing the rate for the entire thirty years is void. Although a city has been empowered by statute to authorize a private corporation to construct waterworks and to contract for a supply of water for a period not to exceed thirty years, a subsequent statute empowering any city in which a private corporation has been or may be authorized to supply water for public use to fix reasonable water rates is constitutional; and an ordinance passed under the later statute reducing existing water rates, and fixing them at a reasonable price, is valid, although the city enacting it has, under the earlier statute, at- 61 L. R. A.

tempted by ordinance to fix water rates at a certain figure for the entire unexpired period of thirty years." To the same effect, see the decision in the case of *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363, cited in note to the foregoing case at page 315, 69 Am. St. Rep. It is there held that an ordinance fixing the rates for the full period is merely a declaration that such rates are reasonable at the time when the ordinance was enacted, and that the city is not bound to recognize such rates as reasonable for the full period, and has power to fix the water rates so as to make them reasonable at any time, or from time to time, as changed conditions may affect the reasonableness of the water rates formerly established, and that mandamus will lie at the suit of a citizen to compel the water company to furnish him with water at the changed rates, provided they are reasonable. In the case of *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633, the power to regulate water rates is recognized and enforced, with the like qualification that they must be reasonable. The case of *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363, and of *Danville v. Danville Water Co.*, and also the additional case of *Freeport Water Co. v. Freeport*, 186 Ill. 179, 57 N. E. 862, all from the supreme court of Illinois, were taken by writ of error to the Supreme Court of the United States, and on March 25, 1901, were affirmed. 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505; 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493. In these cases the Supreme Court of the United States held that municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract, and to regulate rates, but such power must be conferred in explicit terms, and that a contract concerning governmental functions, as one which affects the right of a city to regulate rates of a water company, must be strictly construed, and such functions cannot be held to have been contracted away by doubtful or ambiguous provisions; and, further, that an ordinance granting an exclusive franchise to the water company, with the right to use the streets, requiring the municipality to pay certain rentals, and binding the company, among other things, to furnish an adequate supply of water, does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise, by virtue of the provision that the grantee "shall charge the following annual rates to consumers during the existence of this franchise," as this is merely a regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise. It will be seen from an inspection of these cases that the Supreme Court was divided in opinion, the minority relying upon the cases hereafter cited by the defendant as controlling. This difference, as we understand it, extends, not only to the question of the power of the

state to authorize an irrevocable contract, but, likewise, whether the regulation of rates is within the police power.

In a very able and exhaustive argument, counsel for the water company insists that the ordinance of March 30, 1901, impairs the obligations of prior contracts made by the city with the defendant company, and is therefore void, and in support of this contention are cited: U. S. Const. art. 1, § 10; Tenn. Const. art. 1, § 20; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 570, 44 L. ed. 892, 20 Sup. Ct. Rep. 736, 88 Fed. 720, 103 Fed. 711; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Old Colony Trust Co. v. Atlanta*, 83 Fed. 42; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140; *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723; *State ex rel. St. Louis v. Laclede Gaslight Co.* 102 Mo. 472, 14 S. W. 974, 15 S. W. 383. We do not deem it necessary to comment upon all these authorities, but will notice some of those most relied upon, and most nearly in point. The case of *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 570, 44 L. ed. 892, 20 Sup. Ct. Rep. 736, is much relied on. Attention is called to the fact that Justice McKenna, who delivered the opinion in the *Los Angeles Case*, delivered the opinions in the *Illinois cases*, *supra*, and he rested it upon the ground that express authority had been granted to Los Angeles to enter into a contract limiting its power to regulate water rates. It is said on page 570, 177 U. S., page 892, 44 L. ed., and page 740, 20 Sup. Ct. Rep., that it is not denied that the city has the power to regulate rates. The contract of July 22, 1868, with the water company provided that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said party of the second part, or their assignees, provided that they shall not so reduce water rates, or so fix the price thereof, as to be less than those charged by the party of the second part for water. On April 2, 1870, the legislature for California passed an act, held in that case to be valid, ratifying and confirming said contract. Pages 561, 571, 177 U. S., pages 888, 892, 44 L. ed., and pages 737, 741, 20 Sup. Ct. Rep. It is therefore held that, since the city had entered into this contract by such legislative authority, and that the contract did not grant the power to regulate rates, which power was already existent, but was a contract to limit that right, the city had no power by ordi-

nance to violate it. It will be further observed that this case arose under acts and contracts made before the adoption of the Constitution of California of 1879, providing for the regulating of water rates. Page 567, 177 U. S., page 890, 44 L. ed., and page 739, 20 Sup. Ct. Rep. In the case of *Old Colony Trust Co. v. Atlanta*, 83 Fed. 39, it is held that the city could not regulate street car fares, because no such power had ever been delegated to the city. The city asserted such power under the provisions of its own charter, and also those of the charters of the street car companies; but the court, upon construing those charters, held that they granted no such power. The charter of the street car company granted certain franchises and privileges to the company, "provided that the rates and fares on said railroad shall be subject to the approval of the mayor and city council of the city of Atlanta." In the city ordinance granting to this company the use of the streets, etc., it was provided that "the charges for passage on said road shall not exceed 20 cents for any through line, and 10 cents for half lines or short distances." The court declined to express an opinion as to whether this constituted a contract between the city and the company, but said that, if the proviso in the railroad company's charter granted any power to regulate, it was exhausted upon its first exercise. But the court did not determine what effect would be given to a direct grant of power to the city to regulate fares, instead of this mere reservation out of the franchises granted to the railroad company; and further held that the power to approve, such as was reserved in this charter, is not equivalent to the power to regulate and fix rates. See page 42. The case of *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339, simply holds that the Constitution of California of 1879, requiring annual regulation of water rates, would not avoid a valid contract previously entered into by a city with a water company, authorizing the water company to fix its own rates. The case has no application to the questions involved in the present case. The case of *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, is a case somewhat peculiar in its facts. By an act of the territory of Washington incorporating the city of Walla Walla it was enacted that it should have power to provide a supply of water, and to grant the use of the streets for a term not exceeding twenty-five years, "provided none of the rights and privileges herein granted shall be exclusive nor prevent the council from granting the same rights to others." The city, in pursuance of this act, passed an ordinance in 1887 granting to the company the right to lay, place, and maintain all necessary water mains, pipes, connections, and fittings in all the highways streets, and alleys of the city, for the purpose of furnishing water. In 1893 it passed another ordinance to provide a system of waterworks of its own, and one of the questions presented was its power to pass the

latter ordinance. The court said: "The case upon the merits depends largely upon the power of the city under its charter. The ordinance authorizing the contract which purports to have been passed in pursuance of this charter declared that, until such contract be avoided by a court of competent jurisdiction, the city should not erect, maintain, or become interested in any waterworks, except the ones established by the company, while the ordinance of June 20, 1893, provided for the immediate construction of a system of waterworks by the city, for the purpose of supplying the city and its inhabitants with water. Upon the face of the two ordinances there was a plain conflict. The latter clearly impaired the obligation of the former." The city contended that the original ordinance was beyond its power to make, first, because it created a monopoly not authorized expressly or impliedly by legislative grant, and was void as being in contravention of public policy; second, that it was an attempt to contract away a part of the governmental powers of the city council, and for other reasons which we need not notice. The court held that as the original contract was limited to twenty-five years, and was not an exclusive grant, it was not beyond the power of the city council; that, if it had been exclusive, it would have been a monopoly, and objectionable, unless authorized by express sanction of the legislature. The court further held that the contract would be void if it interfered with the police power of the city, and this police power extended to the peace, good order, health, and morals of the inhabitants, and if deleterious to them it might be controlled by the city, or the contract entirely abrogated under the police authority of the city; but the court held that the matter of the contract did not fall within the police power, but the contractual power, of the city. In the case of *State ex rel. St. Louis v. Laodel Gaslight Co.* 102 Mo. 472, 483, 14 S. W. 974, 15 S. W. 383, the charter of the company granted by the state authorized the company to fix the price of gas manufactured by it, and it was held that such price could not be diminished by subsequent legislative action, state or municipal. It was further held that the regulation of the price of gas by the state or by municipalities created by it is not the exercise of a police power which cannot be abrogated by contract. It may be said that, under the grant from the legislature in the Missouri case, it was intended to remove the company from the exercise of the police power of the state over it, in so far as its rates of charge were concerned. While not assenting to the views expressed in that case, we think this case clearly distinguishable from the present one under consideration, in that the legislature in the Missouri case intended to put the question of rates beyond future control of the state or municipality, and beyond its police regulation, while in the present case, under § 2 of the charter, it was clearly intended to keep the question of rates under 61 L. R. A.

control, and to treat them as subject to police supervision.

Under the cases we have cited, and others that might be collated, it is, we think, apparent that the authorities are not agreed as to whether the state can, by legislative grant, empower a municipality to enter into an irrevocable and perpetual contract with a water company or other private or quasi public corporation for a system of waterworks and a supply of water, and whether such company can, by legislative grant, be removed from the supervision of the police power of the municipality; yet we think there is no question but that, in order to do so, the legislative grant must be unquestionable, and admit of no other construction, but must be plain, positive, and unequivocal. If the municipality has no such power under legislative grant, it can make no such contract; nor can it waive its police powers, or refuse to exercise them, when the good of the citizens of the municipality demands. What matters fall within the scope of the police powers of the state or of a municipality has never been definitely determined. A large number of subjects has been embraced, such as the public health, the public morals, the public safety, and the general and comprehensive clause of the public welfare; and, after the enumeration of all the subjects under these and other general heads, the text-books announce that there are also other instances. Different jurisdictions lay down different rules and limits. In *Thetlan v. Porter*, 14 Lea, 626, 52 Am. Rep. 173, the safety and tranquility of the community, and the orderly existence of the government, are included in the enumeration. As to what may be done under this power, see, generally, Dill. Mun. Corp. p. 95, § 71, note; Id. pp. 141, 142, 244, 314, 752; Id. p. 920, note; 8 Am. & Eng. Enc. Law, pp. 620, 624; 18 Am. & Eng. Enc. Law, p. 752; *Harbison v. Knoxville Iron Co.* 103 Tenn. 423, 56 L. R. A. 316, 53 S. W. 955; *Leeper v. State*, 103 Tenn. 503, 48 L. R. A. 167, 53 S. W. 962; *Dayton Coal & I. Co. v. Barton*, 103 Tenn. 604, 53 S. W. 970; *State v. Martin*, 2 Tenn. Cas. 555; *Louisville & N. R. Co. v. Burke*, 6 Coldw. 50. It was said in *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079: "No legislature can bargain away the public health or the public morals." While the rate to be paid for water is not so palpably a regulation within the police supervision of a city as is the purity and supply of the water furnished, yet the rate of charge is a matter which affects the health, welfare, and comfort of the city, since, if rates are unreasonably high, they will prove a restriction upon the use of water which may seriously impair the health and interfere with the comfort and welfare of the people,—especially the poorer classes, who, by reason of high prices, may be cut off from the benefit of the water partially or altogether. The case of *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736, is relied on to show that a city may waive or renounce its right to regulate wa-

ter rates; but, as we have before stated, it appears that express authority was given to that city in its charter to enter into a contract limiting its power to regulate rates; the language of the charter being, in substance, that the city may regulate the rates, "provided they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged by the parties of the second part [the water company] for water." But the difference in that case and the present is that by the charter of Los Angeles the city had the express power to make an irrevocable contract, while in this case the city of Knoxville is not by its charter granted such a right, but the proper construction of the charter is, we think, that the city shall have a continuing right to regulate the charges for water, limited only by a condition that such rates shall not be unreasonable and oppressive. As before stated, this question of reasonableness or unreasonableness of rates is not considered in the present case, but seems to have been waived by consent.

It is said that it is unreasonable to give to the city of Knoxville the right to regulate the water rates of the company, when it is itself the principal party to be affected by such rates; and in this connection the language of Mr. Justice Jackson in *Cleveland Gaslight & Coke Co. v. Cleveland*, 71 Fed. 612, 614, is cited, as follows: "It would be a fearful proposition—monstrously absurd and outrageous—if the legislature were to undertake to confer upon a citizen of Cleveland the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The city of Cleveland has undertaken to do that thing. . . . The thing cannot be done, and ought not to be done." But the fallacy, as we think, in this argument, lies in the fact that the question of the reasonableness or unreasonableness of the rates is always open to judicial investigation; and while it may safely be said that the legislature cannot constitutionally delegate the power to fix prices at which water shall be sold in a city to the authorities of the city, which is itself a consumer, either in its municipal capacity or through its inhabitants, without liability to a judicial investigation of the reasonableness of the rates fixed by such authorities, still, if no such provision is made in an ordinance, the law will imply one, and preserve to the company its right to litigate the question upon that ground. We do not think it necessary that the provision be incorporated in the contract or in the ordinance, but it will be implied when not expressly provided for.

It is said, in addition, that the city has an option to purchase the plant after 1898, and the argument is made that the city authorities, by oppressive legislation and ordinances, may make the plant unproductive and

less valuable, in order to secure it at less than it is worth; but in answer to this we think we can safely say the defendants may protect themselves against such action and results by a recourse to the courts, and protection against ordinances which are intended to, or do, have such results. No such case is before us now, as the question of the income and profits of the water company has not been opened up or considered; the naked question here being the power to regulate the rates as the city, in its judgment, may deem right and just.

Recurring again to the provision in the 2d section of the charter (Acts 1877, chap. 104), we think that its proper construction is that nothing in it, and no power granted by it to the corporation to contract for and provide water, shall in any way interfere with the police or general powers of the city; and it expressly provides that such corporate authorities shall have power by ordinance to regulate the price of water to be supplied by such company. It is to be noted that defendant's counsel insist that the proper construction of § 2 of the charter of the city is that, while the city originally had the power to regulate the price of water to be supplied by the company, it is not a continuing right, but that, having once exercised it, its power was exhausted, and, having once made a contract for a certain schedule of rates, it is bound by such contract. The contention is forcibly put as follows: "The city was the master of the situation. If it chose to refrain from making a contract, it might exercise the power of regulation, limited only by what would be unreasonable and oppressive. But if it should exercise the power vested in it, and specially conferred upon defendant company, and enter into a contract with said company for the use of water, and agree upon the price for the use of such water, then it became bound by that provision of the Constitution of the United States, which is written into every contract, that it is sacrosanct from alteration, change, or impairment, except with the consent of the other party." And it is said: "If such were not the case, what city could persuade parties to invest their capital in improvements, which, to be profitable, must either be permanent, or continue for such a length of time as to enable the investor to receive some return upon the amount invested by him? A different construction would be disastrous to the interests of the city." In *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 498, it is said: "This power of regulation is a power of government, continuing in its nature; and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514, 561, 7 L. ed. 939, 955, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.'"

In that case the term used was, "at such rates as may be fixed by ordinance." It was said: "The words 'fixed by ordinance' may be construed to mean by ordinance once for all, to endure during the whole period of thirty years, or by ordinance from time to time, as might be deemed necessary. Of the two constructions, that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time." The language of the city charter in the present case is not that the corporate authorities shall have power by ordinance to fix, but to regulate, the price of water to be supplied by such company, and in the same connection the full police and general powers of the corporation are reserved to it. We are of opinion that the right to regulate rates was not exhausted by an agreement at any particular time upon a schedule of prices, but it is a continuing right, under the terms of the

charter, but not to be exercised arbitrarily and unreasonably; and when rates are so reduced as to become oppressive upon the company, and so as not to yield a fair income on the investment, the courts can interfere, upon a proper showing, and restrain such action. As has been very tersely said, a reasonable rate the law assures, even against governmental regulation. *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 498. The rates adopted by the ordinance are not shown by the proof to be unreasonable, and the ordinance is not shown to be oppressive, and its violation subjects the defendant to the penalties imposed.

The judgment of the court below is reversed, and judgment will be entered in this court as herein indicated.

Affirmed by Supreme Court of United States March 23, 1903.

KENTUCKY COURT OF APPEALS.

E. P. TAYLOR, Admr., etc., of A. J. Moreland, Deceased, *et al.*, App'ts.,
v.

CITIZENS' SAVINGS BANK.

(.....Ky.....)

1. A sufficient noting of protest of a bill for nonpayment is made by an indorsement thereon of the words "Protested for nonpayment," together with the date and the official signature of the notary.
2. Failure to preserve the slip upon which the noting of protest of a bill was entered will not discharge the person sought to be held liable thereon, if the noting

was actually made, the instrument of protest executed, and notice duly given to him.

3. Notice of protest of a bill of exchange, to a drawer who has executed an assignment for benefit of creditors, is sufficient to bind his estate in the hands of the assignee.
4. A bill of exchange reading, "One hundred and eighty days, pay to the order of," is payable one hundred and eighty days after date.
5. Objections to the report of a commissioner appointed to purge the usury from bills of exchange cannot be taken for the first time on appeal.

(January 21, 1903.)

NOTE.—To whom should notice of protest or nonpayment be given after appointment of receiver, assignee, or other representative of insolvent?

- I. Introduction, 900.
- II. Absence of notice, either to insolvent, or to his representative, 900.
- III. Notice to assignee, or other representative of insolvent, 900.
- IV. Notice to insolvent maker, indorser, or accommodation payee, 901.

I. Introduction.

The language of most of the few cases bearing on the subject is cautious and somewhat contradictory, but the weight of authority seems to be that insolvency or bankruptcy does not excuse notice, but that, if notice is simply given, either to the maker, or indorser, or accommodation payee, of a bill of exchange or promissory note after the appointment of the assignee or other representative, or to the assignee or other representative, it is sufficient to bind his estate.

- II. Absence of notice, either to insolvent, or to his representative.

Where a bankrupt entitled to notice of dishonor of a bill of exchange absconds, but his 61 L. R. A.

house continues open, and an agent of the assignee, chosen under the commission, is there, notice is essential; and neglect to give it, either to the drawer, or to his assignee, bars the holder's claim against the bankrupt's estate. *Rohde v. Proctor*, 4 Barn. & C. 517, 6 Dowl. & R. 610.

In *Ex parte Johnson*, 3 Deacon & C. 433, where a bankrupt, and, in his absence, members of his family, or a messenger of the assignee, were in possession of the bankrupt's house, it was held that notice should at least have been left at the house. The court seems somewhat to favor the doctrine that the assignee was preferably the one to be ultimately reached by notice. But the question as to how far it was necessary to seek him out is expressly left untouched.

- III. Notice to assignee, or other representative of insolvent.

Notice of nonpayment of a promissory note, served on a general agent employed to liquidate the affairs of the indorser, is good service on the indorser. *Fassin v. Hubbard*, 55 N. Y. 465.

Due notice of protest of a dishonored bill, if given to the assignee of the accommodation payee and indorser under a voluntary conveyance for the payment of the assignor's debts, is sufficient to bind such accommodation payee

A PPEAL by defendants from a judgment of the Circuit Court for Daviess County in plaintiff's favor in an action brought to enforce payment of certain bills of exchange. *Affirmed.*

The facts are stated in the opinion.

Messrs. Walker & Slack, for appellants:

A failure to draw the protest *in extenso* on the day of the maturity of the bill, or to make, in proper form, a note or minute of its dishonor on the very day it occurs, from which the extended or formal protest may be written in the future, will release an accommodation drawer or indorser thereon.

Walden v. Citizens' Sav. Bank, 19 Ky. L. Rep. 1393, 43 S. W. 488; 2 Dan. Neg. Inst. 4th ed. § 939; Byles, Bills, p. 12, note 5, (250) 396; 2 Am. & Eng. Enc. Law, p. 406; *Read v. Bank of Kentucky*, 1 T. B. Mon. 93,

15 Am. Dec. 86; *Bailey v. Dozier*, 6 How. 23, 12 L. ed. 328; *Dennistown v. Stewart*, 17 How. 606, 15 L. ed. 228; *Seebree Deposit Bank v. Moreland*, 96 Ky. 157, 29 L. R. A. 305, 28 S. W. 153.

The accommodation drawer and indorser were released on each bill which has written on it only, "Protested for nonpayment," because this is not a sufficient or valid initial protest or noting.

2 Dan. Neg. Inst. 4th ed. § 939.

A notice to the assignee was indispensable to fasten liability.

3 Randolph, Com. Paper, § 1243; *American Nat. Bank v. Junk Bros. Lumber & Mfg. Co.* 94 Tenn. 624, 28 L. R. A. 492, 30 S. W. 755.

Evidence of the habits and customs of a notary is relevant to show that a particular act was done by him in accordance with such

and indorser, although the whole of his estate is not assigned, and he is not, in fact, insolvent. *Callahan v. Bank of Kentucky*, 82 Ky. 231.

Notice of dishonor is sufficient when sent to the place of business of an absconded indorser of a promissory note, whose affairs are there actually in process of settlement by an assignee, the indorser's sign remaining over the door, it being the place where he expects notices and letters to be sent to him, and he having arranged to have such letters and notices as his counsel deems important, forwarded to him, the indorser having no other place of business. This was so held, although the holder of the note knew of the insolvency, and although the indorser did not receive notice of dishonor in consequence of his counsel telling the assignee not to forward notices of protest. *Bank of America v. Shaw*, 142 Mass. 290, 7 N. E. 779.

Another case against the same defendants as in *Bank of America v. Shaw*, arising upon almost identical facts, is *Importers & T. Nat. Bank v. Shaw*, 144 Mass. 421, 11 N. E. 666, in which the decision was to the same effect as in the former case.

Notice of nonpayment of a promissory note, addressed to the indorsers at their former place of business, where their affairs are being settled up by a trustee to whom they have made an assignment for the benefit of their creditors, and receiver by the trustee, is sufficient. *Casco Nat. Bank v. Shaw*, 79 Me. 376, 10 Atl. 67.

Whenever a general assignment is made by the indorser of a negotiable instrument, the assignee so far stands in the shoes of his assignor that notice to such assignee of the nonpayment of the indorsed paper will bind such indorser, whether such notice is directed in the name of the indorser or of the assignee. *American Nat. Bank v. Junk Bros. Lumber & Mfg. Co.* 94 Tenn. 624, 28 L. R. A. 492, 30 S. W. 755.

The court, in the above case, says that the question under discussion has come up only three times in American courts, citing *Callahan v. Bank of Kentucky*, 82 Ky. 231; *House v. Vinton Nat. Bank*, 43 Ohio St. 346, 54 Am. Rep. 813, 1 N. E. 129, and *Casco Nat. Bank v. Shaw*, 79 Me. 376, 10 Atl. 67; and that the question, therefore, being undetermined in Tennessee, the rule would be laid down that whenever a general assignment was made, the assignee in such assignment so far stands in the shoes of the assignor that notice to the assignee of the nonpayment of indorsed paper will bind the indorser.

A demand and notice upon a Federal examiner in possession of an insolvent national

bank may be sufficient to bind the bank as an indorser, when he is, by operation of law, in charge of its books and papers, so that there is no other person upon whom to make the demand at the place appointed in the note. *Autten v. Manistee Nat. Bank*, 67 Ark. 243, 47 L. R. A. 329, 54 S. W. 337.

But in *House v. Vinton Nat. Bank*, 43 Ohio St. 346, 54 Am. Rep. 813, 1 N. E. 129, it was held that the liability fixed by demand and payment is a personal liability, based on the contract of indorsement, and can attach only to the indorser; and, therefore, after an assignment, notice of protest must be duly made to the indorser, and not to his assignee. In this case there is a dissenting opinion; and the textbook writers are generally opposed to the doctrine of the case while it is in direct conflict with the other decisions above stated.

IV. Notice to insolvent maker, indorser, or accommodation payee.

Notice of dishonor to the drawer of a bill of exchange, after being adjudged a bankrupt, none being given to the trustee of his property then appointed, is sufficient. *Ex parte Baker*, L. R. 4 Ch. Div. 795, 46 L. J. Bankr. N. S. 60, 36 L. T. N. S. 339, 25 Week. Rep. 454.

Notice of dishonor of a promissory note to the indorser, and not to the assignee, where the holder resides in another state, and has no knowledge of the assignment, is sufficient to bind the indorser. *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165.

Notice to a bankrupt was held good in *Ex parte Moline*, 19 Ves. Jr. 216, when it appeared that there was no assignee, as "the bankrupt represents his estate until assignees are chosen."

Waiver of protest by a bankrupt was held allowable in *Ex parte Tremont Nat. Bank*, 2 Law. Dec. 409, Fed. Cas. No. 14,169, it appearing that at the time an assignee had not been appointed.

The result of the adjudications thus far made on the subject is not definite enough to justify a positive statement as to what will constitute sufficient notice in case of insolvency. But the most of the authorities have upheld the notice actually given in the particular instances, whether given to the insolvent, or to his representative. It may be, therefore, contended with some justification that either is sufficient. But those who have the duty of giving notice in such cases will, of course, do well, out of abundant caution, to give notice to both if possible.

H. C. S.

habits and customs; and the presumption that it was done in a way different from his usual course of business is illogical, and never allowable.

Lawson, Usages & Customs, p. 81; *Miller v. Hackley*, 5 Johns. 375, 4 Am. Dec. 372; *Union Bank v. Stone*, 50 Me. 595, 79 Am. Dec. 635; *Shove v. Wiley*, 18 Pick. 561; *Smith v. Montgomery*, 5 T. B. Mon. 502; 7 Am. & Eng. Enc. Law, p. 63.

Where computation of time is to be made from the act done, the day on which it is done must be included; but, if to be made after or from the day itself, the day must be excluded.

Moore v. Covington City Nat. Bank, 80 Ky. 305; *Chiles v. Smith*, 13 B. Mon. 461; *Handley v. Cunningham*, 12 Bush, 401; *Wood v. Com.* 11 Bush, 220.

On petition for rehearing.

Mr. W. S. Pryor, also for appellants:

Evidence of the habits and customs of a notary is relevant to show that a particular act was done by him in accordance with such habits and customs, and the presumption that it was done in a way different from his usual course of business is illogical, and never allowable.

Lawson, Usages & Customs, p. 81; *Miller v. Hackley*, 5 Johns. 375, 4 Am. Dec. 372; *Union Bank v. Stone*, 50 Me. 595, 79 Am. Dec. 635; *Shove v. Wiley*, 18 Pick. 561; *Smith v. Montgomery*, 5 T. B. Mon. 502; 7 Am. & Eng. Enc. Law, p. 63.

Where the matter is in issue, a presumption that an officer performed his duty is never indulged, but is determinable only by the evidence logically relevant.

McKelvey, Ev. Hornbook Series, 53; *Phelps v. Ratcliffe*, 3 Bush, 336; *Hickman v. Skinner*, 3 T. B. Mon. 210; *Anderson v. Sutton*, 2 Duv. 485; *Bate v. Speed*, 10 Bush, 647; 22 Am. & Eng. Enc. Law, 2d ed. p. 1236.

There is an agreement among the witnesses that on June 1 and 11, 1892, noting the dishonor of a bill had never been practised, or even known, in Owensboro, and that Parish was the first notary in the city to observe it by making a minute across the face of the bill.

An initial protest is "not self-sufficient as a protest, but sufficient in the meantime, if the certificate of protest is regularly extended afterwards."

2 Dan. Neg. Inst. 5th ed. § 939.

The plea in the present case is that the extended and initial protests were made on the day of the maturity of the bill, when, if the extended protest was written out on that day, the initial protest would be invalid, and could not be used as documentary evidence.

The petition averred that the certificate of protest was written out on the day the bill matured, and, therefore, no reply was necessary, unless appellee wished to plead, in avoidance, an initial protest, in which case it would have had to concede that the extended protest was written out on a day subsequent to the maturity of the bill, and pleaded, affirmatively, that an initial pro-

test was made on the very day of its maturity, and the extended protest was antedated so as to be of the same date as the initial protest.

Smith v. Louisville & N. R. Co. 95 Ky. 18, 22 L. R. A. 72, 23 S. W. 652; *Wise v. Covington & C. Street R. Co.* 91 Ky. 537, 16 S. W. 351; *Erment v. Dietz*, 19 Ky. L. Rep. 1639, 44 S. W. 138; *Brown v. Ready*, 14 Ky. L. Rep. 583, 20 S. W. 1036.

The reply could not present an issue as to there having been an initial protest by a denial of a mere negative; but had to plead, affirmatively, the facts, remaining consistent with the petition, in avoidance of this defense.

Crabtree v. May, 1 B. Mon. 289; *Conn v. Corry*, 10 Ky. L. Rep. 588; *Clay City Nat. Bank v. Conlee*, 106 Ky. 788, 51 S. W. 615.

Mr. J. A. Dean, for appellee:

The protest was drawn up so soon as the ordinary course of business would permit, or, at least, in sufficient time to supersede the necessity of noting the bill at the moment.

Read v. Bank of Kentucky, 1 T. B. Mon. 93, 15 Am. Dec. 86.

These bills are all inland or domestic bills, and no protest is required.

Citizens' Sav. Bank v. Hays, 96 Ky. 365, 29 S. W. 20; *Murphy v. Citizens' Sav. Bank*, 22 Ky. L. Rep. 1672, 61 S. W. 25.

Under the statute, inland bills may be protested, but are not required to be protested.

See Dan. Neg. Inst. § 926.

There is ample evidence in the record, outside of the notarial certificates, of the dishonor of the bills and of notice, within reasonable time, to the drawers and indorsers of the dishonor.

Young v. Bennett, 7 Bush, 474.

Paynter, J., delivered the opinion of the court:

The issue herein arises over certain bills of exchange. There is no issue as to the drawing, acceptance, and indorsement of them. In this action it is sought to hold the accommodation drawer and indorser responsible on them. The payment is sought to be avoided by the drawer and indorser of same on the grounds that the law was not observed in noting protest, giving notice of protest, and writing the instruments of protest by the notaries public. Two of the bills over which there is a controversy are for \$5,000 each, one for \$3,685, one for \$3,000, and one for \$3,200. These bills were drawn by J. P. Moreland, accepted by S. D. Walden, and indorsed by J. P. Fuqua. It appears that the bills (unless the one for \$3,685 was not) were protested on the days that they matured. As to that bill it is insisted that it was not protested until the day after its maturity. That defense is interposed in addition to the others heretofore stated. I. N. Parish, notary public, protested the bills for \$5,000 each on the days of their maturity, and indorsed on them, "Protested for nonpayment," and, in addition to that, gave the day of the month and year, to which in-

dorsement he affixed his official signature. W. H. Moore was the notary who protested the bill for \$3,000 and the one for \$3,200. No memorandum noting the protest was left attached to either of the bills by the notary, nor was such indorsement made upon them. Either on the day the bills were protested or on a subsequent day the instruments of protest were written, but the evidence leaves no doubt that the notices of protest were duly mailed to the drawer and indorser of the several bills on the days they were protested.

The first thing which we will consider is whether the noting by Parish was sufficient. The authorities seem to be agreed that the noting or initial protest was unknown to the law as distinguished from the protest, but that it has grown into practice within recent years. It seems to be well established that, if the instruments of protest are not written shortly after the demand and protest, the noting or initial protest is necessary as a basis for the instrument of protest. 2 Dan. Neg. Inst. 4th ed. § 939. This court, in *Read v. Bank of Kentucky*, 1 T. B. Mon. 93, 15 Am. Dec. 86, had under consideration the question as to the necessity of noting. The court said: "The protest was drawn up so soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment." The court seemed to be of the opinion that, if the instrument of protest was written as soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment, then those sought to be held liable were bound. We are of the opinion that the indorsements which Parish made on the bills were sufficient.

The facts as to the bills protested by Parish differs somewhat from those protested by Moore. We will not go into the discussion of the question of the competency of evidence to prove the course of business of notaries in protesting paper; neither is it necessary for us to determine whether the instruments of protest were written on the day the bills matured, or on a subsequent day; hence the necessity is obviated of determining whether the proof is sufficient to impeach the dates of the instruments of protest, they bearing dates that the bills matured. If the noting of protest was made, the instruments of protest could have been prepared thereafter. Moore testified that when he protested the bills he attached to each of them a memorandum showing the protest, but when the instruments of protest were written he destroyed it, as he had no further use for it. Counsel for appellee urges that the preservation of these slips was essential to the validity of the protest *in extenso*, as they form a necessary part of the record in establishing the steps that must be taken in order to fix liability upon the drawer and indorser. The object of noting is to have a record from which the instrument of protest can be written, so a notary will not be required to rely upon his

memory as to the facts. If the noting was made, the destruction of it, whether it was purposely or accidentally done, could not invalidate the instrument of protest which was based upon it. It preserves the right of the notary to prepare that instrument, and, when done, the essential steps have been taken to fix the liability upon the accommodation drawer and indorser. The bill having been protested for nonpayment, and notice having been given to the drawer and indorser, the noting having taken place, and the instrument of protest having been executed, the liability of the drawer and indorser was fixed. The destruction of the paper upon which the noting was made could not relieve them of the liability that had attached by the necessary act of the notary.

After the several bills were drawn, and before their maturity, Moreland made an assignment to E. P. Taylor for the benefit of his creditors. When the bills were protested, notices of protest were not sent to the assignee, but to Moreland. It is insisted that, as the assignee accepted the trust, and qualified as such assignee, notices of protest should have been given to him, instead of to Moreland, in order to bind the trust estate. The exact question here presented has not been before this court, although this court, in *Callahan v. Bank of Kentucky*, 82 Ky. 231, held that notice of the dishonor of a bill to one who is the assignee of the payee was sufficient. But the court said: "We must not be understood as determining whether a notice of the dishonor of negotiable paper sent to the bankrupt or insolvent alone, and not to the assignee, would or would not be sufficient, as that question is not presented in this case." The text-writers upon this question are extremely unsatisfactory. 1 Parsons, Notes & Bills, 500, in speaking of the person to whom notice of protest should be given in the case of a bankrupt, says that perhaps the notice should be given to the assignee, if the holder knows, or might know, by the exercise of due diligence, that the estate is in his hands; but he adds: "But notice might perhaps, even then, be sufficient if given to the bankrupt." Byles, Bills, page 216, says: "If the drawer of the bill become bankrupt, notice must nevertheless be given to him, in all events, before the choice of assignees. If the assignees are appointed, perhaps notice should be given to them." Dan. Neg. Inst. § 1002, says: "If the party be bankrupt, it is best to give notice to him, and to his assignee also. If there be as yet no assignee appointed, notice to him is sufficient, and perhaps it might be sufficient, even if one had been appointed. If given to the assignee alone, it would probably be sufficient." When a party assigns all of his property for the benefit of his creditors, and places it in the hands of a trustee for distribution, all of his creditors are entitled to participate in the distribution of it. This is true whether the debts have matured or not. Moreland's liability on these bills existed at the time of the assignment, and, if

it was preserved, then the holder of them was entitled to participate in the distribution of the proceeds of the assigned estate. He being personally liable to the holder, it was important to it that he receive notice of protest that that liability might be preserved. When that liability was preserved, it seems to us to necessarily follow that the holder of the bills is entitled to participate in the trust estate, because the very purpose of his assignment was to pay his liabilities in full or *pro rata*, as the case may be. We conclude that notice to Moreland was sufficient to preserve his liability, and, if his liability continued, there is no escape from the conclusion that the holder of the bills which evidenced it was entitled to participate in the distribution of the estate.

The bill for \$3,685 reads as follows:

Citizens' Savings Bank,
Owensboro, Ky., Mch. 29, 1892.
\$3,685.00. No. 14,773.

One hundred and eighty days pay to the order of J. A. Fuqua, negotiable and payable at Citizens' Savings Bank, thirty-six hundred and eighty-five dollars, for value received, with interest at ten per centum per annum after maturity, until paid, and charge to account of J. P. Moreland.
To S. V. Walden,
City.

The note was protested upon the idea that the bill was payable one hundred and eighty days after date. It is insisted for the ap-

pellant that it was due within one hundred and eighty days. In our opinion, the words import that the bill was due one hundred and eighty days after date. It is often necessary for a court, by construction, to supply words obviously omitted through oversight, to give an instrument the meaning manifestly intended. In order to construe it as meaning within one hundred and eighty days, we would have to supply the word "within." We know, from the customary way of drawing such instruments, that they are usually payable at the time specified after the date upon which they are drawn. The parties did not mean that the money should be paid on or before one hundred and eighty days, and, if we should hold that it was to have been paid within one hundred and eighty days, we should, in effect, hold that it was to be paid on or before one hundred and eighty days.

The commissioner to whom the case was referred to purge the bills of usury made a report showing that he had done so. No exceptions were filed to the report, and no question made as to the correctness of it, except in the brief in this court. It is too late to raise the question. It was the duty of the appellants, had there been a correction which should have been made in the report of the master commissioner, to have called the lower court's attention to it, so that he could have had an opportunity to make the correction. Besides, we fail to find an error in the report of the master commissioner.

The judgment is affirmed.

TEXAS COURT OF CRIMINAL APPEALS.

Lon LEE, *Appt.*,
v.
STATE of Texas.

(.....Tex. Crim. App.....)

1. Upon a prosecution for rape alleged to have been committed by means of a sham marriage, evidence of marriage of defendant to another woman a few months later may be considered by the jury in passing upon the intention, purpose, and motive of defendant with regard to the ceremony through which he procured the consent of the prosecuting witness to sexual intercourse.
2. That defendant abducted the woman whom he subsequently married is not admissible on a prosecution for rape by means of a sham marriage ceremony.
3. Evidence that witness knew defendant, and saw "them" going to a hotel late at night, does not sufficiently identify the prosecuting witness, so as to make evidence that a woman was seen in the room with defendant admissible upon a prosecution for rape alleged to have been effected by a sham marriage.
4. A common-law marriage is not ef-

fectuated where a man, without any intent of consummating a marriage, procures the consent of a woman to casual and occasional cohabitation by means of a sham marriage, she living at the home of her parents, and not with him, and he never holding her out to the world as his wife.

5. Rape is committed by procuring the woman's consent to the intercourse by means of a sham marriage, under statutes defining rape as carnal knowledge of a woman without her consent, obtained by force, fraud, etc., and providing that the fraud must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband.
6. Upon a prosecution for rape effected through a sham marriage the prosecuting witness cannot be asked as to conversations which she had with third persons who charged her with criminal intimacy with accused.
7. A witness cannot be permitted to testify as to statements by third persons that they had had carnal intercourse with the prosecuting witness prior to the commission of the alleged rape upon her, in a prosecution for such offense.

(Davidson, P. J., dissents.)

(December 17, 1902.)

NOTE.—The above decision seems to be a novel one as to the liability for rape committed by means of a sham marriage.
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A PPEAL by defendant from a judgment of the District Court for Dallas County convicting him of rape. *Reversed.*

The facts are stated in the opinion.

Messrs. J. C. Muse and J. C. Kearley for appellant.

Mr. Robert A. John for the State.

Brooks, J., delivered the opinion of the court:

Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of twenty years.

The indictment charges the crime to have been committed on the 7th day of July, 1901, by the use of force, threats, and fraud. The following is substantially the facts proved: Prosecutrix, about twenty-two years of age, lived at Coppell, a small village in Dallas county. Appellant was keeping a saloon for his father, and frequently visited the prosecutrix, Rosa Parrish. Appellant was about twenty years of age. After associating together for some time they came to Dallas on July 7th. Prosecutrix states that, after reaching Dallas, appellant took her to the Alamo hotel, secured a room, and after awhile came back with a party, whom he introduced as Rev. Brown. Thereupon, in the presence of some of the inmates of the hotel, said Brown proceeded to perform the rites of matrimony between prosecutrix and appellant. Appellant said he had secured a license in Cleburne, Johnson county, authorizing said marriage. After the marriage was performed said Brown wrote out what was said to be a certificate, certifying to having performed the marriage, and gave the license, with the certificate, to appellant, for which service appellant paid said Brown some money, but she did not know how much. Thereupon the parties who witnessed the marriage, together with the minister, departed, and she and appellant went to bed in the room, and stayed there three or four hours. They then went back to prosecutrix's home, some 16 or 17 miles from Dallas, stopping on the way at a physician's to stay all night. Prosecutrix was accidentally shot in the leg just before reaching the physician's, and they stopped there for medical assistance. After prosecutrix returned home, appellant accompanying her, he left. A short while after this appellant went to San Antonio, and from there various letters were written, making the utmost asseverations of love and fealty on the part of appellant to prosecutrix. However, after returning from San Antonio, appellant informed prosecutrix that he had received a letter from said Brown, who was reputed to have performed the marriage ceremony, informing appellant that the marriage was a farce, and that he was not a clergyman, nor did he have any license to perform the marriage. This letter was shown to prosecutrix by appellant. Prosecutrix, however, states that appellant pacified her over this condition under assurance that he would rectify the matter as soon as he should be able by a legal marriage, and would make her his wife. Subsequent to his going to San Antonio he came

back to Dallas, and lived there for some time. From Dallas he also wrote various letters to her, still protesting fealty and love, promising to bring her to live with him after awhile. On several occasions prosecutrix visited appellant in Dallas, and stayed at hotels all night with him. In the latter part of October or first of November they stopped at the National hotel. Mrs. Ray, the proprietress thereof, testified that appellant introduced prosecutrix to her as Mrs. Rosa Parrish. This was prosecutrix's real name. The clerk of the hotel testified that appellant told him prosecutrix was his wife, and they occupied the same room at the hotel. On another occasion they went to a boarding house run by Mrs. Rath, and appellant there told his name as Parrish and that prosecutrix was Mrs. Parrish. At this place he secured for prosecutrix and himself a week's board, paying for the same in advance. Prosecutrix stayed there three days, and left with him. They left the house during the night, upon ascertaining the fact that Mrs. Rath had discovered their deception. There is a great deal of evidence on the part of appellant going to show that prosecutrix had been intimate with him prior to the 7th of July, the date alleged in the indictment. He also denies *in toto* any mock marriage or ceremony at the Alamo hotel. The evidence further discloses that some time after this transaction for which appellant is being prosecuted he was married to another woman.

The first bill of exceptions complains that the court erred in permitting the state to prove by J. M. Skelton, justice of the peace in Dallas county, that on April 6, 1902, witness, as such justice, under a marriage license issued from the county clerk of Dallas county, solemnized the rites of matrimony between defendant Lon Lee and Ella Lee. He also objected to introduction of the marriage license. Appellant insists that said testimony was irrelevant and immaterial and impertinent, and tends to show another offense committed by defendant, and that said evidence was calculated to create a prejudice in the minds of the jury against defendant; and because said marriage between defendant and Ella Lee is not and cannot be an issue in this case, or as tending to shed light upon the rape charged in the indictment. The rape alleged to have been committed was on July 7, 1901; and the fact that appellant on the 6th day of April, 1902, married another woman, is a circumstance that might be properly considered by the jury in passing upon the intent, purpose, and motive of appellant at the time that the rape is alleged to have been committed,—that is, it is a circumstance going to show that he had no motive or purpose of ever consummating the marriage at any time. Its probative force is a question for the jury.

Bill No. 2 complains that the court erred in forcing appellant to testify that he went to Arkansas for his wife, and to various and sundry matters going to show that he had abducted his wife from the home of her parents, against their wish, will, and con-

sent, and ran away with her, and brought her to Dallas, and married her. These circumstances would not be germane to any issue being tried, and would be introducing, as appellant insists, other offenses or acts that shed no light upon the crime for which he is being prosecuted.

The third bill insists that the court erred in the following: Appellant introduced Jones Paynes, who testified that he knew appellant, and that in the latter part of October or the first of November, and late in the evening, "he saw them going to the National hotel, in the city of Dallas, situated on Pacific avenue." That on that night about 9:30 or 10 o'clock he went to said hotel, and to defendant's room, and knocked on the door. Defendant opened the door, and talked with witness, and he saw a woman in the room. Counsel asked said witness how defendant was dressed when he came to the door, and whether or not he was undressed. The state objected to said testimony, and the court sustained the objection. Appellant offered to prove that witness saw a woman in the room, but did not recognize her. We see no connection that this testimony may have with the other facts of this case. It is true, as above stated, the bill of exceptions shows that the witness testified "that he saw them." There is nothing shown by the bill as to whom this relates. Clearly, if appellant went to the National hotel with prosecutrix, and there are circumstances showing that prosecutrix was in the bed with appellant, it would be proper to permit the testimony to be introduced, but the bill does not show that any error was committed.

Appellant insists that the court erred in failing to peremptorily instruct the jury to return a verdict of not guilty, for that under the testimony of Rosa Parrish, defendant and Rosa Parrish were lawfully married in accordance with the laws of Texas. As we understand appellant, he insists that the evidence of prosecutrix makes out a lawful marriage under the laws of Texas. Appellant justly insists that there can be marriage in Texas without a license, as provided by the statutes, since the decisions hold that the statute authorizing licenses to marry does not inhibit a common-law marriage without license. In *Simon v. State*, 31 Tex. Crim. Rep. 186, 20 S. W. 399, 716, we held that all that can be required in any case involving marriage is proof of a valid marriage, for the violation of which the parties thereto may be punished, whatever be the form of the ceremony; or if there be no ceremony, if the parties agree presently to take each other for husband and wife, and from that time on live professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding on the parties, which would subject them to legal penalties for the disregard of its obligations. An inspection of the evidence in said case discloses that the parties lived together, acknowledging each other as husband and wife, for years after the consummation of the marriage. In *Ingersol v. McWillie*, 9 Tex. Civ. App. 543, 30 S. W. 56, Chief Justice Light-

foot, delivering the opinion of the court, after commenting upon the failure to get a license, said: "Of course no such excuse can be shown now for a failure to observe all the rules and regulations prescribed by law and sanctioned by an enlightened people and Christian civilization, but the policy of the law in protecting parties who have innocently been led into such a marriage is the same. From the testimony in this case we think there can be no doubt that Hortense Dix, an inexperienced and confiding girl, just from school, and who had a right to look to A. R. Collins as a protector, was induced to enter with him into the marriage state, under the agreement of present marriage, he giving some business complications as an excuse for not making it public by license and public ceremony. They lived and cohabited as husband and wife, and he introduced her to his friends as his wife, thereby admitting the marriage. She bore him a child, as his wife. While living he did not repudiate the relation." This case cites a great many authorities supporting the validity of common-law marriage, where there is no statutory inhibition, and holds that in this state a valid common-law marriage can be had. "Mere words, without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and if once exchanged it must be clearly shown that both parties intended and understood that they were not to have effect." *McClurg v. Terry*, 21 N. J. Eq. 227. And this is the effect of all the authorities to which we have had access. *Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520, 50 S. W. 135; *Holder v. State*, 35 Tex. Crim. Rep. 19, 29 S. W. 793. It will be seen from an inspection of the authorities that the bare statement of a man to a woman that they take each other for husband and wife, without cohabiting together and recognizing each other as husband and wife, would not make a common-law marriage. Marriage is like any other civil contract. The minds of the parties must meet. They must mutually agree to the same thing. There is no authority supporting appellant's contention. However, some of the decisions state that where a marriage is entered into by fraud, and the parties subsequently live together as husband and wife, recognizing that relation to the public for any number of years, it would still be a legal marriage. These decisions, however, are based upon the proposition that either party to a fraud in a contract can waive the fraud by their acts and conduct. In this respect we do not understand there is any difference between a marital contract and any other kind.

Now, reverting to the facts, we hold that, if the testimony of the prosecutrix be true, appellant, through fraud, procured prosecutrix's consent to casual and occasional cohabitation, and she returned to her home; he never lived with her; did not hold her out to the world as his wife, and the evidence conclusively shows that he had no such

purpose or intent. Could it be insisted that if appellant had fled from the country after July 7, 1901, after perpetrating upon prosecutrix what she details, he could insist in a court that he was the husband of prosecutrix? Clearly not; since, as stated, if her testimony be true, he had no purpose or intent of ever consummating the marriage or holding prosecutrix out to the world as his wife. The fact that he took her to the Alamo hotel, which the evidence shows was an assignation house, shows that he had no legitimate intent. We therefore hold that the evidence does not make a common-law marriage, as insisted by appellant, and the court did not err in so ruling.

Appellant furthermore insists that the court erred in not instructing the jury to acquit because there was no evidence of rape by force or threats, and that the state's case hinged upon the theory of a fraudulent impersonation by defendant as the husband of Rosa Parrish, and, if not married, the facts disclose no offense, for that since a rape by such means is under the statute applicable alone to the protection of married women. In support of this proposition appellant cites *King v. State*, 22 Tex. App. 652, 3 S. W. 342; *Franklin v. State*, 34 Tex. Crim. Rep. 203, 29 S. W. 1088; *Milton v. State*, 23 Tex. App. 204, 4 S. W. 574, 24 Tex. App. 286, 6 S. W. 39; *Mooney v. State*, 29 Tex. App. 258, 15 S. W. 724; *Payne v. State*, 38 Tex. Crim. Rep. 494, 43 S. W. 515. These cases appear to support appellant's contention; but an inspection of the statement of fact in each instance shows that these were prosecutions for rape by fraud upon a woman theretofore married—that is, a woman married to a person other than appellant—and the decisions merely hold in that character of prosecution that the indictment should show the woman was a married woman. Article 633, Penal Code 1895, defines rape as follows: "Rape is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud," etc. Article 636 reads: "The 'fraud' must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband." From these articles this court would not be authorized in holding that the woman upon whom fraud is practised, in order to secure her consent to an act of copulation, must be a married woman in every instance. This would be a strained construction; in fact, would not be a construction at all, but an interpolation upon the statute. This is not warranted in construing any law. Nor can we say that the legislature intended to permit fraud practised upon a single woman not to be rape when the same fraud would be rape if practised upon a married woman. If the fraud is such as to cause the woman, whether legally married or unmarried, to give consent to the act of copulation, believing she is the wife of the man she is copulating with, it is nevertheless rape whether the woman be married or single. We therefore hold that the court did not err in refusing to charge the jury as insisted by appellant.

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Appellant insists that the following portion of the court's charge is erroneous, to wit: "In this case the means charged to have been used in committing the alleged rape is fraud. The fraud must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband. It is a presumption of law which cannot be rebutted by testimony that no consent was given when the intercourse was had by fraud as above defined. Stratagem means the use of any artifice or trick, and to constitute the fraud essential to render the act of copulation rape the stratagem resorted to must have been intended by the offender to induce, and must have induced, the injured female to believe that the offender was her husband." And again: "If you believe from the evidence beyond a reasonable doubt that in Dallas county, Texas, on or about July 7, 1901, the defendant did represent to Rosa Parrish that he had procured a marriage license to marry her, and that he carried her to the Alamo hotel, in the city of Dallas, to marry her, and that he sent out for a person authorized to marry them, and had brought into the said hotel the person introduced by the defendant to the said Rosa Parrish as a minister of the gospel, and had said person to perform the marriage ceremony and marry him, the defendant, to the said Rosa Parrish, and that by virtue of the said ceremony said Rosa Parrish believed, and was induced thereby to believe, that the defendant was her husband, and that the defendant intended by telling her of said marriage license, and sending for and introducing said person as a minister, and having him perform the marriage ceremony, to believe that he was her husband, and that defendant resorted to said acts for the purpose of having carnal knowledge of the said Rosa Parrish, and that he did by said means have carnal knowledge of her, and that she submitted to his embraces, believing then and there that he was her husband; and you further find that said marriage ceremony was a sham, and said marriage a mock marriage, and that defendant then and there knew it to be a sham and mock marriage; and you further find that defendant was then and there an unmarried male person over the age of sixteen years, and that said Rosa Parrish was then and there over the age of fourteen years,—then the defendant would be guilty of rape as charged, and you will so find affixing the penalty therefor." Appellant objected to said charges, because the definition of fraud was not applicable to the facts of the case, and because, if there was no statutory or common-law marriage, Rosa Parrish was not a married woman, and the statute has relation only to the protection of married women. These questions have all been reviewed above, and the charge as copied is responsive to what has been heretofore stated. We think the charges are correct. We do not believe that appellant could justly insist that the court should define common-law marriage under the laws of this state, because, in our opinion, the evidence does not raise this issue.

Appellant insists in the fifth bill of exceptions that the court erred in admitting the testimony of prosecutrix, the substance of which is detailed above. Without passing seriatim upon the several questions raised, since they have been discussed above, we will merely say that the evidence offered by the state was germane to the issues to be proved, and appellant's exceptions, as contained in said bill, are not well taken.

By the sixth bill it is made to appear that Rosa Parrish was introduced as a witness by the state, and the defendant upon cross-examination proved by her that she had an uncle by marriage by the name of Tom Stringfellow, and that she had a conversation with defendant about Stringfellow. At this point the jury were retired, and the following questions and answers were elicited: "Did you ever have a conversation with defendant concerning certain charges that your uncle, Stringfellow, had made against you and defendant, in which he reported that he had followed you and defendant or knew where you entered in a cornfield; that you had lost your handkerchief there, and that he had found it; and it looked as though you had all laid down in the field; and that he was telling it around the country that you and defendant were criminally intimate; and is it not true that you told defendant about it?" The witness answered, "Yes, sir." "Did you not know that defendant afterwards hunted Stringfellow up and whipped him for it?" To which witness answered, "Yes, sir." "The Court: When was that time? Ans. I do not remember the date. The Court, to defendant's counsel: I do not think it would be relevant evidence unless you had the man himself here." This testimony would be hearsay, as indicated by the court, and there was no error in excluding the same. The same character of testimony was offered to be proved by Rosa Parrish with reference to another uncle by the name of Frank Parrish. None of this testimony was admissible.

The seventh bill complains of the following: Appellant introduced witness Huggins, and asked: "Are you acquainted with Rosa Parrish, and were you acquainted with her and her general reputation for chastity and virtue prior to July 7, 1901, in the community in which she lived?" He answered, "Yes; and that her reputation in that regard was bad." Upon the cross-examination by the state said witness was asked if he had heard anybody speak or talk about the general reputation of Rosa Parrish for chastity and virtue, and he answered in the affirmative. He was then asked to name the persons with whom he had talked touching such reputation, and the witness named a number of parties, among them Bob Hardcastle. Defendant, upon redirect examination, asked the witness to state what the several parties had said to him touching the general reputation of Rosa Parrish for chastity. On objection by the state the witness was not allowed to answer. Defendant then offered to prove by said witness that Bob Hardcastle, with whom he had talked, had told witness

that he (Hardcastle) had repeatedly had carnal intercourse with said Rosa Parrish prior to July 7th. This was hearsay testimony, and the court did not err in excluding it.

Appellant tendered various charges to the court, which were refused, and after a careful review of the same we do not think the court erred in so doing. The record before us is very voluminous, but we have attempted to pass upon every feature raised by appellant.

Because the court allowed the state to force appellant to testify to the mode, manner, and means of securing his wife in Arkansas and bringing her to Texas, which testimony was calculated to prejudice defendant before the jury, the judgment is reversed, and the cause remanded.

Davidson, P. J., dissenting (filed March 26, 1903):

I desire to give some reasons why I cannot concur with my brethren in some of the conclusions set forth in their opinion.

I concur in the reversal, for the reasons assigned in sustaining bill of exceptions No. 2. I dissent from refusal to reverse the judgment on the matter set up in bill of exceptions No. 1. The same reasons apply for admitting the testimony in this bill as to that admitted in bill No. 2. I am unable to perceive the relevancy of appellant's subsequent marriage to Ella Lee to the rape of Rosa Parrish. The court says: "The rape alleged to have been committed was on July 7, 1901; and the fact that appellant on the 6th day of April, 1902, married another woman is a circumstance that might be properly considered by the jury in passing upon the intent, purpose, and motive of appellant at the time that the rape is alleged to have been committed,—that is, it is a circumstance going to show that he had no motive or purpose of ever consummating the marriage at any time. Its probative force is a question for the jury." How the issuance of the license on the 6th of April, 1902, to one woman, could tend to show motive for the prior rape upon another woman, is not apparent. If the doctrine announced be correct, then every marriage subsequent to a rape becomes legitimate evidence upon the trial of the previous rape, if the alleged rapist is party to such marriage.

The court instructed the jury, in substance, that the testimony of Rosa Parrish, if true, would constitute a rape by fraud. Appellant on the contrary, insisted that if her testimony was true or believed by the jury, he would be entitled to an acquittal upon two grounds: First, it was a marriage; and second, the facts could not constitute a rape by fraud; to which may be added, third, that it could in no event be rape, because she consented to the act of carnal intercourse. In order to bring this question clearly in review, it is necessary to make a substantial statement of the facts bearing on the question of marriage. Some of the most material facts bearing on the question of marriage are omitted in the opinion.

Rosa Parrish testified that appellant told her that he was twenty-one or twenty-two years of age,—something a year older than herself; that on the morning of July 7, 1901, he came to her mother's residence (who was a widow), and requested her to attend a camp meeting; that after they had gotten in the buggy and started for the supposed camp ground appellant urged her to go with him to Dallas, a distance of some 18 miles, and marry him; that she agreed to this proposition. After reaching Dallas appellant registered their names at the Alamo hotel, but she was not advised as to the names placed on the register, as she did not look to see. "Defendant said we would go to the hotel and be married there; get a minister and witnesses, and be married there. I think we must have stayed there three or four hours. While we were there he took me to a room, and went out and got a minister and witnesses, and we were married. He introduced the minister to me by the name of Brown. He brought in two witnesses. He introduced them, but I don't remember their names. They were a man and a woman. He said it was the man and his wife of that hotel. I don't remember their names. I had been in that room just a few minutes when defendant went down and got the minister. Defendant took me to the room, went out, and was gone some little time, and he came back with the minister and the two witnesses, and we were married there, and the minister wrote out the certificate and gave it to him, and the witnesses signed their names. The minister wrote out the certificate on the dresser,—there was no table in the room. He did that in the same room we were in. He gave the certificate to Lon Lee. The minister had a marriage license to authorize him to perform that ceremony. He kept the license. I did not read it, and don't know what was in it. I don't know whether this man was a minister or not. That occurred on Sunday. Lon Lee claimed that he got the marriage license at Cleburne. He paid the minister a fee, but I don't know how much. He paid him a bill. That ceremony was performed in Dallas county, Texas. After the ceremony was performed, the minister and witnesses went out of the room. I don't know where they went. Defendant and I stayed in that room three or four hours after the minister left. We stayed there some time, and then went home. I had carnal intercourse with defendant in that room in the bed. I believed I was his wife at the time I let him have carnal intercourse with me." Later in the evening they returned in the direction of their home, which was near Coppel, in Dallas county. *En route* defendant's pistol was discharged, wounding prosecutrix, which compelled them to stop overnight at Dr. Butler's. She further says: "I had an understanding with defendant that our marriage was to be secret. We agreed to that as we came to Dallas. Defendant said he was unable to take a wife then, because he was considerably in debt, and then he said he was going away, and he wanted me to marry him before he

went away. I agreed to that. At the time of this ceremony Lon Lee was a single man and I was single. After that marriage defendant said we would have to keep it secret until he was able to provide for me. He afterwards told me that the man who performed the ceremony was no minister. I do not remember exactly when it was he told me that, but think it was in November of last year (1901). I kept insisting that defendant tell that we were married, and he always made excuses for not telling it, and then showed me a letter he received from this man that married us, and he said he was no minister, and the marriage was all a fraud. Defendant has that letter, or had it at the time I saw it. I read the letter. Defendant said he had received it from the man that married us. Defendant said he thought it was all right, and we were married, and that we would marry again. He made that statement to me some time in November, as well as I remember." Shortly afterwards appellant went to San Antonio, and from there wrote prosecutrix quite a number of letters, professing the greatest love and fealty on his part toward the witness. One of them is as follows: "My Dearest Girl. On surprise of myself as well as you, I leave for Dallas to-day to accept a position. I didn't know that I was going until last night, as I received a telephone message to come at once. Papa will go to Childress in my stead, but after the building is completed, then I will take charge of the business, and we will go to housekeeping. Pet, don't become worried, trust in me, and I shall be true and royal to you." It seems there was an understanding between appellant and his father that the father would secure a building at Childress, where they were to engage in the saloon business. Appellant was to take charge of the business, and this is the matter referred to in this letter. While appellant was in Dallas, at his solicitation prosecutrix several times visited and stayed with him at different hotels, where they registered as man and wife, not, however, under the name of Lon Lee and wife, but under some other name. At the hotel conducted by Mrs. Rath appellant registered himself and prosecutrix as "Mr. and Mrs. Parrish," where they remained from Sunday evening until Wednesday night. He held her out at this hotel as his wife, as he did at all of the other hotels where they registered. While there prosecutrix asked Mrs. Rath to call her husband next morning at 5 o'clock. During the conversation Mrs. Rath said something to prosecutrix which led her to believe that Mrs. Rath thought their name was not Parrish, but Lee. Prosecutrix called appellant's attention to this, and told him that she would not remain in the hotel unless he straightened the matter and told the truth about it, and informed Mrs. Rath of their real status. This he declined, and at witness's request they left and registered at the "Windsor hotel." It was at defendant's suggestion they went by the name of Parrish at Mrs. Rath's. She says: "He told that to Mrs. Rath, the land-

lady. I came away the next morning after she found out what his name was. I don't know how she found out his name. I didn't stay there any longer, because he would not explain matters to her, and I told him I would not stay unless he did. I wanted him to tell her that we were married, and the circumstances of the case, and he would not do it." It is not necessary to enter into details as to the various times he registered themselves as man and wife at hotels in which he held her out at those different places as his wife. The last of these occurred about the middle of March, 1902. A child was born to them the latter part of April, 1902.

Further, as bearing upon the question of the marriage, and appellant's recognition of that marriage to prosecutrix, witness Pinson Howell testified: "I know Miss Rosa Parrish, and have known her all my life. I remember hearing of her being shot on July 7, 1901. I heard Lon Lee speak about the matter. I believe it was in his place of business when he spoke about it, in his father's saloon, where he worked. He said the shooting occurred at some place east of Farmer's Branch. He told me that he and Rosa Parrish had started to White Rock that day, to a camp meeting. After that I had some little conversation with defendant in reference to Rosa Parrish. He spoke to me about being married to her. That was some time before last Christmas, 1901." "He simply said that he and Rosa Parrish were married, is all that I know. I could not say how they were married. He just said they were married. It is true that defendant, Lon Lee, told me that he had been secretly married to Miss Rosa Parrish. He said he guessed they would go to housekeeping pretty soon." On cross-examination this witness states that he had heard of two fights appellant had had—one with Frank Parrish, uncle of prosecutrix, in regard to her, and the other was with Stringfellow, another uncle of prosecutrix. "It was about that time or after that that I had this conversation with him. He told me that she was his wife. He told me that he was married to Miss Rosa Parrish; I know that."

Along the same line, Brice, a police officer of the city of Dallas, testified that he was acquainted with defendant, and knew him by the name of Lonnie, while he was working at the Ivy house by the Katy depot. "He and I have talked together quite often. I used to go over there often, and we talked. Some time during the fall of last year [1901] I was in there talking to him one day, and there was a lady in the restaurant. I told him there was a party wanted to see him, and he said, 'Wait a minute;' and I just remarked, 'That is quite a good looking girl.' He said, 'Yes, that is my wife.' And I said, 'I beg your pardon.'" It is unnecessary to further recite acts and conduct of the parties in regard to this question of marriage, except as to the fact of the acts of intercourse occurring. These occurred whenever desired by appellant, and he states that "after July 7th, and before I came to Dal-

las, I had intercourse with her whenever I desired, and did it very frequently. I did not make any note of the times. I would not try to mention the number of times." Prosecutrix testifies, in substance, as did appellant.

As the writer understands the law, these facts constitute marriage. If the license was issued and the minister performed the ceremony, the marriage would be valid under the statute. If not by virtue of the license, then it will clearly come within the essentials of a common-law marriage. *Ingersol v. McWillie*, 9 Tex. Civ. App. 543, 30 S. W. 58; *Coleman v. Vollmer* (Tex. Civ. App.) 31 S. W. 413; *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. 564, 16 Tex. Civ. App. 382, 41 S. W. 533; *Simmons v. Simmons* (Tex. Civ. App.) 39 S. W. 639; *Cumby v. Garland* (Tex. Civ. App.) 25 S. W. 673; *Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520, 50 S. W. 136; *Soper v. Halsey*, 85 Hun, 404, 33 N. Y. Supp. 105; *Onneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284; *Bull v. Bull* (Tex. Civ. App.) 68 S. W. 727; *McClurg v. Terry*, 21 N. J. Eq. 227; *Holder v. State*, 35 Tex. Crim. Rep. 19, 29 S. W. 793; *Simon v. State*, 31 Tex. Crim. Rep. 186, 20 S. W. 399, 716; *Robertson v. Cole*, 12 Tex. 361; *Nixon v. Wichita Land & Cattle Co.* 84 Tex. 411, 19 S. W. 560; *Johns v. Johns*, 44 Tex. 40; *Bell v. Graham*, 13 Moore P. C. C. 242; *Barnett v. Kimmell*, 35 Pa. 13; *Jackson ex dem. Dies v. Winno*, 7 Wend. 47, 22 Am. Dec. 563; *Taritt v. Negus*, 127 Ala. 301, 28 So. 713; *Mickle v. State* (Ala.) 21 So. 66; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286.

My brethren hold the marriage testified by the girl to be a "farce and mockery;" "that the minds of the parties did not meet;" that they did not mutually agree to the marriage.

I find this statement in the opinion. "Now, reverting to the facts, we hold that, if the testimony of the prosecutrix be true, appellant, through fraud, procured prosecutrix's consent to casual and occasional cohabitation, and she returned to her home; he never lived with her; did not hold her out to the world as his wife, and the evidence conclusively shows that he had no such purpose or intent. Could it be insisted that if appellant had fled from the country after July 7, 1901, after perpetrating upon prosecutrix what she details, he could insist in a court that he was the husband of prosecutrix? Clearly not; since, as stated, if her testimony be true, he had no purpose or intent of ever consummating the marriage or holding prosecutrix out to the world as his wife. The fact that he took her to the Alamo hotel, which the evidence shows was an assignation house, shows that he had no legitimate intent. We therefore hold that the evidence does not make a common-law marriage, as insisted by appellant, and the court did not err in so ruling."

I take issue with my brethren upon several propositions included in this short excerpt. I insist it is a correct deduction that had appellant "fled from the country" after the events occurring at the Alamo hotel, he was

there was a marriage, and an actual consummation of that marriage by cohabitation before they left the hotel, his flight could not alter the status thus brought about. The contract was consummated. That their minds met, that it was a mutual agreement, that the marriage was insisted upon by appellant,—brought about by his earnest solicitations,—the facts make unquestionably true, if the testimony is to be believed. Marriage is like any other civil contract, and governed by the same rules as to fraud. But the rule in regard to fraud has here been subverted, and the party perpetrating the fraud is justified in taking advantage of his own wrong, to the disgrace and infamy of the innocent victim, who contracted the marriage in good faith. I have searched authorities for a decision sustaining the proposition that under circumstances of this character a man can perpetrate such a fraud upon a woman through the solemnization of the marital ceremony, and after cohabitation himself declare the marriage a nullity. There are authorities which tend to support the theory that the woman, the innocent and injured party, might take advantage of the fraud by divorce proceedings, if she promptly acted upon her knowledge of the fraud. But I find no authority which gives the party perpetrating the fraud that right, even where resort is had to judicial proceedings. In *Robertson v. Cole*, 12 Tex. 361, Judge Hemphill, for the supreme court, said, where the husband obtained the license, and subsequently married under the license, by means of perjury and fraud, that the girl could take advantage of that fraud in divorce proceedings, if she acted before the final consummation of the marital relation by sexual intercourse. This is an outpost case, even in favor of the innocent party. The case of *Johns v. Johns*, 44 Tex. 40, was a divorce proceeding in which the plaintiff, as husband, sought to annul the marriage on the ground that his consent was obtained by force and undue influence. He complained that appellee caused him to be arrested on a warrant charging him with having seduced her, and that the sheriff, after making the arrest, took him to the office of the justice of the peace, and appellant, being ignorant of the law, appealed to the officers of the law and the bystanders to know what to do in order to be liberated. The justice of the peace, deputy sheriff, clerk of the district court, and other persons advised him that it would be lawful and to his interest to marry prosecutrix, and thereby he would be relieved from the prosecution for seducing her. Upon these grounds he stated in his petition that the marriage was not valid and legal, and that their living together as man and wife was intolerable and insupportable. The trial court refused the divorce, and the supreme court affirmed the judgment. Speaking of this, the court said: "The plaintiff appears to have understood that the marriage would cancel the offense with which he was charged and release him from custody. He knew whether he was guilty or not of the charge against him when he mar-

ried, and he cannot now cancel the marriage, and rid himself of his wife as he did the prosecution, without showing a better reason for it than he has given in his petition." In that case the marriage was procured by fraud and perjury, and the plaintiff, who was a minor, was married without the consent of her parents. In cases of seduction the party charged with crime has the option to marry the girl and avoid the consequences of the seduction, or stand his trial, with the chances of conviction and punishment. This is not a compulsory marriage; it is optional with the accused whether or not he marries the seduced woman. Even from the standpoint of this statute, a marriage of this kind, under the decision of my brethren, would not be a meeting of the minds of the parties. It would not be a mutual agreement, and therefore not a marriage, if the seducer "fled from the country" after marriage. If it be necessary that the minds of the "parties must meet," in *Johns v. Johns*, 44 Tex. 40, there was not a meeting of the minds of the parties, for there was a mental reservation by the seducer that he would not be bound by the marriage, and sought a divorce. It would have been a case of rape, not a marriage, if my brethren be correct. If marriage be a civil contract, it follows that parties assuming that relation are bound by it despite mental reservations to the contrary by one of them. *Tartt v. Negus*, 127 Ala. 301, 28 So. 713; 13 Moore P. C. C. 242. An accused may marry to avoid the punishment for seduction, with the mental reservation not to fulfill the marital relations. He may marry simply to avoid the consequences of his crime; but this does not affect the good faith of the marriage, nor make the intercourse rape by fraud. It is as binding, nevertheless, as any other character of marriage. If such a marriage has been annulled on the ground of want of mutual consent, it has escaped the observation of the writer. The rule for which I contend is sustained by the authorities. *Jackson ex dem. Dies v. Winne*, 7 Wend. 47, 22 Am. Dec. 563; *Barnett v. Kimmell*, 35 Pa. 13. In *Barnett v. Kimmell*, 35 Pa. 13, the doctrine was thus laid down: Consent to a marriage will be presumed from the formal ceremony of marriage, although there was a secret intent on the part of one of the parties not to perform the duties of the marriage relation. And this marriage is complete when the parties have assented to it. *Robinson v. Robinson*, 188 Ill. 379, 58 N. E. 906; *Elaas v. Elaas*, 171 Ill. 632, 49 N. E. 717; *Stevens v. Stevens*, 56 N. J. Eq. 488, 38 Atl. 460; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284. Cohabitation is not necessary to the completion of the marriage or to make a marriage contract valid. *Franklin v. Franklin*, 154 Mass. 515, 13 L. R. A. 843, 28 N. E. 681; *Hulett v. Carey*, 66 Minn. 327, 34 L. R. A. 384, 69 N. W. 31; *Jackson ex dem. Dies v. Winne*, 7 Wend. 47, 22 Am. Dec. 563. Nor does an agreement that the marriage is to be kept secret affect the validity of that marriage,

though it may cast a suspicion upon the intent of the parties. *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286. If the marital contract is complete, and marriage occurs,—they agree to live together as husband and wife,—the fact that they agree to keep the marriage secret does not affect the marriage. It is a contract by which the parties are bound, as much so as if it were any other civil contract, whether the world knew it or not, and constitutes a valid marriage. Judge Neill, speaking for the court of civil appeals, in *Ounco v. De Ounco*, 24 Tex. Civ. App. 436, 59 S. W. 284, among other things uses this language: "The present consent and agreement between the parties is the gist of a common-law marriage. It requires only the agreement of the man and woman to become then and henceforth husband and wife. When this takes place the marriage is complete. *Simmons v. Simmons* (Tex. Civ. App.) 39 S. W. 639. It is not sufficient to agree upon a present cohabitation and a future marriage. 1 Bishop, Marr. Div. & Sep. § 262; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737. It is required that the cohabitation be as man and wife and in pursuance of the marriage contract. It can of itself be no part of the marriage contract, except it take place after, and not before, the agreement. *Soper v. Halsey*, 85 Hun, 464, 33 N. Y. Supp. 105; *Farley v. Farley*, 94 Ala. 501, 10 So. 646. 'A consent de præsenti is essential to such a marriage, and a subsequent marriage is established by a proof of a promise and a copula, on the ground that the copula was a consequence and performance of an anterior promise. The copula does not constitute marriage, but it is taken, when circumstances justify it, as evidence of the performance of a previous promise.' *Rodgers*, Dom. Rel. § 87; *Simmons v. Simmons* (Tex. Civ. App.) 39 S. W. 639."

Perhaps it is useless to pursue this line of thought or investigation. Tested by the authorities and all the rules of law and fact applicable to this record so far as I am apprised, if the testimony of prosecutrix is true or believed by the jury, the marriage is valid. Certainly appellant cannot say nay. He will not be permitted to deny that his mind met that of prosecutrix. Why? Because it was at his instigation she came to Dallas, and it was at his urgent request and solicitation she married him, and for his gratification she submitted her body to his desires. So, we have by the testimony an actual marriage, followed almost immediately by cohabitation, and continuing to within about a month of the birth of their child. There is nothing wanting under her testimony to make a complete marriage, and if appellant had died before the second marriage there would have been no question of the right of prosecutrix and the child to inherit whatever of his property the law would set apart to his widow and child. It is not asserted the second marriage annulled the first. This could not be the law, if asserted.

Suppose appellant had been charged with seduction of the prosecutrix, instead of rape, 61 L. R. A.

and she had testified the marriage occurred under the circumstances detailed and subsequent to the seduction, would it be contended for a moment that any court in this state would permit a conviction for seduction? Certainly not. Or suppose appellant had been tried for bigamy for the second marriage, with this testimony before the jury would it not have become the bounden duty of the trial court to charge the jury, if they believed the facts stated, appellant would be guilty of that crime in contracting the second marriage? Most assuredly. I desire to say, in concluding this branch of the case, that prosecutrix's testimony as to the marriage is denied by appellant *in toto*. He says the ceremony never occurred; so there is a square issue as to whether or not the marriage took place. But if the jury believed it occurred, then the girl is not contradicted. In fact, by appellant's letters, by his confessions, by his acts, by holding her out at the hotel and thus to the world as his wife, by his admissions and statements, and by all his conduct, the testimony of the girl is corroborated, it occurs to me, in the fullest manner. His admissions alone are proof of his marriage. *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481; *State v. Hughes*, 35 Kan. 626, 57 Am. Rep. 195, 12 Pac. 28; *State v. Hilton*, 3 Rich. L. 434, 45 Am. Dec. 783; *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Wolverton v. State*, 16 Ohio, 173, 47 Am. Dec. 373; *Forney v. Hallacher*, 8 Serg. & R. 159, 11 Am. Dec. 590; *Jackson v. People*, 3 Ill. 231.

In regard to the other branch of the case, in which the court charged the jury to find appellant guilty of "rape by fraud," it occurs to me this is so utterly at variance with the law that the mere statement of the proposition brings its own refutation. If the majority be correct, then a man, after inducing a girl to enter the marital relation with him, may desert and leave her a wreck on society, his children bastards, and this desertion form the basis of "rape by fraud." In order to sustain this ruling of the trial court, every decision in Texas on the question must be ignored. Quoting from the opinion of the majority: "Appellant furthermore insists that the court erred in not instructing the jury to acquit because there was no evidence of rape by force or threats, and that the state's case hinged upon the theory of a fraudulent impersonation by defendant as the husband of Rosa Parrish, and, if not married, the facts disclose no offense, for that since a rape by such means is under the statute applicable alone to the protection of married women. In support of this proposition appellant cites *King v. State*, 22 Tex. App. 652, 3 S. W. 242; *Franklin v. State*, 34 Tex. Crim. Rep. 203, 29 S. W. 1088; *Milton v. State*, 23 Tex. App. 204, 4 S. W. 574, 24 Tex. App. 286, 6 S. W. 39; *Mooney v. State*, 29 Tex. App. 258, 15 S. W. 724; *Payne v. State*, 38 Tex. Crim. Rep. 494, 43 S. W. 515. These cases appear to support appellant's contention; but an inspection of the statement of fact in each instance shows that these were prosecutions for rape

by fraud upon a woman theretofore married,—that is, a woman married to a person other than appellant,—and the decisions merely hold in that character of prosecution that the indictment should show the woman was a married woman." This excerpt overrules another line of decisions, many of which are expressly mentioned.

In regard to the fraud which must be used where the woman is married, this language is found in article 636, Penal Code, 1895: "The 'fraud' must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband." The majority further say: "From these authorities this court would not be authorized in holding that the woman upon whom fraud is practised, in order to secure her consent to an act of copulation, must be a married woman in every instance. This would be a strained construction—in fact, would not be a construction at all, but an interpolation upon the statute." I might perhaps rest upon the statement of the majority that all of the decisions in Texas heretofore rendered are in direct conflict with their opinion, for all former decisions expressly hold that the article just quoted refers only to married women; that is, to a woman married to some person other than the party accused of the rape. The article under discussion has been enacted and re-enacted by legislative bodies, and again and again given the same construction. And in *Payne's Case*, 38 Tex. Crim. Rep. 494, 43 S. W. 515, the court went so far as to hold "that an indictment . . . which charges a rape by fraud in personating the husband, in order to be sufficient, must allege that the injured female is a married woman, and not the wife of the defendant."

But there are two or three suggestions I desire to make in regard to this matter. It will be noticed that in our Penal Code each class of offenses is treated as a harmonious whole in regard to the subject about which the legislation occurred. In regard to illicit intercourse, for instance, we find statutes prohibiting fornication, adultery, abduction for the purpose of marriage, etc., rape, assault to rape, attempt to rape, rape by force, rape by threats, rape by fraud, rape upon imbecile women, rape upon girls under fifteen years of age with or without force, with or without consent, and statutes against incest, bigamy, and seduction. Each of these crimes has within itself constituent elements, differing from each of the others. They have been carved out by the legislature, and were intended to be separate from and not to trench one upon the other; that each is an independent offense, made up of the elements set out in its definition, and each peculiar to itself, by the legislative act. The opinion in this case is an entering wedge into this division or subject of our Penal Code, the harmony heretofore existing is broken, confusion the result, and what has heretofore been bigamy may become rape by fraud; what has been a valid marriage to avoid the consequences of seduction is or may be a rape by fraud; and so it may be of

incest, if the marriage is followed by sexual intercourse. It strikes at the fundamental constituent elements of these different offenses, and blends them all into one general "hotch-potch," denominated "rape by fraud." This construction saps the very foundation of the marital relation, and wipes out all statutory distinctions between these crimes and that of "rape by fraud." I cannot agree that the prior decisions are "interpolations on the statute." The opinion in this case is the "interpolation." The legislative mind intended what the courts have heretofore held, and what a casual inspection of those statutes demonstrates; and from these there has been no dissent, either from bench or bar, until the decision in this case. Decisions heretofore rendered have been recognized as correct; that is, that a rape by fraud upon married women must be by a party other than the husband or alleged husband of the ravished woman. Applying the doctrine now laid down by this case to the crime of bigamy, it will be found that whenever the accused enters into a bigamous marriage, and that marriage is consummated by sexual intercourse, it necessarily is rape by fraud. Why? Because such marriage is a fraud on the part of the bigamous husband. The accused in such case cannot enter into a second marriage; it is void by law, by reason of the previous existing marriage; therefore it must be fraudulent. There would be no question that the accused in a bigamous marriage would thereby induce the woman, however innocent she may be, to believe that he is her husband. That point being reached, their decision is, or may be, authority for the conviction for a "rape by fraud." I had heretofore thought this was one of the distinguishing characteristics between bigamy and rape. So, in seduction, if the accused, in order to avoid conviction for seduction, marries the woman, without intending to live with her; that his mind did not meet with hers; that he had a secret mental reservation to discard the marital relation; that he was not performing the marriage in good faith,—he would thereby be perpetrating a fraud upon the woman in order to keep out of the penitentiary for the seduction, and therefore guilty of rape by fraud, and his marriage consummated to avoid the consequences of the seduction would be the incontestable proof of the more heinous crime of "rape by fraud," for which his life could be forfeited, despite the holding of the supreme court that it does not constitute ground for divorce. So of incestuous marriage, if the act of sexual intercourse occurs it makes rape by fraud more than a possibility, and so of most of the prohibited acts of illicit intercourse. The court finds the facts true, but the acts and purpose of one party fraudulent; hence the presumption in favor of marriage and presumption of innocence and reasonable doubt are unitedly turned against the accused. These presumptions should have been indulged favorably to appellant, and not to force conviction. This case may be the progenitor of another line of decisions at variance with all prior decisions, and contravary to all

statutory provisions on the subject, the result of which is not readily contemplated or easily foreseen.
For the reasons indicated, I cannot concur

with my brethren. The opinion is wrong in principle, and will be vicious in its application. Therefore I enter this my solemn protest, and respectfully dissent.

TENNESSEE SUPREME COURT.

John A. CROCKETT, *Appt.*,

v.

J. Craig McLANAHAN.

(.....Tenn.....)

1. That defamatory matter in a pleading refers to a stranger to the record does not deprive it of its absolute privilege, if it is pertinent and relative to the issue.
2. Whether or not defamatory matter in a pleading is pertinent to the issue is a question of law for the court.
3. Allegations that certain persons who cast their votes for a bond issue were not legal voters because not registered as required by law are pertinent and relative to a proceeding to enjoin the issuance of the bonds because not authorized by the voters.
4. Want of probable cause for the insertion of defamatory matter in a pleading is not admitted by a demurrer to the declaration setting it up in a subsequent suit to decover for the alleged libel.

(*Wülkes, J., dissents.*)

(February 14, 1903.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Davidson County in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Affirmed.*

The facts are stated in the opinion.

Messrs. Gen. Washington and J. M. Head for appellant.

Messrs. James O. Bradford, John J. Vertrees, and William O. Vertrees, for appellee:

Where the matter alleged in a pleading is pertinent to the issue, or fairly supposed to be so, although not in the strictest sense relevant, the pleader is absolutely privileged, although he may have entertained sentiments of malice to the adverse party.

An election was a condition of the power of the city to subscribe.

Hawkins v. Carroll County, 50 Miss. 735; *Winston v. Tennessee & P. R. Co.* 1 Baxt. 60.

The allegations relating to the election, and which averred that persons voted at and in the election for the proposition, and thereby carried it, who were not qualified to vote, were therefore strictly relevant.

It was proper to plead so as not to entrap

NOTE.—As to privilege of defamatory words used in pleading, see also, in this series, *Randall v. Hamilton* (La.) 22 L. R. A. 649, and note; *Sherwood v. Powell* (Minn.) 29 L. R. A. 153; *Jones v. Brownlee* (Mo.) 53 L. R. A. 445; *Grant v. Hayne* (La.) 54 L. R. A. 930; and *Cooley v. Galyon* (Tenn.) 60 L. R. A. 139.

and surprise; to give the names of the illegal voters, and the wards in which they voted. The rules of good pleading required this to be done.

Rigsbee v. Durham, 99 N. C. 341, 6 S. E. 64; *Todd v. Cass County*, 30 Neb. 823, 47 N. W. 196; *Whitney v. Blackburn*, 17 Or. 575, 21 Pac. 874; *Moore v. Sharp*, 98 Tenn. 493, 41 S. W. 587; *Blackburn v. Vick*, 2 Heisk. 383.

Whether the matter alleged to be libelous was relevant, or could reasonably have been thought by the pleader to be relevant, is a question of law for the court.

Lea v. White, 4 Sneed, 111; *Shadden v. McElwee*, 86 Tenn. 152, 5 S. W. 602; *Johnson v. Brown*, 13 W. Va. 146; *Harlow v. Carroll*, 6 App. D. C. 128.

The question of relevancy or pertinency determines the question of probable cause.

Lea v. White, 4 Sneed, 111; *Shadden v. McElwee*, 86 Tenn. 152, 5 S. W. 602; *Ruohs v. Backer*, 6 Heisk. 404, 19 Am. Rep. 598; *Cooley v. Galyon* (Tenn.) 60 L. R. A. 139, 70 S. W. 609.

A false statement in a pleading filed in a judicial proceeding which is relevant and pertinent is absolutely privileged.

Newell, Defamation, 424; 18 Am. & Eng. Enc. Law, 2d ed. p. 1024; *White v. Nicholls*, 3 How. 266, 11 L. ed. 591; *Union Mut. L. Ins. Co. v. Thomas*, 28 C. C. A. 96, 48 U. S. App. 575, 83 Fed. 804; *Lea v. White*, 4 Sneed, 114; *Shadden v. McElwee*, 86 Tenn. 151, 5 S. W. 602; *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598; *Cooley v. Galyon* (Tenn.) 60 L. R. A. 139, 70 S. W. 608.

There is no distinction between statements made in the course of judicial proceedings relative to the parties thereto and those which relate to strangers to the record.

18 Am. & Eng. Enc. Law, 2d ed. p. 1025; *Johnson v. Brown*, 13 W. Va. 71; *Henderson v. Broomhead*, 4 Hurlst. & N. 569.

McAlister, J., delivered the opinion of the court:

The question presented for our determination upon this record is whether a party to a judicial proceeding is liable in damages to a stranger to the record for defamatory matter alleged in the pleading concerning him, or whether said matter, being pertinent and relative to the issue, is not absolutely privileged. The allegations of the declaration are that on June 2, 1902, the defendant, J. Craig McLanahan, filed a bill in the United States circuit court for the middle district of Tennessee, in which it was averred that on the 8th of August, 1901, an

election was held in the city of Nashville to determine whether the city should subscribe \$1,000,000 of the capital stock of the Nashville & Clarksville Railroad Company, and that at said election the plaintiff (Crockett) was an illegal voter, for the reason that, after being registered in the twentieth ward, he had changed his residence, and had not again registered twenty days before said election, as required by law, and yet cast his vote at said railroad election. It is alleged that defendant (McLanahan) in said bill meant to charge that plaintiff (Crockett) was an illegal voter in said election, and guilty of a high misdemeanor and a violation of the criminal laws of Tennessee. It is alleged in the second count of plaintiff's declaration that said allegations were made falsely, recklessly, wantonly, with actual malice, and in bad faith; that they were made without probable cause, and not under such circumstances as reasonably created a belief in the mind of defendant (McLanahan) that they were true. It is further alleged that plaintiff was not a party to said suit in the Federal court, and had no interest in it. A demurrer was interposed to this declaration, which assigned the following causes, to wit: "(1) It shows on its face that the alleged libelous publication is an averment in a bill filed by this defendant and others, as complainants, in the circuit court of the United States for the middle district of Tennessee, against the Tennessee Central Railroad *et al.*, to enjoin the issuance of bonds by the mayor and city council of Nashville in payment of a subscription to the capital stock of said railway, upon the ground among others, that said subscription did not receive the requisite three-fourths of the votes cast at the election held with respect thereto, and that plaintiff's vote and the votes of others were counted for said proposition when they were illegal and void, for that said voters were not duly registered and voted in wards in which they did not reside. Defendant says that the alleged illegal, libelous statement is a pleading in a judicial proceeding in said court, which does not assail the plaintiff's character, and therefore is absolutely privileged, and that this suit cannot, for that reason, be maintained against him. (2) The declaration does show that said suit is still pending, undetermined, and that therefore this suit is premature, and cannot now be prosecuted against this defendant." At the September term, 1902, of the circuit court of Davidson county, Hon. John W. Childress, presiding, the demurrer was sustained and the suit dismissed. Plaintiff appealed, and has assigned as error the action of the circuit court in sustaining the demurrer.

The determinative question of law arising upon the pleadings is whether the alleged defamatory matter was absolutely, or only conditionally, privileged. The rule on this subject at common law was thus stated by Mr. Townsend in his work on Slander & Libel, 4th ed. § 221, *viz.*: "In a civil action, 61 L. R. A.

whatever the complainant may allege in his pleading, as or in connection with his grounds of complaint, can never give a right of action for libel. The immunity thus enjoyed by a party complaining extends also to a party defending. Whatever one may allege in his pleading by way of defense to the charge brought against him, or by way of countercharge, counterclaim, or set-off, can never give a right of action." This rule was adopted in this state at an early day, but it was coupled with the qualification that the alleged defamatory matter must be pertinent or material to the subject of inquiry in the particular litigation. In *Lea v. White*, 4 Sneed, 113, it was said, *viz.*: The communications are, on account of the occasion on which they are made, *prima facie*, or, as the books have it, "conditionally privileged. That is, they do not amount to defamation (actionable) until it appears that the communication had its origin in actual malice in fact." In such cases it will be incumbent on the plaintiff to show, in addition to the injurious publication, malice in fact, and that the occasion was seized upon as a mere pretext. Illustrations of this class of communications are statements in respect of the character of servants, official communications, reports of judicial proceedings. But, continues the court, there is another class of cases which are absolutely privileged and depend in no respect for their protection upon their bona fides. The occasion is an absolute privilege; and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion. In this class are embraced judicial proceedings. The proceedings connected with the judicature of the country are so important to the public good that the law holds that nothing which may therein be said with probable cause, whether with or without malice, can be slander, and, in like manner, that nothing written with probable cause under the sanction of such an occasion can be a libel. The pertinency of the matter to the occasion is that which is meant by probable cause, and probable cause is in this class of absolutely privileged communications what bona fides is to the class of conditionally privileged communications, which are protected unless there is malice in fact.

It will be observed that the cardinal inquiry is whether the alleged defamatory matter is pertinent to the issue involved. As said by this court in *Shadden v. McElwee*, 86 Tenn. 152, 5 S. W. 604, "where the matter alleged is pertinent to the issue, or fairly supposed to be so, although not in the strictest sense relevant, the pleader is absolutely privileged, although he may have also entertained sentiments of malice to the adverse party." It is, moreover, the rule that the question of pertinency or relevancy is a question of law for the court. *Lea v. White*, 4 Sneed, 111; *Shadden v. McElwee*, 86 Tenn. 152, 5 S. W. 602; *Jones v. Brownlee*, 161 Mo. 258, 53 L. R. A. 448, 61 S. W. 795. It cannot be seriously controverted

that the allegations of the bill in the United States circuit court with respect to the disqualifications of the plaintiff as an elector in the election of August 8, 1901, were pertinent and relevant to the matter of inquiry in that suit. The legality of the election was challenged in that proceeding upon the ground that the municipal aid subscription had not been carried by a three-fourths majority of the voters, as required by law. It was necessary that the bill should specifically recite the names of the disqualified voters, in order that an issue might be made in respect of their qualifications. *Moore v. Sharp*, 98 Tenn. 493, 41 S. W. 587; *Blackburn v. Vick*, 2 Heisk. 383. The name of the plaintiff was included in a list of about fifty citizens of the twentieth ward, who were alleged to have been disqualified to vote in said election on account of a failure to reregister after changing their residence in said ward twenty days before the election. The matter alleged being pertinent to the issue, it was absolutely privileged, and it is wholly immaterial whether the element of malice entered into the charge. As said in *Lea v. White*, 4 Sneed, 113: "It certainly cannot be maintained that, because a person is malicious in his sentiments towards the adverse party, therefore he will not be permitted to set up in his defense any matter that he may reasonably suppose would be available."

It is alleged in the declaration there was no probable cause, or that defendant could not have reasonably supposed it necessary, in his case, to have alleged the libelous matter. It is said the demurrer admits this allegation. It is well settled that "a demurrer does not admit inferences from facts, nor conclusions of law averred." 6 Enc. Pl. & Pr. 336; *Park Bros. & Co. v. Kelly Aoe Mfg. Co.* 1 C. C. A. 395, 6 U. S. App. 26, 49 Fed. 618; *Kent v. Lake Superior Ship Canal R. & Iron Co.* 144 U. S. 75, 36 L. ed. 352, 12 Sup. Ct. Rep. 650; *Foster, Fed. Pr. § 106*; *Hopper v. Covington*, 118 U. S. 148, 151, 30 L. ed. 190, 192, 6 Sup. Ct. Rep. 1025; *Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L. R. A. 288, 54 N. E. 712. Averments in a declaration as to the meaning and interpretation of a writing attached thereto, or exhibited, are not admitted by a demurrer. *National Park Bank v. Halle*, 30 Ill. App. 17; 6 Enc. Pl. & Pr. 337, 397; *Foster, Fed. Pr. § 106*. "Neither does a demurrer admit matters averred in the declaration contrary to law." *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; 6 Enc. Pl. & Pr. 338, 398; *Foster, Fed. Pr. § 106*; *Hopper v. Covington*, 118 U. S. 148, 151, 30 L. ed. 190, 192, 6 Sup. Ct. Rep. 1025. As already seen, the pertinency of the matter to the occasion is that which is meant by probable cause. The pertinency of the matter to the issue presented is a matter for the court, and the demurrer does not admit the want of probable cause, or any other conclusion of law which must be drawn by the court. We think, as matter of law, the

alleged defamatory matter was absolutely and unqualifiedly privileged.

But it is insisted on behalf of plaintiff in error that the present case falls within an exception to the general rule which was recognized and established by this court in *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598. In that case it was held that the rule as to parties does not apply to strangers to the record, and such statements, although pertinent, are only conditionally privileged. The facts of that case were that Ruohs, as next friend of two young girls, filed a petition in the county court of Hamilton county, in which he asked the removal of their guardian, upon the ground (alleged) that "the guardian has had in his family a girl who is now probably over sixteen years of age, who came to live with him about the age of thirteen years, and has remained in his family ever since. Her reputation is ruined, and she is now an example of shame and prostitution." The court said, *viz.*: "Having the undoubted right to present the petition, the question recurs, Was the reason assigned by the plaintiff in error to the county court for the removal of the guardian such a reason as he might lawfully assign, and his petition a privileged communication within the meaning of the law? . . . Although there are authorities which would, perhaps, sustain the petition to the county court as falling within the definition of absolutely privileged communications, this court is of opinion that a distinction should be taken between statements made in the course of judicial proceedings relative to the parties thereto and those which relate to strangers to the record, and that the protection of private character, as well as the peace of society, require that imputations against persons having no connection with the judicial proceeding should, even when properly relating to such proceeding, be considered as falling within the class of conditionally privileged communications."

The case of *Ruohs v. Backer* was decided in 1871 in an opinion delivered by Judge Nelson. It has not been reaffirmed, as erroneously stated by counsel, nor has it been distinctly overruled. In the recent opinion of this court in the case of *Cooley v. Galyon* (Tenn.) 60 L. R. A. 139, 70 S. W. 607, a rule antagonistic to that laid down in *Ruohs v. Backer* was announced. It was held in that case that slanderous words spoken by a witness in a judicial proceeding, which are relevant and pertinent to the subject of inquiry or responsive to questions, are absolutely privileged. The court said, *viz.*: "It is immaterial that neither the plaintiff nor the defendant were parties to the cause in which the defendant was called to testify. The majority of witnesses are not parties to the cause in which they are examined, and facts in relation to other strangers to the litigation often become the subject of necessary inquiry. If the privilege was confined to parties, it would be reduced to narrow limits, and the proper administration

of justice would be greatly embarrassed and made difficult." It was held in *Henderson v. Broomhead*, 4 Hurlst. & N. 569, that no action lies against a party who in the course of a cause makes an affidavit which is scandalous, false, and malicious, though the person scandalized and who complains is not a party to the cause.

This question was under consideration in the recent case of *Jones v. Brownlee*, 161 Mo. 258, 53 L. R. A. 448, 61 S. W. 795, a case from Missouri, in which the court said, *vis.*: "With the exception of *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598, we have not been able to find any case, either in England or the United States, which holds that an absolutely privileged communication made in a pleading in a cause ceases to be such when written or spoken of one not a party to the suit. We think . . . such a distinction cannot be made without disregarding the public policy upon which the whole rule depends. There are so many cases in which the rights and character of persons who are not parties to a suit become collaterally the subject of inquiry, and the right to make such inquiry so unquestionable, that no good reason for making the exception can be given so long as the rule itself is maintained." Again, in the case of *Johnson v. Brown*, 13 W. Va. 130, the court wrote as follows: "The English and American courts, as will be seen by reference to many of the authorities before cited, in laying down the rule which is to determine whether libelous matter appearing in the proceedings or conduct of a cause is or is not to be considered as absolutely privileged, appear to assume that it in no manner depends upon whether it relates to or was uttered about a stranger to the suit or otherwise. While in many cases, as we have seen, qualifications are added in stating the rule which exempts from libel or slander suits utterances in the prosecution regularly, of a suit, yet the qualification that they must not be uttered in reference to a stranger to the suit is never added. There is, nevertheless, one American case that decides that if a libelous statement, made in the course of judicial proceedings, is made in regard to a third person, such statement is not an absolutely privileged publication, but is only conditionally privileged, and is actionable if made with malice, without probable cause, and under such circumstances as would not reasonably create the belief that they were true,"—citing *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598.

Judge Nelson in his opinion states, *vis.*: "If a guardian may be removed because his domestic associations are such as tend to the corruption or contamination of the ward, upon what principle is it that the person seeking the removal may not even name his associates and cause their character to be inquired into? . . . There are many cases in which the rights and character of persons who are not parties to the suit become collaterally the subject of inquiry;" 61 L. R. A.

and the right in this case, continues Judge Nelson, "is unquestionable." If, then, the right to make the inquiry is material and pertinent, why should not the rule of exemption from liability, grounded on reasons of public policy, which favors a free and untrammelled investigation in courts of judicature, not apply when the allegation is made concerning a stranger, as if made against a party to the record? The exception undertaken to be made destroys the rule and defeats the objects of public policy upon which it was founded. It is not supported by any authority, but is contrary to the rule announced in all the cases, and should not be adhered to as a precedent. The fact that cases of hardship may arise, and persons who have been defamed in the course of judicial proceedings may be left remediless, is no reason why a wholesome legal, principle, founded upon reasons of public policy, should be overthrown. A multitude of instances might be cited where the rights of the individual are required to be sacrificed for the public good.

Without further elaboration, we are of opinion the judgment of the Circuit Court on the demurrer was correct, and the same is affirmed.

Wilkes, J., dissenting:

I cannot concur in the view taken by the majority. I concede that the holding of the court in *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598, is contrary to the great weight of authority, though I must insist the reasoning and justice of that holding are unassailable and unanswerable. Accepting as law, however, the principle that statements made in the course of judicial proceedings by parties in their defense and by witnesses on examination are absolutely privileged, when they are pertinent and relevant, even though maliciously made, I think the present suit does not upon demurrer present such case. Parties in their defense and witnesses in their examination should be privileged in making responses to pertinent charges and questions, because they are before the court upon compulsion and not upon their own motion, and they have nothing whatever to do with framing the issues or questions, but must meet them as made by others. But I cannot agree that a plaintiff may go into court upon his own motion, and frame pleadings and present issues to suit himself, and under the issues thus presented libel a stranger to the record, and then defend himself from liability upon the plea that such libelous charges are pertinent to the issues which he has formulated.

To illustrate: I cannot agree that the purest, most innocent woman, of the highest standing, may with impunity be libeled as corespondent in a divorce suit upon grounds of adultery, simply because such a baseless charge is pertinent to the charge made. Other illustrations can be given, and if this is the rule no man or woman in the community can be free from malicious and un-

warranted attacks upon character under the guise of judicial proceedings. To make a practical application of the present case: Mr. McLanahan brings a suit against the city. He charges Mr. Crockett, a stranger to the record, with the crime of illegal voting. Whether he did vote illegally could be ascertained by an investigation of the registration record. There is no allegation that this was done. The charge is made without regard to its truth, recklessly, but, so far as we can see, without actual malice. But if done through malice the result would be the same; that is, because he had charged Mr. Crockett with matter pertinent to the issue with the city, he was privileged to make it, even though made ignorantly, recklessly, or with express malice. In such case, when the libellant makes the issue himself, he should be required to show good faith and probable cause in charging a stranger with crime, even though pertinent and relevant to the issue. He should be required to answer, and show that in making the libelous charge he acted after investigation and upon well-grounded information which he believed to be true.

In other words, the gist of my dissent

and protest is that no man or woman shall be maligned and traduced in even judicial proceedings, unless the charges are made in good faith and upon reasonable ground to believe they are true. Especially is this true when the party traduced is a stranger to the records, the means of information as to the truth of the charge are open and matters of record, and the issues presented are made by the same party who makes the charges. Under the facts disclosed in this declaration the defendant should be required to answer and show that his charges were made in good faith and with probable cause. Nor can I agree that the question of pertinency or relevance is a question of law in all cases. The majority cite to support this proposition *Lea v. White*, 4 Sneed, 111; *Shadden v. McElwee*, 86 Tenn. 152, 5 S. W. 602; *Jones v. Brounlee*, 161 Mo. 258, 53 L. R. A. 448, 61 S. W. 792. In both the Tennessee cases it is expressly said that pertinency and probable cause mean the same thing, and the question of probable cause or pertinency may be for the jury or not, according to the circumstances of the case. See also 13 Enc. Pl. & Pr. 107; 18 Am. & Eng. Enc. Law, 2d ed. 1050.

WISCONSIN SUPREME COURT.

Robert K. BOYD, Receiver of Mutual Fire Association of Eau Claire, *et al.*, *Appts.*,
v.

MUTUAL FIRE ASSOCIATION OF EAU CLAIRE *et al.*, *Repts.*

(.....Wis.....)

1. The statute of limitations begins to run against the liability of policy holders in a mutual insurance society to contribute towards indebtedness of the society at the time it is adjudged insolvent and a receiver is appointed for it.
2. Executors or administrators of deceased officers of a corporation stand in no different position, as to the running of the statute of limitations against claims to hold such officers liable to creditors of the corporation for misfeasance or malfeasance in office, than the officers themselves would occupy.
3. That the liability of stockholders of a corporation for corporate debts has become barred by the statute of limitations does not prevent the enforcement of their liability as directors, although they are sued in both capacities in the same action.
4. The interruption of the running of the statute of limitations against the liability of a stockholder of a corporation to creditors by the bringing of an action to

wind up its affairs and collect the assets is not prevented by the fact that he is plaintiff instead of defendant in the action.

5. Joining a defendant against whom the statute has not run in a demurrer by several defendants setting up the statute of limitations will prevent its being sustained in favor of any of them.
6. Misapplication of funds belonging to a corporation, by its receiver, and gross misconduct by him in managing the receivership, constitute a good cause of action in favor of his successor, but not in favor of the creditors of the corporation.
7. A cause of action in favor of the receiver of a corporation is not properly joined with causes of action in favor of its creditors.

On Rehearing.

8. Creditors of a corporation who are compelled to resort to equity to collect its assets, possess no greater right to be relieved from the effect of the statute of limitations than the corporation itself would have had in an action at law.
9. The relation of officers and directors of the corporation to it and its stockholders is not such as to prevent their taking the benefit of the statute of limitations in an action to hold them liable for misfeasance or malfeasance in office.
10. Making a director of a corporation a party to an action to wind up its affairs and collect its assets does not prevent the running of the statute of limitations against his liability for acts of misfeasance or malfeasance in office, if such acts are not included in the cause of action.

NOTE.—On the general question of the fiduciary character of directors of a corporation, there is a brief note to the case of *Marshall v. Farmers' & M. Sav. Bank* (Va.) 2 L. R. A. 534.

As to liability of directors to corporation, see *Bosworth v. Allen* (N. Y.) 55 L. R. A. 751, and note.
61 L. R. A.

(May 19, 1902.)

APPEAL by plaintiffs from orders of the Circuit Court for Eau Claire County sustaining demurrers to the complaint, and from an order refusing to state the grounds upon which the demurrers were sustained, in an action brought to wind up the affairs of the defendant corporation, and to enforce the liability of its directors and stockholders for its debts. *Affirmed.*

Statement by **Cassoday, Ch. J.:**

This action was commenced November 13, 1890, by the defendants John S. Owen and the Northwestern Lumber Company, as creditors, in their own behalf, and as representing all others similarly situated, against the Mutual Fire Association of Eau Claire, to have it adjudged insolvent, and to wind up its affairs. On the same day the association put in a verified answer, admitting the essential facts, and November 15, 1890, the defendant James A. Smith was appointed receiver of the corporation, and on the same day qualified as such. June 30, 1899, Smith was removed, and the plaintiff Boyd was duly appointed receiver in his place. Upon the petition of Boyd, as such receiver, and some of the creditors, who are now plaintiffs, the action was reorganized May 8, 1900, by making those who were then plaintiffs defendants with the association, and by bringing in all the additional persons now named as defendants herein, and making such petitioners, who were and are creditors of the corporation, plaintiffs herein. Such new plaintiffs were thereupon ordered by the court to prosecute the action for the benefit of all the creditors of the corporation. Accordingly, such new plaintiffs and Boyd, as receiver, filed and served an amended complaint. To such amended complaint thirteen demurrers were interposed; three of them by a single defendant, and the other ten by two or more defendants, as they deemed their interests to be similar. Each of the thirteen demurrers were upon the same grounds, to wit: "First, that it appears upon the face of said complaint that said complaint does not state facts sufficient to constitute a cause of action as against them or either of them; second, for that it appears upon the face of said complaint that several causes of action have been improperly united; third, that it appears upon the face of said complaint that the action was not commenced within the time limited by law, and was not commenced within the time limited by §§ 4219, 4221, 4222, 4224, 4227, and 4252 of the Revised Statutes of Wisconsin for the year 1878, and of the Revised Statutes of Wisconsin for the year 1898, reference to which sections is hereby made." A fourth ground is mentioned, but, as it is expressly waived by counsel for defendants, it is unnecessary to state it. This is an appeal from an order sustaining each of such thirteen demurrers, or, rather, thirteen orders, embodied in one paper, each sustaining some particular one of such demurrers; and also from an order refusing to state the particular ground upon which such demurrers were sustained. Omitting

formal matters, the substance of the amended complaint, so far as necessary to an understanding of the questions presented for decision on this appeal, is, in addition to the facts stated, to the effect that the Mutual Fire Association was incorporated September 1, 1885, under Rev. Stat. 1878, chap. 89, and did business as an insurance company from that time until it was adjudged insolvent, as hereafter stated. The articles of incorporation contained the following: "All persons holding contracts of insurance with this corporation, and the heirs, executors, administrators, successors, or assigns of such persons continuing to be so insured, shall thereby become members of this corporation, and shall continue to be such members during the continuance of such respective contracts of insurance, and no longer." As soon as the corporation was organized, its directors and officers, all of whom are named as defendants herein, agreed to disregard the statutes of this state as to the manner such corporation should do business, and to pursue a plan of their own, one feature of which was that no assessment should be made upon any member of the corporation to meet any of its liabilities, whereas the statute requires such assessments to be made. That plan was followed till the corporation was declared insolvent. Another feature of the agreement, made as aforesaid, and which was carried out, was that two kinds of policies should be issued,—one called "cash policies," covering periods of one year or less, each policy being issued for a single cash premium paid down; the other kind being those issued for three or five years, the policy holder in each case giving a premium note payable in installments as needed and called for by corporate authority to pay losses and expenses of the company. From the beginning to the end all the officers and directors of the corporation were interested in property insured by the company, and their aim was to obtain cheap insurance for themselves, regardless of its jeopardizing the ability of the company to furnish safe insurance to outside parties. To that end such officers and directors knowingly charged for carrying risks some 30 per cent less than they knew would be necessary to do so and pay the expenses of the corporation and claims upon policies as they accrued, the idea of such officers and directors being that by such method their own risks could be carried for a few years at a very low rate, and the corporation then be allowed to go into insolvency, and the accumulated liabilities, representing losses in the business, be thrown on outside parties, such as plaintiffs. The scheme worked successfully for about two years, during which time no assessment was made on members of the corporation to pay losses or expenses, all being paid by using money as fast as collected to pay matured claims. To accomplish that, the sixty days after a proof of loss, allowed by the insurance contract for payment thereof, was taken in all cases. In the fall of 1887, in order to continue business in the manner afore-

said, more than sixty days was taken for the payment of losses suffered by policy holders and duly proved. Before the end of that year it became necessary to either abandon such method, and resort to assessments upon members of the corporation, or obtain money by borrowing, or to cease doing business altogether. That condition was created by disregarding the legal requirement to collect money from members of the corporation sufficient for a fund to pay losses as they matured. The difficulty was tided over temporarily by the officers and directors, without knowledge of the other members of the corporation, borrowing large sums of money. Money was so obtained prior to February 27, 1888, to the amount of \$10,746.76, from eighteen different persons and corporations, all of whom are named in the complaint, and the amount borrowed of each stated. That method was continued till the new receiver was appointed, as stated; the total indebtedness incurred in that way being about \$26,254. When it was apparent to the officers and directors of the corporation that it could not continue doing business much longer, pursuant to the plan agreed upon, as aforesaid, they planned to have it wound up by proceedings commenced in an adversary way by creditors, but really upon their own motion, though to delay matters as long as possible to enable them to gather in as much money as possible, and apply the same in payment of the borrowed money in preference to the claims of policy holders. A part of the plan from first to last of doing the corporate business was not to keep books, so the real situation could not be readily discovered, and such plan was effectually executed. For that reason all the details of the borrowing operations resorted to as aforesaid cannot be stated. But the indebtedness of the corporation created by such operations steadily increased from the time that method of obtaining money was resorted to till the corporation was declared insolvent, notwithstanding the officers and directors well knew that the collapse thereof was only a question of a short time.

In order to obtain new members of the corporation and retain old ones, false representations of its condition were made, by which means plaintiffs and others were so deluded. Such false representations consisted, in the main, of the following: Money was given to persons who had paid the same into the corporation on premium notes, ostensibly as a legitimate division of a surplus over and above what was necessary to satisfy its needs for expenses and the payment of losses to policy holders. Policies were canceled, and money returned to the holders thereof as return premiums, when it was required to pay the *pro rata* share of such policy holders necessary to meet its then existing liabilities. In February, 1887, on false representations made by the officers and directors, a certificate was obtained of the commissioner of insurance of the state of Wisconsin to the effect that the corporation had available assets in cash and pre-

mium notes to meet future losses to the amount of \$90,021.66, and the certificate was made public. Statements were made, ostensibly in compliance with Rev. Stat. 1878, § 1941d, in which the assets of the corporation were overstated from 40 to 200 per cent, and its liabilities understated from 5 to 70 per cent, the degree of falsity being least at the start and increasing from year to year up to the time of the final collapse of the company. In the reports so made no mention was made of the indebtedness of the corporation for borrowed money, though a true statement in that regard was required by law as a part of such reports; and, notwithstanding the fact that when such reports were made indebtedness of the corporation for borrowed money existed as before stated. Copies of such reports were made public. All the officers and directors of the corporation from first to last were parties to the acts of misfeasance and malfeasance aforesaid, and to other acts by which its indebtedness was increased and assets lost to the injury of the corporation and its creditors as follows: A large number of policies were issued on property and to persons outside the state where it had no lawful right to go, by which premium notes were taken aggregating \$85,000, which were worthless. Between January 5, 1889, and November 15, 1890, the officers and directors took from the corporate treasury \$26,078.20, and appropriated it to their own use by applying the same in payment of their own debts. A detailed statement of the transactions in that regard is set forth in the complaint. Defendant Smith, while he was secretary and manager of the corporation, and under contract to turn into the corporate treasury the fees obtained by him as an insurance broker for procuring insurance in other companies received for such fees \$500, and converted the same to his own use. The officers and directors of the corporation, during the year 1890, misappropriated its funds to a large extent. A detailed statement of their doings in that regard was made a part of the complaint, showing that among the sums so squandered was \$281.73 which was paid to defendant Smith without consideration, and which he retained. The persons composing each board of directors and each executive committee of the corporation from the time of its organization to the time it was adjudged insolvent were named in the complaint, the last board of directors being composed of the following named persons: R. L. McCormick, John S. Owen, W. A. Rust, D. R. Moon, A. M. Bailey, J. T. Barber, H. E. Knapp, and W. J. Starr; and the last executive committee was composed of George B. Shaw, John S. Owen, J. T. Barber, D. R. Moon, and A. M. Bailey. By November 13, 1890, the officers and directors, with H. H. Hayden, finally perfected arrangements to cause the corporation to be wound up, a part of the plan being that a friendly receiver should be secured; that the secretary and manager of the corporation, the defendant Smith, should be suggested to the court, and his appointment se-

cured; and that he, after coming into possession of the property of the corporation as receiver, while ostensibly performing his official duties, should use his position so as to save harmless the participants in such scheme from liabilities which they had incurred by reason of the manner in which the business of the corporation had been conducted as aforesaid. The agreement so made was fully carried out, so far as the participants in the scheme could bring the same about by means of the action. Pleadings were made up in the action in form as if the proceedings were of an adversary character. The proceedings upon both sides were directed by the same hand, and in the interests of the participants in the aforesaid plan. The corporation was in due form adjudged insolvent, and Smith was appointed receiver, November 15, 1890, and he duly qualified and took possession of the assets of the corporation. Thereafter he administered such assets until he was removed, ostensibly in a legitimate manner, but in fact in furtherance of the plan pursuant to which his appointment was secured. By reason of his misconduct expenses to the extent of \$1,500 were incurred necessarily in efforts to remove him and to undo the wrongs done by him to the creditors. The amount which will ultimately be realized from the assets of the corporation will be less by \$20,000 than it would have been had Smith faithfully performed his duties; that loss being largely due to the fact that in the meantime many members of the corporation had died, others have removed from the state, and others have become insolvent. During the progress of the action the receivers have obtained from the assets of the corporation \$8,711.78. The sum of \$65,000 more will be required to pay all the liabilities of the corporation established in the action.

During Smith's administration an assessment was duly made by the court in April, 1894, and confirmed July 13, 1896. After the liabilities of the persons so assessed became fixed by the order of the court, a demand was made upon each such person for payment of the amount for which such person was liable, but no part of the liability was discharged. Such a demand was made by the first receiver and was repeated by the second receiver. November 13, 1899, by order of the court, an assessment of 100 per cent was made on so much of the premium notes in the hands of the receiver as remained uncollected, and the same amount on the premium notes wrongfully released after the debtors were liable to assessment to the extent thereof to pay the debts of the corporation; also on cash premiums and money repaid by the corporation to the policy holders as unearned premiums after the same were applicable to the payment of the debts of the corporation. January 8, 1900, on demand and notice to all persons interested, such assessment was confirmed by the court, and the receiver directed to collect the same. Notice of such assessment and of the time limited for payment thereof was

given to each person liable. More than thirty days elapsed thereafter without any payment of such assessments before the persons liable were brought into this action as defendants. All were so brought in. All the persons named in a tabulated statement, made a part of the complaint, were policy holders of the corporation, having taken out one or more policies, and are liable to contribute a proportionate share of the money necessary to pay the liabilities of the corporation to the extent of the amounts assessed against them respectively. The statement shows the names of those who gave premium notes for policies, except such as have paid the receiver in full, or settled with him by order of the court; the names of all members except as aforesaid, who took out insurance, and were assessed for any reason, and are made defendants herein, being so designated as to be readily identified, members who became such as partners being designated by their firm name under an appropriate heading; the place of residence of each policy holder while he was a member of the corporation; the number of each policy and note assessed; the kind of policy issued to each policy holder, whether cash or on the mutual plan, as to each policy holder; the period for which each policy ran; the date of the contemplated cancellation or surrender as to each policy so dealt with; the date of each note and policy; the amount each note was given for; the cash premiums paid for short policies; the amount of each of the assessments referred to as to each person affected thereby remaining unpaid, except interest from the time payment should have been made; the amount wrongfully paid to members, specifying as to each person so affected the amount received and claimed by him on the pretense that the corporation had earned enough and was competent to pay a dividend; the dates when dividends were paid; the total indebtedness as to each member, showing the policy or policies to which the indebtedness relates, interest only to be added from the time such indebtedness should have been paid. Notwithstanding the pretended cancelation of policies as above mentioned, the policies which the officers and directors attempted to terminate, and upon which money was paid back ostensibly as unearned premiums, continued as binding contracts, preserving the memberships of the holders thereof, and their liability to assessment for payment of all the debts of the association which existed or were contracted during the period of such memberships; the fact being that the indebtedness of the association was so great at the times of such attempted cancelations that the entire amount of the premium notes was required to pay the same, in order that each member should bear his proportionate part thereof. The complaint closed with a prayer for judgment for \$65,000, and for such relief against each and all of the defendants as the court should deem just and equitable.

Messrs. L. A. Doolittle and A. J. Sutherland, for appellants:

But one winding-up suit to settle the affairs of a corporation is proper, and in such suit all the rights, and all the liabilities, of creditors, officers, and stockholders are to be worked out.

Gager v. Marsden, 101 Wis. 603, 77 N. W. 922; *Hurlbut v. Marshall*, 62 Wis. 590, 22 N. W. 852; *Hurlbut v. Tayler*, 62 Wis. 607, 22 N. W. 855; *Gager v. Bank of Edgerton*, 101 Wis. 593, 77 N. W. 920; *Foster v. Posson*, 105 Wis. 99, 81 N. W. 123; *Powers v. O. H. Hamilton Paper Co.* 60 Wis. 23, 18 N. W. 20; *Michelson v. Pierce*, 107 Wis. 85, 82 N. W. 707; *Davis v. Shearer*, 90 Wis. 250, 62 N. W. 1050; *Davis v. Paroher & J. A. Stewart Co.* 82 Wis. 488, 52 N. W. 771; *Scovill v. Thayer*, 105 U. S. 143, 155, 26 L. ed. 968, 974; *Cunningham v. Wechselberg*, 105 Wis. 359, 81 N. W. 414; *Ogilvie v. Know Ins. Co.* 22 How. 380, 16 L. ed. 349; *Sanger v. Upton*, 91 U. S. 56, 62, 23 L. ed. 220, 223; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739.

The liability of a stockholder on his subscription for stock may be enforced in equity at the suit of creditors who have exhausted their remedy at law against the corporation.

Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885; *Holmes v. Sherwood*, 3 McCrary, 405, 16 Fed. 725; *Crawford v. Rohrer*, 59 Md. 599.

If any part of the bill is good, and entitles the complainant either to relief or discovery, a demurrer to the whole bill cannot be sustained.

Higinbotham v. Burnet, 5 Johns. Ch. 186; *Laight v. Morgan*, 1 John. Cas. 433; *Heath v. Erie R. Co.* 8 Blatchf. 407, Fed. Cas. No. 6,306; *Savannah, F. & W. R. Co. v. Jacksonville, T. & K. W. R. Co.* 24 C. C. A. 437, 52 U. S. App. 51, 79 Fed. 38; *Currier v. Concord R. Corp.* 48 N. H. 321; *Powell v. Spaulding*, 3 G. Greene, 443; *Edwards v. Bay State Gas Co.* 91 Fed. 947; *Many v. Beekman Iron Co.* 9 Paige, 188; *Lewis v. St. Albans Iron & Steel Works*, 50 Vt. 477; *Masters v. Rossie Lead Min. Co.* 2 Sandf. Ch. 303; *Vermilyea v. Fulton Bank*, 1 Paige, 37; *Griggs v. Thompson*, Ga. Dec. pt. 1, p. 146; *Hallsolaw v. Johnson*, Ga. Dec. pt. 2, p. 146; *Morton v. Granada Male & Female Academies*, 8 Smedes & M. 773; *Miller v. Ford*, 1 N. J. Eq. 358; *Metler v. Metler*, 19 N. J. Eq. 457; *Le Roy v. Servis*, 1 Cal. Cas. III.; *Kimberly v. Sells*, 3 Johns. Ch. 467; *Livingston v. Livingston*, 4 Johns. Ch. 294; *Parsons v. Boune*, 7 Paige, 354; *Wood v. Hathaway*, 2 Ch. Sent. 12.

Where the demurrer is to the whole bill, and the bill is in itself sufficient, aside from the allegations contained in it on which the demurrer was taken, the demurrer is properly overruled.

LaCroix v. May, 15 Fed. 236; *Conklin v. Wehrman*, 38 Fed. 874; *United States v. Southern P. R. Co.* 40 Fed. 611; *Lowe v. Burke*, 79 Ga. 164, 3 S. E. 449; *Gooch v. Green*, 102 Ill. 507; *Dimmock v. Diaby*, 20 Pick. 368; *Shearer v. Shearer*, 50 Miss. 113; 41 L. R. A.

Reading v. Stover, 32 N. J. Eq. 326; *Trenton Pass. R. Co. v. Wilson*, 53 N. J. Eq. 577, 32 Atl. 1; *Le Roy v. Veeder*, 1 Johns. Cas. 417; *Dike v. Greene*, 4 R. I. 285; *Sprague v. Rhodes*, 4 R. I. 301; *Whitbeck v. Edgar*, 2 Barb. Ch. 106; *Blount v. Garen*, 3 Hayw. (Tenn.) 88; *Crowder v. Denny*, 3 Head, 359; *Trafford v. Wilkinson*, 3 Tenn. Ch. 449.

No objections to the complaint can be sustained on the ground that the action is not brought by the receiver, for the simple reason that the action is equitable, and he is a plaintiff.

Gluck & B. Receivers, 1st ed. § 35; Smith, Receiverships, §§ 398, 406; *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 545; *Michelson v. Pierce*, 107 Wis. 85, 82 N. W. 707.

The statute of limitations does not begin to run on premium notes until after an assessment has been made.

Smith v. Bell, 107 Pa. 352; *Savage v. Medbury*, 19 N. Y. 32; *White v. Haight*, 16 N. Y. 310; *Howland v. Edmonds*, 24 N. Y. 307; *Eichman v. Hercker*, 170 Pa. 402, 33 Atl. 229; *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207; *Great Western Teleg. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214; *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Wardle v. Hudson*, 96 Mich. 432, 55 N. W. 992; *Peake v. Fuller*, 123 Mich. 684, 82 N. W. 847; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867; *Harris v. Gateway Land Co.* 128 Ala. 652, 29 So. 611.

The assessments, having been made and confirmed, cannot be attacked collaterally.

Commonwealth Mut. F. Ins. Co. v. Hayden Bros. 60 Neb. 636, 83 N. W. 922; *Parker v. Stoughton Mill Co.* 91 Wis. 174, 64 N. W. 751.

The complaint shows assessments against the defendants, a confirmation of the assessments, and a demand of payment. The tabulated statement shows the amount assessed against each, and the amount remaining unpaid. No other allegations were essential to enable the court to render judgment.

Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; *Whitaker v. Meley*, 61 N. J. L. 1, 38 Atl. 840; *Corey v. Sherman*, 96 Iowa, 114, 32 L. R. A. 490, 64 N. W. 828; *McDonald v. Ross-Lewin*, 29 Hun, 87; *Sands v. Sanders*, 28 N. Y. 416; *Tobey v. Russell*, 9 R. I. 58; *Wardle v. Townsend*, 75 Mich. 385, 4 L. R. A. 511, 42 N. W. 950; *Jackson v. Roberts*, 31 N. Y. 304.

Assessments made upon the stockholders of a bankrupt corporation by an assignee in bankruptcy, directed and sanctioned by the district court having jurisdiction of the bankrupt, are conclusive, and cannot be impeached collaterally.

Michener v. Payson, 13 Nat. Bankr. Reg. 49, Fed. Cas. No. 9,524.

Wis. Stat. 1898, § 1941e, makes the directors liable for wilfully neglecting or refusing to perform any of the duties imposed upon them by that statute.

There was no excuse for not making the

necessary assessment, for all members of the company, or, rather, the insured property of all members of the company, was liable to assessment to pay losses.

Stewart v. Lee Mutual F. Ins. Asso. 64 Miss. 499, 1 So. 743; *Rundle v. Kennan*, 79 Wis. 492, 48 N. W. 516; *Gores v. Day*, 99 Wis. 276, 74 N. W. 787; 27 Am. & Eng. Enc. Law, p. 391-V.; *Warner v. Penoyer*, 92 Fed. 181; *Gibbons v. Anderson*, 80 Fed. 345; *Briggs v. Spaulding*, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; *Hubbard v. Wear*, 79 Iowa, 678, 44 N. W. 915.

Messrs. **Wickham & Farr**, with Messrs. **Frawley, Bundy, & Wilcox**, for respondents:

A receiver appointed to wind up the affairs of an insolvent corporation can only maintain such actions as might have been maintained by the corporation itself.

High, Receivers, § 206; *Curtis v. Mollenhenny*, 58 N. C. (5 Jones Eq.) 290; *McClure v. Campbell*, 71 Wis. 350, 37 N. W. 343; *Coope v. Bolles*, 28 How. Pr. 10; *Falkenbach v. Patterson*, 43 Ohio St. 359, 1 N. E. 757.

As neither a corporation itself, nor a stockholder thereof, can maintain an action to wind up its affairs, it follows that a receiver, when appointed, cannot do so.

High, Receivers, § 205; *Strong v. McCagg*, 55 Wis. 624, 13 N. W. 895; *State ex rel. Shepard v. Sullivan*, 120 Ind. 197, 21 N. E. 1093, 22 N. E. 325; *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21.

The liability of officers and directors, imposed by §§ 1765, 1906, 1936, and 1941, is to the particular creditor sustaining damage. Such a liability is not a corporate asset.

Stewart v. Lee Mutual F. Ins. Asso. 64 Miss. 499, 1 So. 743; *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536.

The various allegations of conspiracy, failure to make assessments, borrowing money, doing business outside of the state, charging insufficient rate, etc., unaccompanied by allegations of damage and loss to the corporation, do not constitute a cause of action.

Foster v. Taggart, 54 Wis. 391, 11 N. W. 793.

Any cause of action which might have existed against the officers and directors of the Mutual Fire Association of Eau Claire for malfeasance, conversion, or neglect of duty is barred by the six years' statute of limitations.

First Nat. Bank v. King, 60 Kan. 733, 57 Pac. 952; *Williams v. Halliard*, 38 N. J. Eq. 383; *Landis v. Saxton*, 105 Mo. 486, 16 S. W. 912; *Re Lands Allotment Co.* [1894] 1 Ch. 616; *Mason v. Henry*, 83 Hun, 546, 31 N. Y. Supp. 1068; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 15 S. W. 448; *Baker v. Cummings*, 169 U. S. 189, 42 L. ed. 711, 18 Sup. Ct. Rep. 367; *Danville, H. & W. B. R. Co. v. Kase*, 41 W. N. C. 411, 39 Atl. 309; *Cullen v. Coal Creek Min. & Mfg. Co.* (Tenn. Ch. App.) 42 S. W. 693; *Baker v. Atlas Bank*, 9 Met. 197; *Hughes v. Brown*, 88 Tenn. 578, 8 L. R. A. 480, 13 S. W. 286; *Spring's Appeal*, 71 Pa. 11, 10 Am. Rep. 61 L. R. A.

684; *Thompson, Liability of Officers*, 309; *Merrill v. Monticello*, 66 Fed. 165; *Piereson v. Morgan*, 20 Abb. N. C. 428; *Piereson v. McCurdy*, 100 N. Y. 608, 2 N. E. 615; *Price v. Mulford*, 107 N. Y. 303, 14 N. E. 298; *Newson v. Bartholomew County*, 103 Ind. 526, 3 N. E. 163; *Wilmerding v. Russ*, 33 Conn. 68; *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417; *Best v. Campbell*, 62 Pa. 476; *Baxter v. Moses*, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350; *Wood, Limitation of Actions*, § 58; *Wheeler v. Piper*, 56 N. C. (3 Jones Eq.) 249; *Sheldon v. Keokuk Northern Line Packet Co.* 10 Biss. 470, 8 Fed. 769; *Link v. McLeod*, 194 Pa. 566, 45 Atl. 340; 4 Thomp. Corp. § 4495; *Morawetz, Priv. Corp.* § 271; *Cook, Stock & Stockholders*, § 701; *Peabody v. Flint*, 6 Allen, 52; *Farnam v. Brooks*, 9 Pick. 212; *Carrol v. Green*, 92 U. S. 509, 23 L. ed. 738; 6 Thomp. Corp. § 7839; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; *First Nat. Bank v. Greene*, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754.

The statute of limitations runs as to each defendant until the summons is actually served upon him.

Wis. Rev. Stat. §§ 4239, 4240; *Green v. Sanford*, 34 Neb. 363, 51 N. W. 967; *Miller v. M'Intyre*, 6 Pet. 61, 8 L. ed. 320; *Wigton v. Smith*, 57 Neb. 299, 77 N. W. 772; *Harrison v. McCormick*, 122 Cal. 651, 55 Pac. 592; 13 Enc. Pl. & Pr. 196; *Bell's Appeal*, 115 Pa. 88, 8 Atl. 177; *Levy v. Wilcox*, 96 Wis. 131, 70 N. W. 1109.

The commencement of the original action against the defendant insurance company for the purpose of sequestrating its assets did not stop the running of the statute in favor of the officers, directors, and policy holders on their alleged personal liability.

High, Receivers, § 205; *Whalen v. Gordon*, 37 C. C. A. 70, 95 Fed. 305; *Great Western Teleg. Co. v. Purdy*, 83 Iowa, 430, 50 N. W. 45.

Any right of action the corporation, its receivers, or its creditors, may have had against the policy holders for the unpaid balance of their premium notes, or for monies improperly paid for dividends or unearned premiums, accrued immediately on the insolvency of the company, and is, therefore, barred by the six years' statute of limitations.

Mutual Guaranty F. Ins. Co. v. Barker, 107 Iowa, 143, 77 N. W. 868; *Farmers' & M. Ins. Co. v. Smith*, 63 Ill. 187; *Given v. Retter*, 162 Pa. 638, 29 Atl. 703; *Schimpf v. Lehigh Valley Mut. Ins. Co.* 86 Pa. 373; *Lycoming Ins. Co. v. Com.* 10 W. N. C. 230.

The assessment made by Boyd as receiver, more than six years after the cessation of business of the mutual fire association, is a nullity.

McCully v. Pittsburgh & C. R. Co. 32 Pa. 25; *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. 22, 72 Am. Dec. 770; *Hamilton v. Clarion, M. & P. R. Co.* 144 Pa. 34, sub nom. *Hamilton v. Jackson*, 13 L. R. A. 779, 23 Atl. 53; *Great Western Teleg. Co. v. Purdy*, 83 Iowa, 430, 50 N. W. 45.

If this is an action under the statute to wind up the affairs of the insolvent corporation, then the right of the present creditors to bring such action, and to make its members, officers, and directors parties thereto, accrued immediately on the insolvency of the company, without the necessity of an assessment being made.

Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259; *King v. Armstrong*, 50 Ohio St. 222, 34 N. E. 164; *Hollingshead v. Woodward*, 107 N. Y. 101, 13 N. E. 621; *Washington Sav. Bank v. Butchers' & D. Bank*, 107 Mo. 133, 17 S. W. 644; *Shackamacon Bank v. Dougherty*, 20 W. N. C. 297; 1 Cook, Corp. § 195, note; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Younglove v. Kelly Island Lime Co.* 49 Ohio St. 663, 33 N. E. 234; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120; *Garesche v. Lewis*, 93 Mo. 197, 6 S. W. 54; *Franklin Sav. Bank v. Bridges* (Pa.) 6 Cent. Rep. 765, 8 Atl. 611; *Glenn v. Dorsheimer*, 23 Fed. 695; *Webber v. Hovey*, 108 Mich. 49, 65 N. W. 619; *Glenn v. Priest*, 28 Fed. 907; *Citizens & M. Sav. Bank & T. Co. v. Gillespie*, 115 Pa. 564, 9 Atl. 73.

It appears upon the face of the complaint that the plaintiffs have been guilty of laches by permitting the statute of limitations to run in favor of the officers and directors, who would otherwise have been liable. Under such circumstances a court of equity will deny plaintiffs any relief.

Sheldon v. Rockwell, 9 Wis. 158, 76 Am. Dec. 285; *Sable v. Maloney*, 48 Wis. 331, 4 N. W. 479; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532; *Kobiter v. Albrecht*, 82 Wis. 58, 51 N. W. 1124; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; *Gallihier v. Cadwell*, 145 U. S. 368, 36 L. ed. 728, 12 Sup. Ct. Rep. 873; *Wilbard v. Wood*, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176; *Penn. Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223.

In a suit to collect an assessment the complaint must allege, and the evidence show, that the loss to be paid with the proceeds accrued during the membership of the person assessed.

Manlove v. Naw, 39 Ind. 289; *Whitman v. Mason*, 40 Ind. 189; *Embree v. Shideler*, 36 Ind. 433; *Great Falls Mut. F. Ins. Co. v. Harvey*, 45 N. H. 292; *Ouykendall v. Corning*, 88 N. Y. 139; Am. Dig. 1899, p. 2403; *Thomas v. Whallon*, 31 Barb. 172; *Berriman*, Ins. Dig. 164; *Detroit Manufacturers' Mut. F. Ins. Co. v. Merrill*, 101 Mich. 393, 59 N. W. 661; Wis. Rev. Stat. § 1941; *Davis v. Shearer*, 90 Wis. 255, 62 N. W. 1050.

On motion for rehearing.

An officer and director of a corporation is not a trustee of an express trust so as to prevent the operation of the statute of limitations.

Pom. Eq. Jur. §§ 1044 et seq., 1089; 10 Am. & Eng. Enc. Law, pp. 73-76; *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417; *Spering's Appeal*, 71 Pa. 11, 10 Am. Rep. 684; *Williams v. Halliard*, 37 N. J. 61 L. R. A.

Eq. 378; *Landis v. Saxton*, 105 Mo. 486, 16 S. W. 912; *Cullen v. Coal Creek Min. & Mfg. Co.* (Tenn. Ch. App.) 42 S. W. 693; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 15 S. W. 453; *Morawetz*, Priv. Corp. §§ 518, 271; *Baker v. Atlas Bank*, 9 Met. 197; *Baxter v. Moses*, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350; *Pierson v. McCurdy*, 33 Hun, 526, Affirmed in 100 N. Y. 608, 2 N. E. 615; *Newson v. Bartholomew County*, 103 Ind. 526, 3 N. E. 163; *Wood*, Limitation of Actions, § 58; Pom. Eq. Jur. 1044; *Link v. McLeod*, 194 Pa. 566, 45 Atl. 340; *Cook*, Stock & Stockholders, § 701; 6 Thomp. Corp. § 7839.

A technical trustee (against whom the statute does not run) can only be created, whether of real or personal property, by a formal instrument which passes the legal title to the trust estate, and contains a proper declaration of the trust.

Hill, Trustees, p. 63; *Story*, Eq. Jur. 2d ed. § 1089; *Strong v. Gordon*, 96 Wis. 480, 71 N. W. 886.

The statute of limitations applies to any and all trusts created by fiction of law.

Angell, Limitation of Actions, § 468; *Wood*, Limitation of Actions, § 58; *Carroll v. Green*, 92 U. S. 509, 23 L. ed. 738; *Priest v. Mulford*, 107 N. Y. 303, 14 N. E. 298.

Corporate property does not become a trust fund for the benefit of corporate creditors, even though the corporation be insolvent; and its directors do not become trustees of such property until the company ceases to be a going concern, or cessation of business is so imminent that its officers and directors know, or ought to know, that it cannot longer continue.

Ballin v. Merchants' Exch. Bank, 89 Wis. 286, 27 L. R. A. 357, 61 N. W. 1118; *Ford v. Hill*, 92 Wis. 188, 66 N. W. 115; *South Bend Chilled Plow Co. v. George C. Cribb Co.* 97 Wis. 230, 72 N. W. 749; *Gilman v. Gross*, 97 Wis. 228, 72 N. W. 885; *Hinz v. Van Dusen*, 95 Wis. 508, 70 N. W. 657; *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 79 N. W. 51; *Hamilton v. Menominee Falls Quarry Co.* 106 Wis. 360, 81 N. W. 876; *Glencood Mfg. Co. v. Syme*, 109 Wis. 362, 85 N. W. 432; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226.

Cassoday, Ch. J., delivered the opinion of the court:

The numerous claims made against the very numerous defendants, the variety of questions involved, and the mixed condition of the things alleged, have called for and received the very careful consideration of all the members of the court. For the delay in deciding the case the writer assumes the responsibility. Counsel for the plaintiff have, in their brief, classified the thirteen demurrers according to the nature of the claims made against the respective demurrants, and numbered them from 1 to 13, consecutively, as they appear in the record. Counsel for the defendants have acquiesced in such classification, and given their views in respect to the same. For convenience, and to avoid confusion, we shall keep in

view such classification, but not in the order stated by counsel. The most important question presented is whether the amended complaint states a cause of action, not barred by the statutes of limitation against any of the defendants.

1. Six of the demurrers call upon us to answer the question as to whether such amended complaint states such cause of action against the parties named as demurrants who at one time held policies in the corporation. Under the repeated and recent adjudications of this court there can be no question but what this must be regarded as a creditor's suit, brought in equity, under the statutes, to wind up the affairs of an insolvent corporation. Rev. Stat. 1898, §§ 3216-3228. Such being the nature of the action, all the rights and liabilities of creditors, officers, stockholders, and members were to be worked out in this suit. *Gager v. Bank of Edgerton*, 101 Wis. 593, 77 N. W. 920; *Gager v. Marsden*, 101 Wis. 598, 77 N. W. 922; *Foster v. Posson*, 105 Wis. 99, 81 N. W. 123; *Finney v. Guy*, 106 Wis. 256, 49 L. R. A. 486, 82 N. W. 595; *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536; *Gores v. Field*, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411; *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875. Under such statutes the corporation was adjudged insolvent, and a receiver was appointed November 15, 1890. The statute provides that, "whenever any corporation . . . authorized by law to make insurance shall become insolvent or unable to pay its debts, or shall neglect or refuse to pay its notes or evidence of debts on demand, or shall have violated any of the provisions of its act of incorporation or of any other law binding on such corporation, any court having jurisdiction may, by injunction, restrain such corporation, and its officers," etc. § 3218. The statute further provides that "such injunction may be issued upon the commencement of an action for the purpose of closing up the business of such corporation . . . by any creditor or stockholder of such corporation, or at any time thereafter upon proof of the facts required to authorize the issuing of the same. The court may, in any stage of such action, appoint one or more receivers to take charge of the property and effects of such corporation, and to collect, sue for, and recover the debts and demands that may be due, and the property that may belong, to such corporation, who shall in all respects possess the powers and authority conferred, and be subject to all the obligations imposed, upon receivers in other cases, and in all respects be subject to the control of the court." § 3219. So, the statute further provides that "whenever any creditor of any corporation shall seek to charge the directors, trustees, or other officers or stockholders thereof on account of any liability created by law he may commence and maintain an action for that purpose in the circuit court, and may, at his election, join the corporation in such action." § 3223. In such an action the statute further provides that "if the property of such corporation shall be in-

sufficient to discharge its debts, the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as shall be necessary to satisfy the debts of the corporation." § 3226. A member of such mutual insurance corporation must be regarded in a similar position to a stockholder of such association.

The corporation having been adjudged insolvent, and a receiver thus appointed, the right to enforce any liability against its members thereupon accrued. Such, in effect, is a recent ruling of this court. *Booth v. Dear*, 96 Wis. 516, 519-521, 71 N. W. 816. Thus, in an opinion by Mr. Justice Brewer, in the Federal court, it was held that, "where an insolvent corporation ceases to do business, and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor, and against such creditors and trustees, immediately." *Glenn v. Dorsheimer*, 23 Fed. 695. If a cause of action accrued against any of such members at that time, then the statute of limitation began to run in favor of such member at that time. Rev. Stat. 1898, §§ 4219, 4222. Thus, it is stated by a standard text writer that, "where the liability of the shareholder is immediate and primary, and not contingent on the obtaining of a judgment against the corporation, it is clear that the statute of limitations begins to run in favor of the shareholder when the debt matures against the corporation." Cook, Stock, Stockholders & Corp. Law, 3d ed. p. 301, § 225. It is held in Ohio that, "where a company has become insolvent, and made an assignment of all its property for the benefit of its creditors, the right of the creditors, or any of them, then accrues to commence suit against the stockholders on their liability under the statute, without any prior proceeding against the company; and the statute of limitations begins to run from that time against the right of action." *Barriek v. Gifford*, 47 Ohio St. 180, 24 N. E. 259. To the same effect, *Younglove v. Kelly*, *Island Lime Co.* 49 Ohio St. 663, 33 N. E. 234; *Davidson v. Rankin*, 34 Cal. 503; *Stilphen v. Ware*, 45 Cal. 110; *Bank of San Luis Obispo v. Pacific Coast S. S. Co.* 103 Cal. 594, 596, 37 Pac. 499; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Hollingshead v. Woodward*, 107 N. Y. 96, 13 N. E. 621; *Washington Sav. Bank v. Butchers' & D. Bank*, 107 Mo. 133, 17 S. W. 644. In a Michigan case it is held that "the statute of limitations begins to run, as against such right of action immediately upon the dissolution of the corporation and the appointment of a receiver." *Webber v. Hovey*, 108 Mich. 49, 65 N. W. 619. Thus, it has been held in the Supreme Court of the United States that "the statute of limitations is a bar to a suit, brought four years after a bank in South Carolina had permanently suspended specie payments, by a holder of its notes, to enforce the individual liability

of the stockholders." *Terry v. McLure*, 103 U. S. 442, 26 L. ed. 403. We must hold that the statute of limitations began to run in favor of the policy holders in question November 15, 1890. All of such policies were issued between October 14, 1885, and August 1, 1890. None of the defendants who joined in the six several demurrers mentioned were made parties to this action until after May 8, 1900. Until they were so made parties, and the summons issued against them, the statute of limitations did not stop running in their favor; and this is so to each of the six groups of such defendants. This has recently, in effect, been so decided by this court. *Gager v. Paul*, 111 Wis. 638, 647, 648, 87 N. W. 875. It is unnecessary to add anything to what is there said in the opinion of Mr. Justice Dodge. As indicated in the statement of facts, twenty-five of such policies were issued and paid for at the time of delivery in cash, and continued for one year or less. The others, and by far the greater number, were issued on the mutual plan, and to continue for three or five years, for which premium notes were given, liable to assessments for losses and expenses from time to time as they accrued. This court has held, in effect, that, where insolvency occurs during the defendant's insurance in such mutual fire insurance company, the action of the court, under the statutes cited, in adjudging such insolvency and granting an injunction and appointing a receiver, operates to cancel such policy and all other existing policies in such company. *Davis v. Shearer*, 90 Wis. 250, 255, 62 N. W. 1050; *Dewey v. Davis*, 82 Wis. 500, 52 N. W. 774. The principle upon which those two cases were decided seems to be applicable here. So there is an additional reason why the statute of limitations began to run against all of such policy holders November 15, 1890; and the right of action was completely barred, as to them, before they were made parties to the action. The nine defendants who joined in demurrer No. 3 at one time held such cash policies which were surrendered before the expiration of the year, and it is here sought to recover from them the unearned premium. We must hold that the complaint fails to state facts sufficient to constitute a cause of action, not barred by the statute of limitations, as against such nine demurrants; and for that reason such demurrer was properly sustained. The same is true with demurrer No. 4, where it is sought to charge the non-resident demurrants with liability on such premium notes given by them for such mutual policies. The same is true with demurrer No. 5, where it is sought to charge a large number of resident demurrants by reason of assessments made upon such premium notes. The same is true with demurrer No. 6, where it is sought to recover from such demurrants unlawful dividends paid to them at various times between 1887 and 1890. The same is true with demurrer No. 11, where it is sought to charge certain resident demurrants by reason of assessments made upon such premium notes, and 61 L. R. A.

also to recover back from some of them moneys paid as pretended dividends and unearned premiums. The same is true with demurrer No. 13, where it is sought to charge the demurrant by reason of an assessment upon such premium note for a policy dated December 10, 1888.

2. Five of the demurrers call upon us to determine whether the amended complaint states facts sufficient to constitute a cause of action, not barred by the statute of limitations, against the officers and directors of the corporation. There can be no question but what the allegations of their misconduct and malfeasance do constitute a cause of action against them. The important question is whether such cause of action is barred by the statute of limitations. Counsel for the plaintiffs claims that the cause of action did not accrue in favor of the creditors who are plaintiffs until they discovered the facts constituting the fraud. *Rev. Stat. 1898, § 4222, subd. 7.* To this counsel for the defendants reply that, if there were any facts to prevent the running of the statute, the burden was on the plaintiffs to plead and prove them. *Howell v. Howell*, 15 Wis. 55; *Tucker v. Lovejoy*, 73 Wis. 66, 40 N. W. 627. But there is another view of the question, which seems to be a complete answer to the contention that the statute is a bar to such cause of action. A learned and able text writer states, in effect, that the correct view, as clearly deduced from the mass of decisions on the subject, is that the officers and directors of a corporation are, in equity, trustees of an express trust for the benefit of shareholders and creditors, and hence are within the principle that the statute of limitations does not run in favor of such trustees as against the *cestui que trust*. 3 *Thomp. Corp. § 4128.* That such officers and directors are such trustees seems to be well established. *Simons v. Vulcan Oil & Min. Co.* 61 Pa. 202, 100 Am. Dec. 628; *Pearson v. Concord R. Corp.* 62 N. H. 537; *Sweeney v. Wheeling Grape Sugar & Ref. Co.* 30 W. Va. 443, 4 S. E. 431; *Farmers' & M. Bank v. Downey*, 53 Cal. 466, 31 Am. Rep. 62; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Bank of Mutual Redemption v. Hill*, 56 Me. 385, 96 Am. Dec. 470; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530. This court has expressly held that "the directors and officers of an insolvent corporation are trustees for the creditors, and must manage its property and assets with strict regard to their interests." *Haywood v. Lincoln Lumber Co.* 64 Wis. 639, 26 N. W. 184. The trust-fund doctrine, so called, recognized in that case, must be regarded as modified so far as creditors of a going corporation are concerned. *Ballin v. Merchants' Exch. Bank*, 89 Wis. 286, 27 L. R. A. 357, 61 N. W. 1118; *Hinz v. Van Dusen*, 95 Wis. 503, 507-509, 70 N. W. 657; *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 79 N. W. 51. But there is no doubt but what the managing officers of a corporation are at all times trustees for the corporation and its stockholders, and also for the creditors after the corporation is adjudged insolvent. *Ibid.*

In fact, our statute on the subject, which is much broader than in some states, provides, among other things, that "express trusts may be created: . . . (5) For the beneficial interests of any person or persons when such trust is fully expressed and clearly defined upon the face of the instrument creating it." Rev. Stat. 1898, § 2081, subd. 5. The trust in the case at bar was necessarily and from the very nature of the corporation, "fully expressed and clearly defined" in the articles of incorporation. We must hold that the officers and directors of the association were trustees of an express trust. It follows that the statute of limitations did not run in their favor against the creditors of the corporation. This court has expressly held that "the statute of limitations has no application in the case of an express trust where there has been no denial or repudiation of the trust." *Bostwick v. Dickson*, 85 Wis. 593, 26 N. W. 549; *Williams v. Williams*, 82 Wis. 393, 399, 52 N. W. 429; *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405; *Taylor v. Hill*, 86 Wis. 99, 106, 56 N. W. 738. Counsel for the defendants cite a large number of cases said to be to the contrary, but, so far as we have examined them, they are in actions by the corporation, or its receiver, or are otherwise inapplicable or distinguishable. We must hold that the statute of limitations did not run in favor of any such officers or directors. The result is that the amended complaint states a good cause of action against the two defendants who joined in demurrer No. 1, since both were directors and one was treasurer. The same is true as to the defendants who joined in demurrer No. 7, including the executors of the will of D. R. Moon, deceased; and also the defendants who joined in demurrer No. 8, including the administrators of the estate of George B. Shaw, deceased; and also the defendants who joined in demurrer No. 10; and also the defendants who joined in demurrer No. 12, including the executors of the will of Ralph E. Rust, deceased,—since in each case such defendants were sought to be charged as officers and directors, or simply as directors, or as the representatives of such officers and directors. We perceive no good reason why such executors and administrators stand in any different position as to the statute of limitations pleaded than the deceased officers whom they represent. True, the defendants who joined in each of the two demurrers last named were only directors from October 15, 1885, to January 13, 1886, but they were liable for whatever malfeasance they were guilty of while in office, notwithstanding they had ceased to be directors before the commencement of the action. 1 Morawetz, Priv. Corp. § 503. The mere fact that the amended complaint seeks to charge the two defendants who joined in demurrer No. 1 as members of the corporation, upon which claims the statute of limitations had run, does not prevent their being held liable as directors. "A demurrer to the entire complaint is properly overruled where it is not good as to one of the causes of action stated." 61 L. R. A.

Pinkum v. Eau Claire, 81 Wis. 301, 51 N. W. 550. So it is held that, "where a complaint states a good cause of action as to certain failures of duty on the part of defendant, a general demurrer thereto will not be sustained merely because it attempts, but fails, to state other failures of duty." *Drefahl v. Connell*, 85 Wis. 109, 55 N. W. 160. Each of the five demurrers last mentioned is based upon another ground, which will hereinafter be considered, and may be sustained.

3. A large number of the members of the corporation, including the Northwestern Lumber Company, joined in demurrer No. 2. The Northwestern Lumber Company was one of the plaintiffs which commenced the action November 13, 1890; and May 8, 1900, by order of the court, it was made defendant instead of plaintiff. Manifestly, the statute of limitations did not run in favor of that company, since it has been a party to the action ever since the suit was first commenced,—more than eleven years ago. This being so, the amended complaint stated a good cause of action against that company. Thus, it appears that one of the demurrants against whom a good cause of action is stated is joined with a large number of members of the corporation in whose favor the statute of limitations had run. This court has repeatedly held that "a joint general demurrer to a complaint for insufficiency on behalf of several defendants is bad if the complaint states a cause of action against any one of them." *Mark Paine Lumber Co. v. Douglas County Improv. Co.* 94 Wis. 322, 325, 68 N. W. 1013, and cases there cited. The result is that we must hold that the amended complaint states a cause of action against the defendants who joined in demurrer No. 2. But that demurrer is based upon another ground, which will hereinafter be considered, and may be sustained. It will be observed that each and every of the twelve causes of action mentioned was in favor of the creditors of the corporation.

4. The remaining demurrer, No. 9, is interposed by James A. Smith, who was appointed receiver November 15, 1890, but who was never an officer or director of the corporation. The amended complaint seeks to charge him with having, prior to May 15, 1891, and while he was such receiver, wrongfully converted to his own use \$500 belonging to the corporation; and also with having obtained, without consideration, on November 12, 1890, and before his appointment as receiver, \$281.73, belonging to the corporation, and converting the same to his own use; and also with gross misconduct in managing the receivership, whereby large sums of money were lost to the corporation. The facts alleged in the amended complaint are sufficient to constitute a cause of action against James A. Smith, and in favor of the receiver Boyd, but not in favor of the creditors of the corporation. It therefore stands as an independent action in favor of the receiver and against Smith. His demurrer, however, like the other demurrers, is based upon another ground, which will now be considered.

5. Each of the several demurrers is in part upon the ground that it appears upon the face of the amended complaint that several causes of action have been improperly united. As indicated, the amended complaint fails to state facts sufficient to constitute a cause of action as against the defendants named in any one of the six demurrers first considered. It is well settled that they are not to be considered in determining whether several causes of action have been improperly united. *Bassett v. Warner*, 23 Wis. 673; *Truesdell v. Rhodes*, 26 Wis. 215; *Willard v. Reas*, 26 Wis. 540; *Lee v. Simpson*, 29 Wis. 333; *Schiffer v. Eau Claire*, 51 Wis. 385, 8 N. W. 253; *Hiles v. Johnson*, 67 Wis. 517, 30 N. W. 721. It is only where the complaint states two or more good causes of action that a demurrer will lie for misjoinder. *Ibid.* As indicated, the amended complaint states a good cause of action in favor of the creditors and against the defendants named in six of the demurrers, and also states a good cause of action in favor of the receiver Boyd and against the defendant James A. Smith. Is this independent cause of action in favor of Boyd properly joined with the causes of action in favor of the creditors? Under the repeated rulings of this court we must answer in the negative. *Barnes v. Beloit*, 19 Wis. 93; *Pier v. Fond du Lac County*, 53 Wis. 432, 10 N. W. 686; *Shanahan v. Madison*, 57 Wis. 276, 283, 15 N. W. 154; *Linden Land Co. v. Milwaukee Electric R. & Light Co.* 107 Wis. 493, 508, 509, 83 N. W. 851. It follows from what has been said that demurrers numbered from 1, 2, 7, 8, 9, 10, and 12 were each and all properly sustained, but only upon the ground that several causes of action are improperly united.

The appeal from the order of the Circuit Court refusing to state the grounds upon which such demurrers were sustained is dismissed. The several orders of the Circuit Court sustaining such demurrers are each and all affirmed, and the cause is remanded for further proceedings according to law.

A petition for rehearing having been filed, **Bardeen, J.**, handed down the following response:

A rehearing of this case was granted on the sole question of whether the statute of limitations had run in favor of the officers and directors of the defendant corporation. In the opinion (*ante*, 924) this court held that such statute had not run, basing such holding upon the proposition that such officers and directors were trustees of an express trust. We are now urged to reconsider and recede from that position.

It abundantly appears from the complaint that more than six years had elapsed between the time of the commission of the acts for which such officers and directors are sought to be held liable and the date they were made parties to this action, so that, unless they are brought within some rule which prevents the running of the statute, they may invoke it, and thus resist the claims sought to be enforced against them. Strictly speaking, this action is not one in which the

creditors are seeking to hold the officers of the corporation as trustees for themselves. It is rather an action in the right of the corporation itself, and brought by the creditors on its behalf because the corporation cannot or will not sue. It was not intended, nor can it be fairly inferred from the former opinion that we held, that the officers of a going corporation were trustees of creditors. We do not intend to abate one jot or tittle from the rule now firmly established in this state on the so-called trust-fund doctrine. The recent cases of *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 79 N. W. 51; *Killen v. Barnes*, 106 Wis. 546-572, 82 N. W. 536, and *Hamilton v. Menominee Falls Quarry Co.* 106 Wis. 352, 81 N. W. 876, sufficiently indicate the position of this court, and by that position we are still disposed to stand. This action, being one in the right of and on behalf of the corporation, is open to any defense which the defendants might have urged, had the corporation itself brought the suit. The acts alleged against the officers are of misfeasance and malfeasance. No doubt can reasonably be entertained but that the corporation might have brought an action at law at any time within six years after the commission thereof. As between the corporation and its officers, the latter were liable in a straight action at law any time during the six years next after their shortcoming. It is not perceived how the fact that creditors must bring their suit in equity, when the corporation cannot or will not act, changes the relations of the parties. The creditors possess no greater right than the corporation. They are bound by the legal status of the parties, and cannot maintain this action unless the relation between the corporation and its officers is held to be such as to render the six-year statute of limitation inapplicable.

We have now reached the very heart of the controversy between the parties. The general rule of law was correctly stated in the opinion that "the statute of limitations has no application in the case of an express trust, where there has been no denial or repudiation of the trust." If, therefore, the officers and directors of a corporation are indeed trustees of an express trust, as heretofore held, that ends the controversy. We are convinced, however, that we stated the rule too broadly in the former opinion. The rule quoted from *Thompson on Corporations* is not fully supported by the authorities. It is not easy to define with exactness the precise relation existing between a corporation and its stockholders, on the one side, and the officers and directors, on the other. The latter are certainly not trustees of an express trust, under the statute mentioned in the opinion. In *Lamberton v. Pereles*, 87 Wis. 449, 459, 23 L. R. A. 824, 58 N. W. 776, this court, by the present Chief Justice, said: "In this state we have no statute making the chapter on uses and trusts, or any part of it, applicable to personal property." The officers of a corporation have no title to its real property, so that they do not become express trustees under the statute. Neither have they the legal

title to either the personal property or the stock of the corporation. Their relation to the corporation is thus defined in 2 Pom. Eq. Jur. § 1089: "The directors and supreme managing officers of corporations are constantly spoken of as trustees. They are not, however, true trustees, with the corporation or the stockholders as their true *cestui que trust*, since they hold neither the legal title to the corporate property, nor that to the stock. In fact, directors are clothed at the same time with a double character,—that of quasi trustees and that of agents." The English court, in *Ex parte Chippendale*, 4 De G. M. & G. 19-52, speaking of this relation, says: "Although directors undoubtedly stand in the position of agents, and cannot bind their companies beyond the limits of their authority, they also stand, in some degree, in the position of trustees." The Supreme Court of Pennsylvania, considering this same question, said: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are undoubtedly said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries," etc. *Sperling's Appeal*, 71 Pa. 11, 10 Am. Rep. 684. The Tennessee court speaks of the matter thus: "Directors are not express trustees. . . . They are mandataries. They are agents. They are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith." *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630-649, 15 S. W. 448. See *Pearson v. Concord R. Corp.* 62 N. H. 537; *Bank of Mutual Redemption v. Hill*, 56 Me. 385, 96 Am. Dec. 470; *Landis v. Saxton*, 105 Mo. 486, 490, 16 S. W. 912. Expressions of this kind without number might be cited without getting any nearer exactitude of definition of this relation. No court that we are aware of has ever defined the relation as broadly as was stated in the former opinion by this court. We therefore withdraw the statement that such officers and directors are trustees of an express trust, as defined by Rev. Stat. 1898, § 2081.

We will now take up the question of whether their relation is such that, under the circumstances alleged in the complaint, they cannot avail themselves of the benefit of the statute of limitations. At this point we are met by a divergence in the authorities. One line of cases, of which *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, is a type, holds that the managers of a savings bank stand in the relation of trustees to depositors, so that the statute of limitations will not be a bar against a charge of mismanagement on their part which had occurred more than six years before the filing of the bill. See *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Southern Mut. Ins. Co. v. Pike*, 32 La. Ann. 483; *Coxe v. Huntsville Gaslight Co.* 106 Ala. 373, 17 So. 626; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 61 L. R. A.

412. The ruling in New Jersey case seems to have been based expressly upon the holding that the relation between the directors and depositors, who were mere creditors, was similar to that of trustee and *cestui que trust*, and that the right of the depositor was a purely equitable one, which he could not enforce in a court of common law. It is perfectly evident that this court cannot follow this decision without overruling a large line of cases repudiating the trust-fund doctrine. Neither the corporation nor its governing body, so long as it is a going concern, holds its property in trust for creditors. The officers or directors occupy a fiduciary relation, demanding care, vigilance, and good faith. If they violate their duty, they at once become responsible to the corporation. If they are guilty of misfeasance or malfeasance, the latter may at once bring an action at law to enforce such liability. If the corporation refuses to act, the stockholders before insolvency, and the creditors after insolvency, may enforce such liability in the right of the corporation, and not otherwise. Such right is not based entirely upon the relation of trusteeship sustained to the creditors, but rather upon the legal right of the corporation to compel them to make reparation for their wrong. The right of the creditor to enforce the rights of the corporation may be said to rest upon the so-called fiduciary relation which the officers sustain to the corporation, and indirectly to them. The fact that the creditor must sue in equity does not alter the situation. The application of the statute of limitations in equity is determined by the cause of action stated, rather than by the nature of relief demanded. *Hughes v. Brown*, 88 Tenn. 578, 587, 8 L. R. A. 480, 13 S. W. 286. The cause of action stated in the complaint being one in the right of the corporation, and one which it might have enforced in an action at law, it becomes susceptible to such objections as the recalcitrant officers might have urged, had the corporation brought the suit.

The case of *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530, much relied upon, is bottomed upon two facts which this court cannot recognize as substantial. One is "that the assets of a corporation are, in equity, a trust fund," and the other is that the relation between the officers and the corporation has "all the elements of an express trust." The case of *Southern Mut. Ins. Co. v. Pike*, 32 La. Ann. 483, was one where the directors intrusted the accounts and assets of the company to one who united in himself the offices of president and cashier, and who died without rendering an account of his trust. The court held that prescription did not run on a demand for a return of the property until the heir had done some act equivalent to a repudiation of the trust. We have no quarrel with the holding. *Coxe v. Huntsville Gaslight Co.* 106 Ala. 373, 17 So. 626, simply holds that the right of a corporation to require an accounting from its president, who was also its general manager and controlled and managed all its affairs for many years, cannot be barred by the statute of limita-

tions when it is shown that the failure to assert the right sooner was due to the refusal of said officer to allow an examination of his books, and to his deception and misrepresentation as to the condition of corporate affairs. The decision rests upon the fraud of the officer, and misrepresentation to the governing body. The case of *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412, may be dismissed with the following quotation from the opinion: "As to the statute of limitations, it need only be said that this is a case of a direct trust, purely technical, not cognizable at law, but falling within the proper, peculiar, and exclusive jurisdiction of a court of equity."

This review of the authorities cited in support of the appellants' position is sufficient to show the difficulty this court must experience in attempting to follow them. On the other hand, there is a clear line of authorities taking a contrary view. In the case of *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417, Chancellor Kent speaks on the subject as follows: "The objection that the society held the money in question in the character of trustees, and that this was a trust which, upon equity principles, was not within the statute, has been the main object of discussion in the cause; and there is ground for a good deal of embarrassment in the examination of the question, arising from the loose manner in which the rule is often mentioned in the books, and the want of consistency, as well as precision, in the series of cases applicable to the point. I cannot assent to the proposition that all cases of direct and express trust, and arising between trustee and *cestui que trust*, are to be withdrawn from the operation of the statute of limitations, notwithstanding a clear and certain remedy exists at law. The word 'trust' is often used in a very broad and comprehensive sense. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee, and may be sued either, at law for money had and received, or in equity, as a trustee, for a breach of trust. Willes, Ch. J., in *Scott v. Surman*, Willes, Rep. 404. The reciprocal rights and duties founded upon the various species of bailment, and growing out of those relations, . . . are all cases of express and direct trust. . . . Are all such cases to be taken out of the statute of limitations, under the notion of a trust, when one of the parties selects his remedy in this court? A review of the decisions will enable us, as I apprehend, to deduce from them a safer and sounder doctrine, and to establish upon the solid foundations of authority and policy this rule: That the trusts intended by the courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court." From his review of the authorities, it may be said that as long as there is a continuing and subsisting trust, acknowledged or acted upon by the parties,

the statute does not apply, but if the trustee denies the right of his *cestui que trust*, and the holding becomes adverse, lapse of time from that period may constitute a bar in equity, but other trusts which are the ground of an action at law are not exempted from the operation of the statute. *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837, was an action by the receiver of an insolvent insurance company to compel a trustee (holding the same office as a director under our statutes) to account for assets fraudulently misapplied by him. The court held that the receiver, as the representative of the corporation, might have sued the defendant, in an action at law, for the damages sustained from his misconduct, or in equity, as he did, to compel an accounting as to the property wasted and lost; that such action was barred by the lapse of six years between the misapplication and the commencement of the suit. *Pierson v. McOurdy*, 33 Hun, 520, Affirmed in 100 N. Y. 608, 2 N. E. 815, holds pretty much the same doctrine. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 15 S. W. 448, was a suit against the officers and directors of a corporation for losses caused by their neglect and mismanagement of the corporate affairs. The following propositions were decided: That primarily such a suit was maintainable at law by the corporation alone, but creditors might maintain the action in equity when the corporation was disabled to sue or wrongfully refused to sue; that such suit, whether brought at law by the corporation itself, or in equity by a creditor, was alike subject to the bar of the statute of limitations; and that the six-year statute was the one that was applicable. So in a later case (*Cullen v. Coal Creek Min. & Mfg. Co.* [Tenn. Ch. App.] 42 S. W. 693) a demurrer to a bill against directors of a corporation for malfeasance in office was sustained after the lapse of six years, on the ground that such directors were not such direct or technical trustees as to take the case without the statute. See *Hughes v. Brown*, 88 Tenn. 578, 8 L. R. A. 480, 13 S. W. 286. The supreme court of Missouri followed substantially the same rule in an action brought against the secretary of a corporation for withholding money of the concern. *Landis v. Saxton*, 105 Mo. 486, 16 S. W. 912. In Indiana the rules above mentioned were applied in an action against public officers to recover moneys received by them under color of their offices; the court holding that, when money can be recovered in an ordinary action at law, the statute of limitations was a valid defense. *Newsom v. Bartholomew County*, 103 Ind. 526, 3 N. E. 163. In *Baxter v. Moses*, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350, it is said that the directors of a corporation hold the corporate property under an implied or constructive trust, and that one who is not actually a trustee, but upon whom the character is forced by a court of equity, may avail himself of the statute of limitations. See *Link v. McLeod*, 194 Pa. 566, 45 Atl. 340. Upon mature deliberation, we are disposed to adopt the view of the latter line of cases. It is plain that, however the relations of

corporate officers to their corporation and its stockholders may be defined, such relations are not "technical and continuing trusts," cognizable solely in a court of equity, which Chancellor Kent declares are the only trusts not affected by the statute of limitations. The various causes of action stated in the complaint for misapplication of funds were rights of action in favor of the corporation, upon which actions at law could have been commenced when the act was done. The plaintiffs here are simply seeking to enforce the right of action of the corporation. They have no greater right than it possessed.

Our statute (§ 4206) is general and comprehensive, and in itself makes no exception as against trustees of any kind; and, while we are not inclined to deny or question the authority of the precedents in this court importing into that statute certain exceptions, we are unwilling to assume a practically legislative function, by adding other exceptions which we might deem wise, which the legislature, in the exercise of its constitutional discretion, has not seen fit to make. Those precedents are cited in the former opinion. Several of them go merely to the extent of exempting express trusts within the statute, but two of them suggest like exception in certain other cases. *Hovell v. Hovell*, 15 Wis. 55, and *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405. The first of these is of but little significance, for in it was no attempt to declare how far the exemption from statutes of limitation do extend, but merely that it does not extend beyond "express or acknowledged trusts," and liability to account for proceeds of land wrongfully purchased with moneys of plaintiff was held barred by limitation. In *Fawcett v. Fawcett*, however, the limitation was extended to a resulting trust arising upon purchase of land in his own name by a husband with his wife's money; such resulting trust having been acknowledged by him, and having continued unrepudiated during their cohabitation to his death. The statute was held not to apply, because the trust was wholly beyond cognizance of courts of law, and had the characteristics of acknowledgment, continuance, and certainty. Chancellor Kent's classification of trusts in *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417, was adopted; among other parts, the declaration being that "other trusts which are the ground of action at law are not exempt." It seems plain, therefore, that nothing in the prior decisions of this court has established immunity from limitation statutes in favor of any trusts other than "those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this [chancery] court," as classified by Chancellor Kent. Obviously corporate officers are not trustees holding upon such a trust. It is not meant by this that they may not be, in a true sense, trustees of an express trust. While express trusts in real property can only be such as are defined and limited by Rev. Stat. 1898, § 2081, there may be many express trusts in personal property, as pointed out by Chancellor Kent in the case above cited, which are entirely independent of the trusts in real property referred to in § 2081. It may well be that corporate officers, so far as they handle and control the personal property of the corporation, may rightly be called trustees of an express trust, of which trust the corporation and its stockholders are the beneficiaries. 1 Perry, Tr. 5th ed. § 86. But so far as they may be sued at law, they do not come within the chancellor's classification, and hence the running of the statute of limitation is not interrupted. As already pointed out, their misapplication of funds might at any time have been reached by an action at law by the corporation. The right to sue arose when the act was done. If the alleged conspiracy as to mismanagement continued down to the death of the corporation, still, as we understand it, the demurring defendants were not made parties to this suit until more than six years thereafter. An action at law might have been instituted by the receiver immediately after this appointment, as to all acts not then barred by the statute. *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 15 S. W. 448.

We are fully impressed with the weight of the reasons supporting and opposing such exemption as is claimed in this action against directors and officers of corporations. The peril to the public in becoming either stockholders or creditors, in view of the ample practical opportunity enjoyed by such officers to cover their malfeasance from the knowledge of any person other than themselves, and to control the action of the corporation whether by way of investigation or suit, until the period of limitations shall have run, is a cogent consideration. On the other hand, in absence of limitation, such officers, and their estates after them, may be held liable for mere negligence at remote periods after their acts, when witnesses may be dead and books and records lost, so that defense against a prima facie case may be impossible, contrary to the policy of the law in all analogous situations. But after all, these are considerations of policy, with which the legislature can deal freely; and we feel induced to hold that, as neither the statute nor the precedents of this court warrant exception from the protection of the limitation statutes of those who, though holding as fiduciaries and trustees, have at all times been liable to remedy by suit at law for their misconduct as such, we may not with propriety take from them that protection which the statute, in terms, gives. We hold, therefore, that the limitation has run, and the action, in the respects mentioned, is barred, upon the allegations of the complaint. The five demurrers mentioned in the former opinion, in subdivision 2, are therefore sustained on the ground herein stated, and such opinion is hereby modified accordingly.

So ordered.

Cassoday, Ch. J., dissenting:

It is well settled that, so long as there is a continuing and subsisting trust, acknowl-

edged or acted on by the parties, the statutes of limitation are not available to a trustee. *Kane v. Bloodgood*, 7 Johns. Ch. 90, 123, 124, 11 Am. Dec. 417. The reason for the rule is that, the trustee being clothed with the legal title or possession of the property, and charged with the duty of caring for and preserving the same for the benefit of the *cestui que trust*, the latter has the right to assume that the trustee will perform such duty, unless he has knowledge that the trustee has denied his right, or claimed the possession of the property adversely to him. *Ibid.* Until such denial or adverse claim, the possession of the trustee is, in equity, deemed to be the possession of the *cestui que trust*. *Smith v. Combs*, 49 N. J. Eq. 420, 24 Atl. 9; *Lindsley v. Dodd*, 53 N. J. Eq. 69, 84, 30 Atl. 896. True, the officers and directors of a corporation are not regarded, in law, as having the title or possession of the property of the corporation, both of which are deemed to be vested in the corporation itself. Nevertheless, they have the actual care and custody of such property, and are chargeable in equity with an active duty in respect to the same, not only for the benefit of the corporation, but also for the benefit of the *cestui que trust*. When, therefore, such officers and directors, in violation of such duty, convert a large portion of the property of the corporation to their own private use, and there is no publicity of the fraud, they necessarily become chargeable in equity, as trustees of the property so fraudulently converted, for the benefit of the *cestui que trust*. As to the property so converted, they hold the same as a continuing and subsisting trust, assumed and acted upon by themselves in violation of duty to the *cestui que trust*. The mere fact that an action might have been maintained in the name of the corporation which was managed and controlled by the wrongdoers, against such wrongdoers, to recover back the money or property so converted, immediately after the conversion took place, is no ground, in my judgment, for holding that the statutes of limitation commenced running in favor of such wrongdoers and against the plaintiffs at the time of such conversion. Thus, it is held in New Jersey that "the managers of a savings bank stand in the relationship of trustees to the depositors, so that the statute of limitations will not be a bar against a charge of mismanagement on their part which had occurred more than six years before the filing of the bill." *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775. Again: "The treasurer of a savings bank, who was at the same time one of its managers, was charged by the receiver of the bank with dereliction and malfeasance in office. Held, that his position as manager made him a trustee, and that, consequently, the statute of limitations was not a defense to the bill." *Williams v. Reilly*, 41 N. J. Eq. 137, 3 Atl. 692. These cases were followed in *Somerset County Bank v. Veghte*, 42 N. J. Eq. 39, 42, 6 Atl. 278; *Williams v. McDonald*, 42 N. J. Eq. 392, 396, 7 Atl. 866. So, in a case in Illinois it is said in the 61 L. R. A.

opinion of the court that "ordinarily an express trust is created by a deed or will; but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist, and to which the same legal principles are applicable; and such appears to be the relation established by law between directors and the corporation." *Ellis v. Ward*, 137 Ill. 509, 520, 522, 25 N. E. 530. See also *Coze v. Huntsville Gaslight Co.* 106 Ala. 373, 17 So. 626; *European & N. A. R. Co. v. Poor*, 59 Me. 277, 278; *Butts v. Wood*, 38 Barb. 188; *Williams v. Page*, 24 Beav. 654. In my judgment, there is less reason for holding that the statutes of limitation run in favor of such officers and directors in the case at bar than in a number of cases in this court wherein it has been held that the statutes did not run by reason of such fiduciary or trust relation. *Sheldon v. Sheldon*, 3 Wis. 699; *Spar v. Evans*, 51 Wis. 42, 8 N. W. 20; *Bostwick v. Dickson*, 65 Wis. 593, 26 N. W. 549; *Second Nat. Bank v. Merrill*, 81 Wis. 151, 50 N. W. 505; *Williams v. Williams*, 82 Wis. 393, 52 N. W. 429; *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405; *Taylor v. Hill*, 86 Wis. 106, 56 N. W. 738.

Such is a brief statement of a few of my reasons for dissenting from the decision on the motion for a rehearing in this case.

The following additional opinion, was handed down April 17, 1903:

Per Curiam:

One point suggested upon the rehearing is not mentioned in the foregoing opinion, and deserves brief consideration. It is said that the defendant John S. Owen, a director of the corporation, who is charged with liability by the amended complaint, was a party to the action from the beginning, and hence that, as to him, the statute of limitations is not available as a defense. It is true that Owen was one of the plaintiffs in the action as originally brought in his capacity as an alleged creditor of the corporation; but the difficulty with the contention is that the action as originally brought was simply a plain action to wind up the corporation and distribute its assets, and did not include any cause of action against Owen, or any other officer, for maladministration, or to recover assets converted. No such cause of action was incorporated into the complaint until the reorganization of the action in May, 1900, when Owen and his coplaintiff were made defendants, and the amended complaint was served. Therefore, no action to enforce such liabilities can logically be held to have been commenced against Owen until such amended complaint was served. It is well settled that, when an amendment to a pleading introduces a new cause of action, the statute of limitations runs until the making of the amendment. 1 Enc. Pl. & Pr. p. 622, and cases cited in note 1; *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875. See also *Chicago R. I. & P. R. Co. v. Young* (Neb.) 93 N. W. 922.

GEORGIA SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,

v.
B. P. BAILEY.

(115 Ga. 725.)

- *1. A petition against a telegraph company, alleging that it has "an office and agent in [the] county doing business therein," sufficiently shows jurisdiction in the courts of the county, under Civil Code, § 2348.
2. The law requiring a plaintiff in certiorari to cause written notice of the sanction of the writ, and of the time and place of hearing, to be given the defendant therein, a message containing a proper notice, and signed by the plaintiff in certiorari, or by another as his attorney, sent by telegraph and properly delivered in writing, is a sufficient notice.
3. Where the attorney at law for the

plaintiff in certiorari contracts with a telegraph company for the sending of such a message, and the company fails to deliver it within the time agreed upon, and in consequence the certiorari is dismissed for want of said notice, and where the attorney, after having paid his client the amount involved in the certiorari proceeding, sues the company for the nondelivery of the message, such attorney occupies the position of the plaintiff, and it is incumbent upon him to show that he would have succeeded in the certiorari proceeding, and was damaged by its dismissal.

4. The evidence in the record disclosing that the attorney failed to show this, but paid his client under what he thought was a moral obligation, the finding of the jury in his favor was contrary to law, and should have been set aside.

(Little J., dissents from proposition 2.)

Headnotes by SIMMONS, Ch. J.

(June 10, 1902.)

NOTE.—Validity of a notice sent by telegraph.

A notice sent by telegraph is generally held valid under statutes requiring a notice to be in writing. This was held where such a notice was given of the granting of a writ of certiorari, also where a judge telegraphed the clerk to adjourn his court. A notice by telegraph that an injunction has been granted will generally be regarded as sufficient to place in contempt the party who ignores it, provided it purports to come from one in authority, without any extraneous circumstances to justify a belief that it is fictitious. Likewise, a notice sent by telegraph from the plaintiff in an execution to the officer, to stop a sale thereunder, has been held to be valid.

In *WESTERN U. TELEG. CO. v. BAILEY* it was held that a telegraph message containing a proper notice, and signed by the plaintiff in certiorari, or by another as his attorney, and properly delivered in writing, was a sufficient notice, under Ga. Civil Code, § 4644, providing that the plaintiff in certiorari shall cause written notice to be given to the opposite party in interest, his agent or attorney, of the sanction of the writ of certiorari, and the time and place of hearing, ten days before the sitting of the court. The court said: "The object of the notice is to give the opposite party timely information that the judge has sanctioned the writ, and that it will be heard at a certain time and place. The object of requiring it to be in writing is to prevent, as far as possible, all disputes as to the correctness and sufficiency of the notice, and as to whether it was given. . . . If the attorney authorized his clerk to write and deliver the notice, and the clerk did so, that would clearly be sufficient. Why, then, can the attorney not employ the telegraph company as his agent, and why, if it sends the message as written by the attorney and delivers to the opposite party a written transcript of it, would this not be a sufficient compliance with the law? We think that it is."

A telegram from a judge to the clerk of the court ordering an adjournment was held to be a written order and valid, under Iowa Code, §§ 167-169, providing that, if the judge does not appear on the day appointed, the clerk shall make an entry on his record and adjourn the court until the next day, and so on until the third day; and that, if the judge does not ap-

pear by five o'clock of the third day, the court shall stand adjourned until the next regular term. These sections further provide that, if the judge is unable to attend, he may, by written order direct an adjournment to a particular day therein specified, and the clerk shall on the first day of the term, or as soon thereafter as he receives the order, adjourn the court as therein directed. *State v. Holmes*, 56 Iowa, 588, 41 Am. Rep. 121, 9 N. W. 894. In this case the clerk adjourned the court from day to day until the third day, and at 3:30 p. m. on that day he received from the judge the following telegram: "I have made and sent you a written order adjourning court until to-morrow morning, 9 o'clock. Adjourn it accordingly." A few minutes before 5 o'clock of said day the clerk adjourned the court until March 10th, at 9 a. m. This was held to be valid. The written order arriving after 6 p. m. of that day was not in time, and the adjournment stood upon the telegram.

So, where a judge, by telegram, ordered the court adjourned until the 19th day of July, on which day he telephoned to the clerk of the court ordering said court to be adjourned until the 6th of August following, it was held that the telegram to the officers of the court directing an adjournment would be considered as an order in writing, and valid; but that the order sent by telephone would not properly be termed a written order, under U. S. Rev. Stat. § 672 (U. S. Comp. Stat. 1901, p. 546), requiring that a written order shall be directed alternatively to the marshal, and in his absence to the clerk, to adjourn court. *Schofield v. Horse Springs Cattle Co.* 65 Fed. 433.

A notice sent by telegraph of the granting of an injunction was held sufficient to place the party disregarding such notice in contempt, where it proceeded from a source entitled to credit, and informed the defendant clearly and plainly from what act he should abstain. *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq. 422. In this case the court said: "Notice, to be sufficient, need possess but two requisites: First, it must proceed from a source entitled to credit; and second, it must inform the defendant clearly and plainly from what act he must abstain. The notice in the case under consideration possessed both requisites. It was sent by the counsel who obtained the order, and it not only informed the defendants what act the order pro-

ERROR to the Superior Court for Butts County to review a judgment in favor of plaintiff in an action brought to recover damages for neglect to transmit and deliver a telegram promptly. *Reversed.*

The facts are stated in the opinion.

Messrs. Hugh M. Dorsey and Dorsey, Brewster, & Howell, for plaintiff in error:

The Western Union Telegraph Company had the legal right to establish reasonable rules and regulations, fixing office hours for its various offices; and it is immaterial whether defendant in error had actual knowledge of such rules or not.

Western U. Teleg. Co. v. Georgia Cotton Co. 94 Ga. 444, 21 S. E. 835.

Bailey did not contract with the telegraph company in his own name or for his own benefit, and the contract under which the message was sent was specifically signed by Bailey as attorney for Gilmore. It is clear, therefore, that Gilmore was not only the real party at interest, but was the actual principal contracting through his attorney for the transmission and delivery of this message.

hibited, but warned them, if they disregarded the order, their disobedience would be a contempt of the authority of the court. There is nothing in the conduct of the defendants indicating that they had the least doubt concerning the authenticity of the notice or the truth of its contents. They made no inquiry respecting its authenticity or its truth, but say that they consulted counsel whether or not they could safely disregard it, and were advised that they could. This advice, to say the least of it, was both injudicious and dangerous. It affords the defendants neither justification nor palliation. They must be adjudged guilty of contempt."

Notice of an injunction restraining a sale under a distress for rent was sent by telegram to the auctioneer and the solicitor, which notice they disregarded. In a proceeding for contempt it was alleged that the defendant, her solicitor, and the auctioneer, all believed that no order had in fact been made, and that the telegram was a forgery. It was held by Jessel, M. R., that a point might be strained in favor of the auctioneer, and that he would not order him to pay the costs in consequence of *Ex parte Langley*, L. R. 13 Ch. Div. 110, 49 L. J. Bankr. N. S. 1, 41 L. T. N. S. 388, 28 Week. Rep. 174, *infra*; but, as to the defendant's solicitor, he had an office in London, and had a telegram between 11 and 12 o'clock stopping the sale, which was to take place at 2, and it was held to be his plain duty, if he had any doubt as to the authenticity of the telegram, to have telegraphed to the plaintiff's solicitors and asked them if it was genuine or not; and he was required to pay the costs of the motion, as was also the defendant. *Tonkinson v. Cartledge*, 22 Alb. L. J. 123.

In *Rc Bryant*, L. R. 4 Ch. Div. 98, 35 L. T. N. S. 489, 25 Week. Rep. 230, a sheriff's officer and an auctioneer were held guilty of contempt of court, where they proceeded with a sale of the property of a trader seized on a *fi. fa.* after they had received notice by letter from the debtor's solicitor that he had filed a liquidation petition, and had also received notice by telegram that the court of bankruptcy had made an order restraining further proceedings under the writ. In this case the court does not discuss the sufficiency of a notice by telegram, ex-

Spence v. Wilson, 102 Ga. 762, 29 S. E. 713.

Defendant in the court below had the right to require plaintiff to elect whether he would proceed in an action on contract or on tort.

Central R. Co. v. Pickett, 87 Ga. 735, 13 S. E. 750; *Allen v. Macon, D. & S. R. Co.* 107 Ga. 848, 33 S. E. 696; *Pitts v. Smith*, 108 Ga. 37, 33 S. E. 814.

If Bailey, being diligent, nevertheless voluntarily paid to his clients the amount involved in the litigation, he did so gratuitously, and as a mere volunteer, and he cannot come into court and seek to hold his agent, the Western Union Telegraph Company, liable to reimburse him for the money voluntarily donated to his clients.

28 Am. & Eng. Enc. Law, p. 499.

If Bailey was negligent he cannot then recover from the telegraph company for the consequence of his own negligence.

Clarke v. Western U. Teleg. Co. 112 Ga. 633, 37 S. E. 870.

The effort to serve notice of certiorari through the medium of the telegraph company was not an effort to sustain a recovery

cept in saying: "He knew, or ought to have known, that after notice of an act of bankruptcy he [the sheriff's officer] should have suspended his proceedings. . . . It is an admitted fact that an injunction had been granted, and that the sheriff's officer and the auctioneer, after they knew this, disregarded it and proceeded to a sale."

In *Heywood v. Wait*, 18 Week. Rep. 205, *Mallows, V. C.*, said: "In one case an injunction was granted to restrain a sale, and the auctioneer knocked down three or four lots after receiving notice of the injunction by telegram, and that was held sufficient for a committal."

In *Ex parte Langley*, L. R. 13 Ch. Div. 110, 49 L. J. Bankr. N. S. 1, 41 L. T. N. S. 388, 28 Week. Rep. 174, it was held that sufficient notice of the granting of an injunction might be given by telegram, but that, before a person could be committed for contempt in disregarding such notice, it should be established that he had in fact notice of the injunction. It was further held that a party who had violated an injunction would not be committed for contempt where he swore that, although he received notice of the injunction by telegram, he in good faith believed that no injunction had been granted: and the circumstances showed that such a belief was reasonable. It was also held that the sheriff's officer, who was not present at the sale, and who had no notice of the injunction, was not responsible for the act of his deputy in allowing the sale to be continued after receiving notice by telegram. In this case *Thesiger, L. J.*, said: "But, in holding that the order of the chief judge cannot be supported, I in no way dissent from the proposition laid down by him in this case, and also in *Rc Bryant*, L. R. 4 Ch. Div. 98, 35 L. T. N. S. 489, 25 Week. Rep. 230, that, under certain circumstances, a telegram may constitute such a notice of an order of a court as to make a person who disregarded the notice and acts in contravention of the order, liable for the consequences of a contempt of court. I think it would be most disastrous to the interests of public justice that the means of communication afforded by the telegraph should not be made use of for such a purpose,—

already obtained, but, on the contrary, was an effort to reopen an adverse adjudication. There is no method known to the law by which the result of this certiorari can be foretold, had it been served. Whatever presumption the law creates rests in favor of the judgment already rendered, which was adverse to the interests of the litigants represented by Bailey.

Clay v. Western U. Teleg. Co. 81 Ga. 285, 6 S. E. 813.

It does not appear that Bailey suffered any damage.

Messrs. Marcus W. Beek and Y. A. Wright for defendant in error.

Simmons, Ch. J., delivered the opinion of the court:

A lien for supplies was foreclosed in a justice's court by Gilmore against Smith as his tenant. Certain property of Smith's was levied upon under this *fi. fa.*, and sold. The constable refused to turn over the proceeds to Gilmore; and the latter obtained a rule nisi against him. The constable answered that he had other *fi. fas.* in his hands claiming the funds. On the trial of

especially in cases like the present. But the question in each case, and depending upon the particular circumstances of the case, must be, Was there, or was there not, such a notice given to the person who is charged with contempt of court that you can infer from the facts that he had notice in fact of the order which had been made?" In this case there had been some attempts on the part of the debtor to delay the sale, and it had been postponed from 11 to 12 o'clock, and then to 1 o'clock. The telegram was as follows: "From Learoyd & Co., Solicitors, London, to the sheriff's officer in possession, Walmer Castle Hotel, Deal.—Take notice, the London court of bankruptcy has made an order restraining you from selling or taking any further proceedings in the action against Bishop;" and the auctioneer was of the opinion that it was merely a ruse on the part of the debtor. The manager of the property levied on had previously attempted to induce the officer to stop the sale, and had started to find the superior officer at another town, and, not finding him, had telegraphed: "Smith gone to Canterbury. You had better stop sale on your own account as I know it is all right." This telegram and the adjournments gave reasonable ground to believe that the notice of injunction was not bona fide.

A telegram sent by plaintiff to the sheriff ordering the suspension of a sale under execution, which telegram was delivered to the sheriff at the end of the line, was held to be the original message, and evidence of its contents, and the officer was bound to act upon it. *Morgan v. People*, 59 Ill. 58.

In *Kaufman v. Wilson*, 29 Ind. 504, a notice was sent by telegram to the holder of a note by a surety thereon, which message was as follows: "Express Nolan & Co.'s note to Esquire Bennett for collection to-day. Don't fail;" and it was urged that the notice by telegram was not a notice in writing within the meaning of Ind. Stat. (2 Gavin & H.) pp. 307, 308, §§ 672, 673, providing that a surety on a contract for the payment of money may require, by notice in writing, the creditor or obligee forthwith to institute an action on the contract, and, if an action is not brought within a reasonable

time and prosecuted to execution, the surety shall be discharged. The court said: "We do not find it necessary to pass upon either of these questions, as the notice, for other reasons, is radically defective. It does not require the appellant to institute an action forthwith upon the contract or note, but to express it, that day, to Esquire Bennett for collection. . . . It was not the province of Wilson to direct in whose hands the note should be placed for collection, but by notice in writing to require the appellant forthwith to institute an action on the note against the principals, and if he failed to do so in a reasonable time, Wilson, as the surety, would have been discharged. Such was not the notice given. It did not discharge Wilson."

In *Cabell v. Arnold*, 86 Tex. 102, 22 L. R. A. 87, 23 S. W. 645, an action for false imprisonment was brought on a marshal's bond for damages, where an arrest was made for a felony by a deputy marshal, after receiving a telegram from the marshal who held a warrant for the arrest. It was held that, authority to make the arrest existing, the manner in which that power was exercised ought not to be held ground for civil action, unless therefrom hurt resulted to plaintiff, which would not necessarily have followed had the exact procedure contemplated by the statute been pursued. The sufficiency of the warrant was not questioned. Tex. Code Crim. Proc. arts. 245, 257, provide that, "in executing a warrant of arrest, it shall always be made known to the person accused under what authority the arrest is made, and, if requested, the warrant shall be exhibited to him." No discussion is made as to the sufficiency of a notice by telegram,—but it appears that the same result would have been reached had the arrest been made by the deputy on any other information that the marshal held the warrant.

In *McElveen Commission Co. v. Jackson*, 94 Ga. 549, 20 S. E. 428, it was held that the court may refuse to grant a continuance applied for on the ground of the providential absence of the party, when the truth of the ground is unsupported by any evidence except a telegram from the party to his counsel.

I. T.

The case was appealed to the superior court. Upon the trial in that court, a motion was made to dismiss the case because the petition did not allege that the company had an agency or place of business in the county, and because no cause of action was set out; it being argued that the message sent would not, even if delivered promptly, have been sufficient written notice of the certiorari under the law. This motion was overruled. The trial proceeded, and resulted in a verdict and judgment for the plaintiff. The defendant made a motion for a new trial, which was overruled. The company accepted, assigning error on the overruling of its motion for a new trial, and on the exceptions *pendente lite* which had been filed to the overruling of the demurrer or motion to dismiss.

1. We think the petition substantially showed jurisdiction in the court under the requirements of Civil Code, § 2348. It alleged that the company had an office and agent in the county doing business therein. The Code authorizes suit against a telegraph company "in any county where such telegraph company may have an agency or place of business." If the defendant had an office in the county, and had also an agent in the county, and was doing business therein, we think it had an agency or place of business. This case differs from that of *Atlanta Acci. Asso. v. Bragg*, 102 Ga. 748, 29 S. E. 706, relied upon by the plaintiff in error. In that case the allegation was that the corporation had an agent and transacted business in the county. There was no allegation that the company had an office, while in the present case it is alleged that the defendant had an office and agent in the county doing business therein. In the case just cited, *Atkinson, J.*, said that the word "agency," in a similar statute, was intended to designate a place at which the company's business was transacted by an agent. If this be true, the allegations in the petition in the present case are sufficient to show jurisdiction. They are substantially in accord with the statute, and there was no error in holding that the court had jurisdiction.

2. After much reflection, we have come to the conclusion that the second point made by the demurrer or motion to dismiss was not well founded. Civil Code, § 4644, requires that "the plaintiff in certiorari shall cause written notice to be given to the opposite party in interest, his agent or attorney, of the sanction of the writ of certiorari, and also the time and place of hearing, at least ten days before the sitting of the court to which the same shall be returnable." Is a telegram such "written notice" as would be effectual? It will be observed that the section does not require the notice to be served by any particular or designated person. It merely declares that the plaintiff in certiorari shall cause written notice to be given. The object of the notice is to give the opposite party timely information that the judge has sanctioned the writ, and that it will be heard at a certain time and place. The object of requiring it to be in writing is to

prevent, as far as possible, all disputes as to the correctness and sufficiency of the notice, and as to whether it was given. When the opposite party has received a notice in writing which contains the information prescribed the object of the statute is accomplished, and there has been, in our opinion, a sufficient compliance with the law. Why, then, cannot the notice be delivered by any person authorized by the plaintiff in certiorari? Were he to write the notice himself, and send it by another, it would clearly be sufficient; so if his attorney were to write it, and have it delivered by a messenger. If the attorney authorized his clerk to write and deliver the notice, and the clerk did so, that would clearly be sufficient. Why, then, can the attorney not employ the telegraph company as his agent, and why, if it sends the message as written by the attorney, and delivers to the opposite party a written transcript of it, would this not be a sufficient compliance with the law? We think that it is. It is true the notice actually written by the attorney is not delivered, but the same words are sent in symbols and signals, and are transcribed in writing at the office where received, and the written transcript delivered to the opposite party. The paper delivered contains the same words, and is in writing. It affords to the opposite party all the information that could have been given by a delivery of the original. This mode of service of the notice is not the usual one, but the telegraph and telephone are used daily in all business transactions, and have been frequently recognized by the courts. Had Bailey telephoned to a friend living near the party to be served, and asked that friend to write the notice as dictated over the telephone, and deliver the writing to the party to be served, a compliance with this request would have been as effectual as though Bailey had delivered the notice himself. The case does not seem different when, by his contract with the telegraph company, he authorizes the company's agent in the receiving office to deliver a written transcript of the words which are transmitted over the wire. The statute requires that the notice shall be in writing, but not that it shall be written or signed by the party or his attorney. A writing by an employee of the company is just as good. The telegraph is used very commonly now to make contracts, and such contracts are uniformly upheld by the courts. It has been held that a contract so made is in writing within the meaning of the statute of frauds. *Crowell, Electricity*, § 690; *Joyce, Electric Law*, § 901. For these reasons, we hold that, if Bailey's telegram had been sent properly, and delivered in time, it would have been sufficient notice of the certiorari.

3. In the motion for a new trial, one of the grounds alleges that the verdict was contrary to law and the evidence. The record discloses that Bailey, in his petition, alleges that he was "forced" to pay his client. In his evidence he states that he paid it because he had a contract to protect

his client's rights. He does not state the nature of this contract, or whether he guaranteed his client against loss. However this may be, we think he was not entitled to recover at all. When he paid his client the money, and brought the suit against the telegraph company, he stood in the shoes of his client. Had the suit been brought by the client, damage must have been shown before a recovery could have been had; and so, we think, when suit was brought by the attorney. Unless Gilmore could, as a result of his proceeding by certiorari, have recovered all or a part of what was therein claimed, no damage was done by the dismissal of the certiorari. In order to show damage it was incumbent upon Bailey to show, *prima facie* at least, that he would have obtained a reversal of the case on certiorari, and that the judge would have entered up final judgment in his favor in the superior court. There is no evidence tending to show this except the petition for certiorari. In that petition, the only specific assignments of error of law were without merit. The petition also contained the general assignments that the verdict was contrary to law and the evidence. Even if these grounds were good, the evidence was conflicting, and the judge, if he sustained the certiorari, could not have entered final judgment in the case, but must

have ordered another trial in the justice's court. These observations are made upon the petition for certiorari. The record does not contain the answer of the magistrate, and we cannot determine whether he would have verified the allegations made in the petition. If the magistrate's answer had been filed, and doubtless it had been, the plaintiff should have produced it on the trial of this case. If the magistrate in his answer had not verified the statements of the petition, the answer would have been controlling, and would have been alone considered by the judge unless it was traversed, and the traverse sustained. The plaintiff not having shown that his client was damaged, and having shown by his own evidence that he paid the money under what he considered a moral obligation, we think the verdict in his favor was contrary to law, and that the court erred in not setting it aside.

Judgment reversed.

All the Justices concur, except **Lewis, J.**, absent on account of sickness.

Little, J., concurring:

I concur in the judgment in this case, but dissent from the proposition announced in the second headnote.

NORTH CAROLINA SUPREME COURT.

SHEPARD'S POINT LAND COMPANY

v.

ATLANTIC HOTEL, *Appt.*

(132 N. C. 517.)

1. The title to lands under the tide waters is vested in the respective states, and may be granted by them to individuals.
2. A street platted between a navigable river and the highway along the shore, and which is incapable of being used as a street, does not affect the rights of the owner of the land bordering on the river as against one claiming the title to the land under the water.
3. When soil on the shore of a navigable water is granted by the state to private owners, certain rights pass as incident to the grant, with which the state cannot interfere itself, or permit others to interfere, except for public uses, and then only upon making compensation.
4. A grant to a riparian owner of land under the water in front of his property, under a statute providing for the grant of such property to such owners "for the purpose of making wharves," does not con-

vey an absolute title which may be separated from the upland so as to cut off the riparian rights of the owner of such land,—at least where the policy of the state has been not to grant the absolute ownership of the soil under the water.

5. A grant of the upland by a riparian owner who has obtained from the state a grant of the land under water in front of his property "for the purpose of erecting wharves" will include the rights under the water, so that the grantor will retain no title which will sustain an action for possession of the land under the water.

(May 5, 1903.)

APPEAL by defendant from a judgment of the Superior Court for Carteret County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Armistead Jones & Son, Charles L. Abernethy, and Simmons & Ward, for appellant:

At common law, the riparian owner on navigable waters had an appurtenant right to use the water front for the purpose of building wharves, fisheries, etc.

Bond v. Wool, 107 N. C. 139, 12 S. E. 281; *Gregory v. Forbes*, 96 N. C. 77, 1 S. E. 541.

The right is "*ex jura naturæ* as incident or appurtenant to the land."

NOTE.—As to title to lands under water, including grants by the state, see also *note* to *Goff v. Cogle* (Mich.) 42 L. R. A. 161; also *Grey ex rel. Simmons v. Paterson* (N. J. Eq.) 48 L. R. A. 717; *Illinois v. R. Co.* v. Chicago (Ill.) 53 L. R. A. 408; and *Watkins v. Dorris* (Wash.) 54 L. R. A. 199.
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28 Am. & Eng. Enc. Law, pp. 947-949; *Stockport Waterworks Co. v. Potter*, 3 Hurlst. & C. 326; *Barducell v. Ames*, 22 Pick. 333.

Appurtenant easements pass with the land.

Wool v. Edenton, 115 N. C. 10, 20 S. E. 165; *Hair v. Downing*, 96 N. C. 172, 2 S. E. 520.

The grant conveys title in fee.

Bond v. Wool, 107 N. C. 146, 12 S. E. 281;

Gregory v. Forbes, 96 N. C. 81, 1 S. E. 541.

Messrs. W. W. Clark and Lindsay Patterson for appellee.

Connor, J., delivered the opinion of the court:

The plaintiff brings this action for recovery of possession of a tract of land described in the complaint as "lying and being situate in the county of Carteret, in Morehead city, adjoining the square on which the hotel building of the defendant is located, and known and described as 'square No. 83' in the plan of Morehead city." It alleges that the defendant is in possession of the above-described lot, "upon which there has been erected certain walks, wharves, bathhouses, pavilion, etc., and that such possession is unlawful and wrongful."

The defendant denies that the plaintiff is the owner of the property described in the complaint, and denies that it is in possession thereof, except that it has a wharf, walkway, and two bathhouses leading from the rear of said hotel over and into the waters of Bogue sound. It avers "that Bogue sound is an arm of the sea, navigable for sea vessels and other ships, and the said hotel is about a mile from the Atlantic ocean; the tide from said ocean ebbs and flows daily in said sound and upon the shore whereon the said hotel is located, and the space between the said hotel and bathhouses and where the walkway and wharf are situated is covered by the waters of said sound, and the defendant is advised that the plaintiff has no title thereto."

The plaintiff claims the land, which is covered by water, described in the complaint, and known in the plan and on the map of Morehead city as "square No. 83," under the following chain of title, to wit: Grant from the state to John M. Morehead and W. L. Arendell, bearing date May 2, 1856. The grant is made to said grantees, "owners and riparian proprietors of the lands known as the 'Shepard's point lands' on Beaufort harbor." It includes the tract or parcel of land lying around Shepard's point lands, and between high-water mark and the deep water of Bogue sound, Newport river, and Calico creek. The description in the grant covers 502 acres of land, and surrounds the lands known as the "Shepard's point lands," which by the charter of Morehead city embraces the entire water front of the said city, and runs out from high-water mark on the shores of said lands to the deep water of said sound, river, and creek. The Shepard's Point Land Company was chartered by Laws 1856-57, chap. 136, p. 164. The charter was 61 L. R. A.

extended by Acts 1887, chap. 50, p. 100. The town of Morehead city was incorporated by Laws 1860, 1861, chap. 172, p. 203. Section 6 provided "that the corporate limits of said city shall embrace the entire plan of the city of Morehead as published by the Shepard's Point Land Company, and from the terminus of the Atlantic & North Carolina Railroad Company to Fifteenth street."

The plaintiff introduced deeds tending to show that at the time of issuing the grant, May 24, 1856, the grantees were the owners of square No. 1, and that said square was abutting square No. 83, the latter being the water front covered by water and extending out into Bogue sound. The plaintiff offered deeds tending to show that the defendant company had acquired title by direct chain from John M. Morehead and W. H. Arendell through the plaintiff, who owned squares Nos. 1 and 83 at the time of the conveyance of square No. 1, upon which the Atlantic hotel is located. The plaintiff introduced a deed from the Shepard's Point Land Company to John M. Morehead, dated August 19, 1859, conveying square No. 1, "bounded on the north by Arendell street, on the east by Third street, on the south by Evans street, and on the west by Fourth street." The plaintiff introduced chain of title to square No. 1 from John M. Morehead to the defendant, and also introduced a map of Morehead city. It will appear by reference to that map that Evans street for a considerable distance, and especially between squares No. 1 and No. 83, "is covered by the tide water at high tide, and has never been opened between squares Nos. 1 and 83, and is not used as a public street."

W. L. Arendell, a witness for the plaintiff, testified: "The hotel is on square No. 1, and is known as the 'Atlantic hotel.' The water front is square No. 83, and is covered by water. At low tide a small portion of it is not covered by water. The wharves and bathhouses on square 83 were built in the latter part of 1880 by the Morehead City Hotel Company, under whom the defendant claims. There are two wharves or piers. They are about 8 feet wide, and one is about 200 feet long, and is connected with the hotel, and extends out into Bogue sound; about 50 feet from the end of it is the gentlemen's bathhouse. The other pier extends out into the sound about 80 feet, and is connected with the other wing of the hotel, and at the end of it is the ladies' bathhouse. These wharves and bathhouses are in the waters of Bogue sound, and on square 83. The depth of water at the end of the long pier is from 6 to 8 feet, sometimes more, sometimes less, according to the tide. The depth of the water at the end of the ladies' pier is about 5 feet, varying according to the tide. The tide water at high tide washes up to square No. 1, and within a few inches of the brick foundation of two of the wings of the hotel. Square No. 83 is south of square No. 1, and is generally covered by water. There was a street leading off, upon the plan of said town, between square 83 and square 1. This street is called 'Evans street,' and

is 60 feet wide, but it has not been opened between squares 1 and 83, and is not used as a public street of Morehead city. At high tide it would be very nearly covered by water. The grant to John M. Morehead and W. H. Arendell covers square 83. Evans street was laid off on the plan of the town after the issuing of said grant. Square 83 is always covered by the tide at any ordinary high tide, and the greater part of it is covered at low tide. The ocean tide comes in at the inlet, which is about 2 miles off, and ebbs and flows over square 83; this square is a part of Bogue sound. Boats sail from the ocean and on the ocean and back to the hotel, and sail over and about square 83, and tie up and anchor all along the long pier from its end up to 75 or 100 feet towards the hotel, according to the state of the tide. Square 83 covers the deepest part of that part of Bogue sound, and that part is connected with the balance of the sound by navigable waters for small vessels, both to the eastward and to the westward. The Shepard's Point Land Company and Morehead never did build any wharves or piers on square 83."

His honor submitted to the jury the following issues: "(1) Is the plaintiff the owner and entitled to the possession of the land described in the complaint as square 83? (2) Is the defendant in possession of any part thereof?" The court instructed the jury that if they believed the evidence they should answer the first issue "yes," and the second issue "yes;" and the defendant excepted. It is agreed that the court answer the issues accordingly. Judgment was rendered thereupon, and the defendant appealed.

The plaintiff's title and right to recover are dependent upon the construction of § 2751 of the Code, being Acts 1854, 1855, chap. 21, p. 45, in the following language: "All vacant and unappropriated lands belonging to the state shall be subject to entry . . . except lands covered by navigable streams, provided that persons owning lands on any navigable sound, river, creek, or arm of the sea, for the purpose of erecting wharves on the side of the deep waters thereof next to their lands, may make entries of the lands covered by water adjacent to their own as far as the deep water of such sound, river, creek, or arm of the sea, and obtain title as in other cases. But persons making such entries shall be confined to straight lines including only the fronts of their own tracts, and shall in no respect obstruct or impair navigation. And when any such entry shall be made in front of the lands in any incorporated town, the town corporation shall regulate the line on deep water to which entry may be made."

The question presented for decision is of great importance, and by no means free from difficulty. It will be well, before entering into an examination of the principles and authorities by which we shall be guided in reaching a conclusion, to note the history of the legislation in North Carolina in regard to the control and disposition of

our navigable waters. It was held in *Tatum v. Sawyer*, 9 N. C. (2 Hawks) 226, that lands covered by navigable waters were not subject to entry under the entry law of 1777, "not by any express prohibition in that act, but, being necessary for public purposes as common highways for the convenience of all, they are fairly presumed not to have been within the intention of the legislature."

Ruffin, J., in *Ward v. Willis*, 51 N. C. (6 Jones L.) 183, 72 Am. Dec. 570, said: "It happened, however, that in the revival of 1836 those parts of the previous acts were omitted, and therefore the court felt bound to hold, in *Hatfield v. Grimstead*, 29 N. C. (7 Ired. L.) 139, that entries of land in Currituck sound were good after it ceased to have a tide or be navigable by reason of the closing of the inlet, or, rather, of such parts of the sound as were frequently not covered by water. When the omissions of the revival were discovered in 1846, the legislature, by an act of that year, chap. 36, revived the provision omitted by enacting that entries of land lying on any navigable water should be surveyed in such manner that the water should form one side of the survey, and the land be laid off back from the water, and proceeded further to enact that it should not be lawful to enter land covered by any navigable sound, river, or creek." The court in that case held that "land lying between the high and low water lines of the tides of the ocean or a navigable stream is not subject to private appropriation under the acts authorizing the entry and grant of lands by the state."

This continued to be the law until 1854, when the act, § 2751 of the Code, was enacted. In 1889 (Laws 1889, p. 517, chap. 555) this act was amended by adding, after the word "navigation," the following: "Provided, further, that no land covered by water shall be subject to entry within 30 feet of any wharf, pier, or stand used as a wharf already in existence, or which may hereafter be erected by any person on his own land or land under his control or on an extended line thereof; but land covered by water as aforesaid for the space of 30 feet from the landing place or line of any wharf, pier, or stand used as a wharf as aforesaid, shall remain open for the free ingress and egress of said owner and other persons to and from said wharf, pier, or stand." By Laws 1891, p. 585, chap. 532, the section is so amended as to read: "Lands covered by navigable waters, provided that persons owning lands on any navigable water for the purpose of erecting wharves or fish houses or for fishing [in] said waters in front of their lands, may make entries of the land covered by said water and obtain title as in other cases; but persons making such entries shall be confined to straight lines, including only the fronts of their own lands, and shall in no case extend a greater distance from the shore than one fifth of the width of the stream, and shall in no respect obstruct or impair navigation, provided nothing in this act shall apply to Currituck county."

By the act of 1893, chap. 17, p. 41, § 2751

of the Code is amended by striking out the words, "to which entries may be made," and inserting, instead thereof, the words, "to which wharves may be built."

It is noted in the plaintiff's brief, and known in connection with the history of the state, that, at or about the time that the act of 1854 was passed, the Atlantic & North Carolina Railroad, having its terminus at what was to be Morehead city, although projected, had not been completed to that point.

The plaintiff's title is dependent upon maintaining three propositions: (1) That the title to navigable waters, sounds, arms of the sea, etc., is vested in the state, and may be granted by the state to private individuals; (2) that by the grant issued to Morehead and Arendell, pursuant to the act of 1854, they became the absolute owners of the soil covered by the navigable waters of Bogue sound, Newport river, and Calico creek, described in the said grant, and containing 502 acres; and (3) that such title as they acquired passed to and vested in the plaintiff corporation, separate and distinct from its ownership of the soil theretofore granted by the state, upon which is located the town of Morehead city, including the defendant's lot No. 1, upon which is built the Atlantic hotel, and that its ownership is in no respect dependent upon the use to which the land in controversy is to be put, or its riparian ownership of the shore.

It is abundantly settled by the courts of this state and the United States that after the Revolutionary War the states became the owners of, and retained the title to, the lands covered by navigable waters, and that they have the power to grant those lands to private individuals. This has been the well-settled doctrine in this country since the case of *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997. "The principle has long been settled in this court that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away. . . . In like manner, the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running." *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248.

Ruffin, J., in *Ward v. Willis*, 51 N. C. (6 Jones L.) 183, 72 Am. Dec. 570, says: "It seems thus to be clear that whatever soil is at any time covered by a navigable water in its natural state is deemed to be in the same state as if it were in the bed of the water; in other words, that it is all one whether it be under the channel or be the margin between the high and low water lines. The same public purposes require that here, as in England, the state should reserve lands in that situation from private appropriation, and, although it may please the legislature to dispose of that by special grant for the promotion of trade and the growth of a commercial town accessible to vessels, it rationally accounts for the restriction upon the common mode of granting other public lands, and enables us to discover the extent of the restriction imposed, and understand the terms in which it is imposed."

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Mr. Justice Field, in *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, thus defines the status of lands covered by tide waters: "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof when that could be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties."—citing *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Weber v. State Harbor*, 18 Wall. 57, 21 L. ed. 798.

For the purpose of this discussion, we treat the first proposition as settled. There has been, however, some discussion and conflict of opinion in respect to the extent of the right of the state to grant the soil under its navigable waters, held in trust for the use of all of the citizens, to private persons.

Mr. Justice Field, in a very able opinion in the *Illinois Central Railroad Case*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, in discussing the character of the title which the state holds in her navigable waters, uses the following language: "The question, therefore, to be considered, is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters, by the grant, against any future exercise of power over them by the state. That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds its title to soils under tide water by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands, and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of land under navigable waters that may afford foundation

for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power, consistently with the trust to the public, upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which, when occupied, do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in the opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of navigation and the use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. . . . So with trusts connected with public property or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state. . . . We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions

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are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."

The plaintiff contends that this court has construed § 2751, and that the grantees, Morehead and Arendell, by the grant issued to them pursuant thereto, acquired the absolute ownership of the soil under the water, subject only to the right of navigation by the citizens of the state. If this contention be well founded, it must be conceded that the plaintiff may bring a possessory action and remove the defendant from any occupancy thereof. If the question has been decided by this court, we would feel compelled to follow such decision as a rule of property, without regard to our own views. The first case in which the question came before the court is *Gregory v. Forbes*, 96 N. C. 77, 1 S. E. 541. An examination of the original record on file in this court shows that the plaintiff, a riparian owner, desiring to erect a wharf in the waters of North river, obtained a grant from the state for the lands adjacent thereto, "for the purpose of erecting a wharf connecting with the shore, under the provisions of § 2751 of the Code." The plaintiff averred that the defendant, who was not a riparian owner, had erected and is using a wharf on the lands embraced in the grant, and that the plaintiff was thereby prevented from erecting his wharf. The defendant set up a lease from the county commissioners, etc. The plaintiff, after showing title to the shore line, introduced a grant from the state to "the water-covered land in front of the shore." The survey, after giving boundaries of 24 acres, annexes the qualifying words, "for wharf purposes." Smith, Ch. J., says: "As the owner of the shore, the plaintiff had a right, under the law, to enter the water front up to the deep water, so as not to obstruct navigation, and thus acquire property in the land. The survey, and we assume the entry which it must follow, expressly declares that it is 'for wharf purposes,' and this is the only use for which the grant could issue. . . . And for our present purpose the grant is operative. Inasmuch as the state can only issue a grant for land covered with navigable waters for the purpose of erecting a wharf, and this only to the riparian proprietor, we are unable to see how the right claimed by defendant could be conferred by the county commissioners upon a stranger, like the defendant." The court below having held upon the plaintiff's showing that he was not entitled to recover, the court simply decided that "the case was a proper one for them to pass upon." In our opinion this case falls

very far short of sustaining the position of the plaintiff in this action. We note the careful restriction which the chief justice places upon the words of the grant. It is sufficient to note now that it is only for our "present purpose that the grant is operative." As shown by Mr. Munroe's very accurate and valuable "Marginal Annotations," the case is not cited in our Reports.

The next case in which the court expresses an opinion in regard to the construction of § 2751 is *Bond v. Wool*, 107 N. C. 139, 12 S. E. 281. This was a controversy between two riparian owners, neither having any grant under the section of the Code referred to, but relying entirely upon their rights as riparian owners. The plaintiff sought to enjoin the defendant from interfering with his fish-house by a threatened erection of a wharf in front of the defendant's land. The construction of § 2751 was not in any way involved in the discussion or the decision of the case. The court held that, "leaving our legislature out of view, the plaintiff, or H. A. Bond, Sr., under who he claims, is, at least in the discussion of this appeal, to be considered as holding, as an incident to the ownership of lot No. 187, the right to build fishhouses over the water at any point east of the dotted line, . . . and in front of the said lot between the land and the navigable water. . . . But the defendant Wool has, if his interest is not affected by our statute, a property of the very same nature," etc. It is true that the court proceeds to cite the statute and comment upon it, noting that the riparian owner was restricted by the act of 1777, chap. 114, § 15, to the water mark, etc., saying: "The act of 1854-55 (Code, § 2751) made an exception in favor of riparian owners of land on any 'navigable sound, river, creek, or arm of the sea,' by giving to them the exclusive privilege of acquiring the absolute fee in the precise territory on their fronts, in which they already held, as incident to the original grant, the qualified property or appurtenant right which we have defined."

In *Holley v. Smith*, 130 N. C. 85, 40 S. E. 847, Clark, J., says: "The land here in question, as was admitted on the trial, is covered by the navigable waters of Chowan river, and therefore it was not subject to entry, except for wharves, by the adjacent riparian owner in front of his own property, . . . and even then subject to restrictions." No other cases in our Reports construe this section of the Code.

In *State v. Glen*, 52 N. C. (7 Jones L.) 321, Battle, J., says: "We hold that any waters, whether sounds, bays, rivers, or creeks, which are wide enough and deep enough for the navigation of sea vessels, are navigable waters, the soil under which is not subject of entry and grant under our entry law." This case was decided in 1859. No reference is made to the act of 1854-55, chap. 21, p. 45.

The authorities bearing upon this subject in other states are conflicting, and it is difficult to thread our way through the divergent decisions. To some extent this conflict may 61 L. R. A.

be explained by noting the distinction between the title to flats and marshes over which the tide ebbs and flows, but which are not in any correct sense of the term navigable waters, and those cases in which the land sought to be recovered is covered by navigable water. The learned counsel for the plaintiff frankly concedes that the question presented is, "Who owns the soil covered by Bogue sound, Newport river, and Calico creek?" Newport river is navigable some distance above Morehead city. *Doughty v. Atlantic & N. C. R. Co.* 78 N. C. 22.

In *Chisolm v. Caines*, 67 Fed. 285, Simon-ton, Circuit Judge, says: "It would seem that there is a great distinction between the shores of the great ocean, the beds of harbors, the channels of rivers, and highways of commerce, and these mud shores cast up by the currents on the sides of harbors and streams. The former must always be kept open for public use, commerce, trade, and pleasure; the latter can be separated from any public use, and can be vested in individuals."

A correct decision of this case involves an inquiry as to the extent to which the state has parted with the title to the land described in the grant under which the plaintiff claims, and what effect shall be given to the words, "for the purpose of erecting wharves in the side of the deep waters thereof next to their lands." The grant must be read and construed as if these words were written into it. The plaintiff insists that the absolute ownership of the soil passed under the grant; that by it the grantees, although described as "riparian owners and proprietors," became the owners of square 83, independent of their ownership of the shore; that whatever rights they had incident to their riparian ownership were destroyed, or at least merged into their separate and independent ownership under the grant; that when the land company conveyed to John M. Morehead square No. 1, by deed bearing date August 19, 1859, he took title to the lot stripped of any riparian rights in respect to the navigable waters upon which it abutted; that the defendant took its title from persons claiming through Morehead in the same plight and condition. In this connection the plaintiff calls attention to the fact that Evans street, 60 feet wide, separates square 1 from square 83, and that, therefore, the defendant does not abut upon square 83. The evidence in regard to the street is that of W. L. Arendell, who says: "This street is called Evans street, and is 60 feet wide, but it has not been opened between squares 1 and 83, and is not used as a public street of Morehead city; at high tide it would very nearly be covered by water. Evans street was laid off on the plan of said town after issuing of the grant." In the absence of any evidence that there was a dedication to, or acceptance or use of the street by, the town, in the view which we take of the title which Morehead and Arendell acquired by the grant, we do not think the so-called street can be considered as affecting the rights of either

party to this controversy. The plat seems to have been made prior to 1860, and during all these years no one has ever claimed, used, or treated these 60 feet as a street. It is incapable of being so used. We therefore dismiss this phase of the case from further consideration.

The defendant contends that the grant conferred upon the grantees only an easement, giving the right to build wharves out to deep water. Certainly some force and effect must be given to the limitation put upon the use to which the thing granted may be put. The policy of the state from 1777 until 1854 was, as we have seen, to preserve its title to the navigable waters, as the same had been held by the King of England, in trust for the free use of all of its citizens. As said by Ruffin, J., in *Ward v. Willis*, 51 N. C. (6 Jones L.) 183, 72 Am. Dec. 570, when it was found that in the revisal of the statutes the prohibition against entry and appropriation had been omitted, as pointed out in *Hatfield v. Grimstead*, 29 N. C. (7 Ired. L.) 139, the legislature immediately re-enacted the omitted sections. Prior to 1854, the owners of lands abutting upon navigable waters had, as incident thereto, certain riparian rights, the extent and stability of which were not very well settled either in this or other states of the Union. The state had, on December 27, 1852, chartered the Atlantic & North Carolina Railroad Company, which was to have its eastern terminus at a point afterwards known as "Morehead city." The state aided liberally in building this road, as did the counties through which it runs. This road was to be the completion of a system of railroads connecting the western portion of the state with the ocean, and thereby making a North Carolina system of travel and transportation. It was the conception of a wise and patriotic statesmanship. Bynum, J., in his very able dissenting opinion in *State v. Richmond & D. R. Co.* 72 N. C. 645, says: "No railroad scheme was ever devised by more of the wisdom and patriotism of the state. It was intended to be in fact what it was in name, the North Carolina Railroad, which, when completed from the Atlantic to the Tennessee line, should radiate a uniform system of lateral roads connecting all parts of the state in a common brotherhood by an easy and convenient intercommunication of trade and travel." Beaufort harbor was to be the haven for vessels and steamships which were to bring to and carry from the state its imports and exports. It was expected that a great seaport city was to grow up. It is interesting to note that by Acts 1856-57, chap. 136, p. 164, the plaintiff corporation was chartered, one of the powers conferred being to "erect wharves;" and that on February 16, 1855 (Laws 1854-55, chap. 21, p. 45), the act was passed on which the plaintiff bases its claim. In 1860, Morehead city was chartered, the boundaries of which, as we have seen, corresponded with those of the Shepard's Point Land Company. Considered in the light of the then existing conditions, it is difficult to believe that the 61 L. R. A.

policy of the state for nearly a century was to be reversed, and the growth of the prospective seaport was to be hampered, by the grant of the absolute ownership of the entire water front thereof, separate and distinct from the ownership of the abutting lands; that the state was to part with this property, which it held in trust for all of its citizens. Nothing, save a clear declaration of such purpose, would justify this conclusion. At that time the rights of riparian owners, while defined, were not settled in respect to their freedom from state interference. Lewis on Eminent Domain says: "The older, and perhaps more numerous, authorities hold that such an owner has no private rights in the stream or body of water which are appurtenant to his land, and, in short, no rights beyond that of any other member of the public; and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the waters over his land, and the public has not. . . . Access to and use of the stream by the riparian owner is regarded as merely permissive on the part of the public, and liable to be cut off absolutely if the public see fit to do so." Vol. 1, § 77.

The courts had very generally held, both in this country and England, that such was the extent of his rights. Wood on Nuisances thus stated the law: "He does not, from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream over any other member of the public, except that by his proximity thereto he enjoys greater convenience than the public generally. . . . But this is a mere convenience arising from his ownership of the lands adjacent to the ordinary high-water mark, and does not prevent the state from depriving him entirely of this convenience by itself making erections upon the shore, or authorizing the use of the shore by others in such a way as to deprive him of this convenience altogether; and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is *damnum absque injuria*." 1 Wood, Nuisances, 1st ed. 592. This doctrine has been held by the New York courts in 1852, in *Gould v. Hudson River R. Co.* 6 N. Y. 522. The Supreme Court of the United States has so held in *Hoboken v. Pennsylvania R. Co.* 124 U. S. 690, 31 L. ed. 552, 8 Sup. Ct. Rep. 643. This court, in *Collins v. Benbury*, 27 N. C. (5 Ired. L.) 118, 42 Am. Dec. 156, held that the riparian owner did not have the exclusive right of fishing, "unless such right be derived from an express grant by the sovereign power."

We can readily understand that Governor Morehead, a man of great sagacity and wisdom, recognized the necessity of securing the permanency, as well as the extent, of the riparian rights which had been acquired by the grant of the Shepard's point lands. It is evident that it was its purpose to sell the lots which the map in evidence shows had been laid off, and encourage persons to buy

and build upon them. Certainly he did not intend to secure the absolute ownership of the entire water front of the prospective city, and hold it separate and apart from the ownership of the land which he, as president of the land company, was conveying to purchasers. He certainly did not contemplate controlling the gateway to the channel, and cutting off the fishing and other privileges incident to the ownership of the abutting land, such as building wharves, etc. To have done so would have been destructive of its growth and prosperity, and would have reversed the policy of the state for so many years. If the construction contended for by the plaintiff is correct, no purchaser of a town lot fronting on the waters could have erected a wharf, pier, or bath-house, or enjoyed many other privileges incident to his riparian ownership, without the consent of the owners of the navigable waters, and the Shepard's Point Land Company could now levy tribute upon the commerce, business, and pleasure of the citizens of the town. The right of navigation would be of little value if a corporation, after selling the lots with water fronts, could prevent the building of wharves and enjoying other privileges. If this were the purpose and policy of the legislature, why restrict the grant to the purpose of "erecting wharves on the side of deep water thereof next to their lands?" and why restrict the privilege to "persons owning land on any navigable water?"

It has been held in recent years, both in this country and in England, that the riparian rights which vest in the grantee of lands are vested rights, and cannot be taken or separated from the ownership of the land, except for public purposes, and then by paying compensation therefor.

The case of *Gould v. Hudson River R. Co.* 6 N. Y. 322, was expressly overruled by *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618, 30 N. E. 654, in which it was held that the owner of land upon a public river is entitled to such damages as he may have sustained against the railroad company which constructs its road across its water front, and deprives him of access to the navigable part of the stream, unless the owner has granted the right, or it has been obtained by the power of eminent domain. The riparian rights which the grantee acquires by virtue of the grant of the abutting soil are stated by Mr. Justice Miller in *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984: "Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream, and amongst those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. . . . This riparian right is property, and is valuable, and, 61 L. R. A.

though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

In the case of the *Buckleuch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418, and 41 L. J. Exch. N. S. 137, Lord Cairns says: "It has appeared to me throughout that the property of the plaintiff in error in this case was what is commonly called 'riparian property.' The meaning of that is that it had a water frontage. The meaning of its having a water frontage was this, that he had a right to the undisturbed flow of the river which passed along the whole frontage of the property in the form in which it had formerly been accustomed to pass. That being the state of things, this water frontage, with the right which the plaintiff in error possessed, were taken for the purposes of the act. Beyond all doubt, the water right was a property belonging to the plaintiff, for which compensation was to be made, and it was for the arbitrator to assess the compensation to which the plaintiff was entitled upon that footing."

In *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 670, it is held that a riparian property owner on the River Thames, and the owner of lands near a public dock upon the river, were entitled to compensation in respect to their lands being injuriously affected by being deprived of access to the river and dock.

Lewis on Eminent Domain, § 83, says: "The following rights may be enumerated as appurtenant to property upon public waters: (1) The right to be and remain a riparian proprietor, and to enjoy the natural advantage thereby conferred upon the land by its adjacency to the water; (2) the right of access to the water, including a right of way to and from the navigable parts; (3) the right to build a pier or wharf out to the navigable water, subject to any regulations by the state; (4) the right to accretions or alluvium; (5) the right to make a reasonable use of the water as it flows past or laves the shore." He says it follows that any injury to riparian rights sufficient to be used is a taking, for which compensation must be made.

Thus we see, when the soil was granted by the state, that certain riparian rights passed as incidents thereto, and that these rights were vested; and the state could not itself nor permit others to interfere therewith, except for public purposes, and then only by making compensation. It would seem to follow from this conclusion that the original grantees of the Shepard's point lands acquired rights in the navigable waters which the subsequent grant could not affect injuriously, and that those rights passed, as appurtenant to such lands, to the purchasers thereof.

The legislature of Florida in 1856 (Laws 1856, chap. 791, p. 25) passed an act reciting that, "whereas it is for the benefit of

commerce that wharves be built and warehouses erected; . . . and whereas, the state being the proprietor of all submerged lands and water privileges, within its boundaries, which prevents the riparian owners from improving their water lots,"—it is thereupon enacted that the state, "for the consideration above mentioned, divests herself of all right, title, etc., in lands covered by water in front of any tract of land. . . ." The supreme court of that state, in *State v. Black River Phosphate Co.* 32 Fla. 82, 21 L. R. A. 189, 13 So. 640, said: "In construing this act, not only are we to keep in view the real nature of the subject-matter, but it is to be judged in the light of the rule applicable to all grants by the government, which is, that they are to be strictly construed, or to be taken most beneficially in favor of the state or public and against the grantee. . . . The plan of the act is that the title of the submerged land should be vested in the riparian owner for these uses and purposes." The state, "for the consideration above mentioned," divests herself, and invests the riparian owner, with the title to the land. "These considerations" are for the purpose and end that commerce may be benefited by the building of wharves, piers, etc. And the grant in this case is one of the class in which the subject of the grant, as long as it is of that character to be used or built for the benefit of commerce, is apparent and controlling. The court held that the right acquired was confined to the purposes set forth in the act.

In *Gregory v. Forbes*, 96 N. C. 77, 1 S. E. 541, Smith, Ch. J., says: "The survey, and, we assume, the entry which it must follow, expressly declares that it is 'for wharf purposes,' and this is the only use for which the grant could issue."

It is elementary learning that, in construing a grant, every part thereof must be given effect, unless absolutely inconsistent with other parts. Thus, in *Robinson v. Missisquoi R. Co.* 59 Vt. 426, 10 Atl. 522, land had been conveyed for the "use of a plank road." The description of the land was complete without these words. The court said: "This clause can have no force as description of the premises conveyed, and no force at all unless as qualifying and limiting the grant. It is an important rule of construction, applicable to all written instruments, that every word and every clause shall, so far as possible, be given some force and meaning, and that in case, construing the whole instrument one way, meaning is given to every word and clause, while, construing it another way, some portion of the language used is rendered meaningless, the construction which gives force and meaning to all the language used is, as a rule, to prevail. This is upon the presumption that the party making the instrument did not use

any language except what was necessary to make it speak the intention of the parties thereto. Again, when it is doubtful what the construction should be, resort to the circumstances surrounding the transaction may be had to enable the reader to understand and apply the language used. . . . We think this clause was intended as a limitation upon the grant, reducing it from the grant of the fee to a grant of an easement for the use of a plank road, all that the grantee cared to acquire, and all that the grantor would be likely to desire to part with."

In *Flaten v. Moorhead*, 51 Minn. 518, 19 L. R. A. 195, 53 N. W. 807, it was held that in a grant or deed conveying a tract of land, immediately following the description of which were these words: "Said tract of land hereby conveyed to be forever held and used as a public park," upon the face of the instrument, the grantee municipality did not acquire an absolute title to the fee in the premises. The court says: "It is not incumbent upon us at this time to determine the precise nature of the estate conveyed by this instrument, whether a mere easement was acquired by the village, or an estate on condition or in trust. But we are obliged to consider the clause in question in connection with the remainder of the deed, and to give it the effect intended, if that can be discovered and is reconcilable with the main purpose of the parties."

This court has held that "riparian rights, being incident to land abutting on navigable water, cannot be conveyed without a conveyance of such land, and lands covered by navigable water are subject to entry only by the owner of land abutting thereon." *Zimmerman v. Robinson*, 114 N. C. 39, 19 S. E. 102.

We are of the opinion that the grant to Morehead and Arendell of square 83 operated to give to them an exclusive right or easement therein, as riparian owners and proprietors, to erect wharves, etc.; that when they ceased to be the owners of the land, by conveyance to the Shepard's Point Land Company, such easement passed as appurtenant thereto, and that it has passed by the several conveyances of the land as appurtenant to square No. 1; that such easement passed to the defendant company, and the plaintiff has no such title to the soil under the navigable water as entitles it to maintain this action.

We are aware that this opinion is in conflict with many cases cited from other states, but we have given them careful consideration, and, in the absence of any controlling authority in this state, we think the conclusion to which we have arrived is consistent with the terms of the grant and the well-settled policy of this state.

There must be a new trial.

MASSACHUSETTS SUPREME JUDICIAL COURT.

GARFIELD & PROCTOR COAL COM-
PANY

v.

ROCKLAND-ROCKPORT LIME COM-
PANY.

(.....Mass.....)

1. To entitle evidence that other vessels have used a dock without injury, to any weight, in an action to recover for injury to a vessel from a defective dock, it should appear that they were of the same length, breadth, and flatness as the vessel injured therein, and that they were as heavily loaded as she was.
2. The mere fact that a vessel owner has to go through mud to reach a

berth in a dock does not cast upon him the risk of injury from a ledge of rocks of which he has no notice, and of which the owner of the dock knows, or by the exercise of reasonable care and diligence could ascertain.

3. The master of a vessel which is to lie in a regular berth at a wharf is under no obligation to take soundings to determine whether or not the berth is safe for the vessel, where he has been assured by the wharf owner or his agent that it is a proper one.
4. The owner of a wharf is bound by statements of one who is ostensibly in charge of it, as to the depth of water in the adjoining dock.

(June 23, 1903.)

NOTE.—*Liability for safety of wharf or dock.*

- I. *General rule of liability*, 946.
- II. *Where wharfinger assigns berth*, 948.
- III. *What are defects*, 948.
- IV. *Defects outside of dock*, 949.
- V. *Defect in surface of wharf*, 950.
- VI. *Liability as between owner and lessee*, 952.
- VII. *Liability of public corporation*, 953.
- VIII. *Defenses*, 954.
- IX. *Other matters*, 956.

I. *General rule of liability.*

When a wharf is devoted to the use of the public, standing as it does at the gateway of commerce, it becomes subject to public regulation. Its owner has certain privileges conferred on him, among which are the right to take toll, and he assumes certain obligations, among which is that of having the wharf and the adjoining dock reasonably fit for the purpose for which they are intended.

A wharfinger does not guarantee the safety of vessels coming to his wharf; but he is bound to exercise reasonable diligence in ascertaining the condition of berths thereby, and, if there is any dangerous obstruction, to remove it, or to give due notice of its existence to vessels about to use the berth. *Smith v. Burnett*, 173 U. S. 430, 43 L. ed. 756, 19 Sup. Ct. Rep. 442.

Wharfingers do not guarantee the safety of the space adjoining their wharves for vessels seeking to use them. They are bound, simply, to use ordinary care to make the spaces in front of them reasonably safe for vessels to approach and lie there. *McCaldin v. Parke*, 142 N. Y. 564, 37 N. E. 622, *Reversing* 66 Hun, 323, 21 N. Y. Supp. 277, which was decided in plaintiff's favor because of the contract of defendant to furnish sufficient water for the vessel to approach the wharf.

The occupant or lessee of a dock or pier to which vessels are allowed or invited to be made fast for the purpose of discharging or receiving merchandise or freight is bound to keep and maintain the same in a reasonably safe condition, and free from defects which might cause injury to those engaged or employed in carrying on such business. *Newall v. Bartlett*, 114 N. Y. 399, 21 N. E. 990.

The occupants of a wharf are liable for injury to a vessel lying thereat, caused by a spike projecting below water from one of the spiles, where they might have ascertained the defect by the use of proper care, and although vessels had used the pier for many years with safety. *Smith v. Havemeyer*, 36 Fed. 927. 61 L. R. A.

An occupant of a wharf is liable for an injury received by a vessel lying thereat, which was damaged by a projection from the pier below the water line, where such occupant does not show reasonable care and examination in regard to the condition of the wharf and the slip. *Id.* 32 Fed. 844.

The owner of a wharf is liable for damages caused to a vessel by concealed obstructions, the existence of which he might have ascertained by reasonable diligence. *Manhattan Transp. Co. v. New York*, 37 Fed. 160.

A person having and assuming to maintain a dock and slip to supply wharfage for hire is bound to keep it in suitable condition for that purpose. *Vroman v. Rogers*, 132 N. Y. 167, 30 N. E. 388.

A municipal wharf owner receiving wharfage must use all the appliances and precautions that a diligent man owning the wharf and the property moored thereto would deem it proper to employ in the preservation of his property from the perils of the river. *Willey v. Allegheny City*, 118 Pa. 490, 12 Atl. 453.

The fact that dock trustees did not know of the existence of a bank of mud at the entrance of a dock, which injured a vessel, does not relieve them from liability, where they did not exercise reasonable care in ascertaining the condition of the dock. *Mersey Docks & Harbour Board v. Gibbs*, L. R. 1 H. L. 93, 11 L. H. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872.

A dock company is liable for negligently allowing banks of mud to accumulate around the docks, whereby a vessel or its cargo is injured, where, by the exercise of reasonable care, it could have discovered such obstructions. *Ibid.*

A dock company is not only liable for negligently failing to remedy defects of which it is cognizant, but it is also liable for negligently remaining ignorant of such defects. *Ibid.*

The owner of a dock is liable only for injuries occasioned by its use which the owner of the vessel was invited or induced by the dock owner to make. *Phillips v. Schlesinger*, 137 Mass. 338.

The owner of a dock does not insure the safety of vessels which he invites to enter it, but is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the owner negligently causes or permits to exist, if such person is himself in the exercise of due care. *The John A. Berkman*, 6 Fed. 535.

The owner or occupant of a dock is liable in damages to a person who, by his invitation, ex-

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for injuries to a vessel which grounded in defendant's dock, which resulted in a verdict in defendant's favor. *Sustained.*

Plaintiff's vessel had a load to be discharged at defendant's dock. It drew 21 feet of water forward, and 22 feet aft. The master reported to the foreman in charge of defendant's wharf, and asked where he should put the vessel. The foreman indicated the dock, and said that there was plenty of water, that the dock had a soft bottom, and that the vessel would sink into the mud, so that she would sit up all right. The vessel was hauled into the dock, and settled upon a ledge of rock which severely injured her.

Plaintiff requested the court to rule that

press or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock, as a bar or shoal, which the occupant negligently permits to exist, if such person is himself in the exercise of due care. *The Calvin P. Harris, 33 Fed. 295.*

A vessel owner having a right to land at any part of a wharf may assume that any part he chooses is safe, and the wharf owner is liable if it is not. *Pittsburgh City v. Grier, 22 Pa. 54, 60 Am. Dec. 65.*

The owners of a dock are responsible for injuries to a vessel lawfully using it, caused by a defect in the bottom adjoining the dock and known to them, but not to the master of the vessel. *Barber v. Abendroth Bros. 102 N. Y. 406, 55 Am. Rep. 821, 7 N. E. 417.*

The owner of a wharf and dock is liable for damages sustained by a vessel lawfully using the dock in the course of business and in the exercise of due care, where the injury resulted from defects in the bottom of the dock of which the master was not warned. *Sawyer v. Oakman, 1 Low. Dec. 134, Fed. Cas. No. 12,404.*

The owner or occupant of a dock is liable to a person who, by his invitation, in the exercise of due care, places his vessel in the dock, for an injury to the vessel caused by its unsafe condition, which the owner or occupant negligently causes, or permits to exist, and the existence of which he knows, or ought to know, in the exercise of ordinary care. *Nickerson v. Tirrell, 127 Mass. 236.*

Duty to warn of danger.

A wharf owner present when a vessel attempts to enter his dock after the tide has fallen should caution the master of the vessel to stop before reaching a point of danger, where she is liable to be grounded to her injury; and he is at fault if he fails to do so. *The John A. Berkman, 6 Fed. 535.*

A wharf owner who, knowing of a rock in the bottom of the adjoining dock, procures a vessel to be brought to the wharf to be unloaded without notifying the owner of the danger from the rock, will be liable for the injury in case the vessel settles on the rock and is injured. *Carleton v. Franconia Iron & Steel Co. 99 Mass. 216.*

A wharfinger is liable for damages sustained by the sinking of a loaded canal boat, moored at his wharf, from the discharge of water from a sewer pipe between low and high water mark, where the captain of the boat was not familiar with the locality, and was not notified of the concealed danger. *O'Rourke v. New York Dye-wood Extract & Chemical Co. 55 Fed. 81.*

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the master of the vessel was justified in relying upon the statement of the person in charge of the wharf that the berth was a proper one, and was under no obligation to take soundings; that, if defendant's wharfinger stated that the berth was proper, defendant is liable for the injury caused by the vessel's resting on the ledge, although the wharfinger and defendant were ignorant of its existence, if sounding the mud would have disclosed it; that it was not necessary for plaintiff to show that defendant knew of the ledge, it being sufficient if its existence could have been discovered by reasonable diligence.

The court refused to make these rulings, and made the following finding for defendant:

"The plaintiff claims compensation for in-

One who erects a new pier, which is apparently ready for public use, is liable for damages sustained by a vessel using it, which settled at low tide upon the uneven bottom, where a notice of the danger is not conspicuously posted. *Heissenbittel v. New York, 30 Fed. 456.*

A dock company opening docks and basins to the public for navigation before the channel has been well cleared of obstructions is liable for injuries to a vessel striking upon a bar covered at high tide. *Thompson v. North-Eastern R. Co. 2 Best & S. 106, 31 L. J. Q. B. N. S. 194, 8 Jur. N. S. 991, 6 L. T. N. S. 127, 10 Week. Rep. 404.*

Duty to dredge.

Dock trustees receiving tolls for the use of the dock are liable for negligently permitting a bank of mud to accumulate at the dock, whereby a vessel entering the dock is injured; and this is not affected by the fact that the trustees receive no profit from the undertaking, they acting merely as public trustees, receiving the tolls and expending them in the maintenance and repair of the docks. *Mersey Docks & Harbour Board v. Gibbs, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872.*

It is the duty of a city to remove, by dredging at reasonable intervals, the accumulation from drains at public wharves to which boats are invited, and for the use of which wharfage is collected. *The Dave & Mose, 49 Fed. 389.*

Contract Liability.

A dock owner who charters a vessel 190 feet long, agreeing that there shall be a certain depth of water, is liable for injury to the vessel from striking a ledge of rocks over which there is less water, 60 feet from the dock, while entering the dock bow on and swinging around to the pier, although he is ignorant of the existence of the ledge. *McCaldin v. Parke, 66 Hun, 323, 21 N. Y. Supp. 277.*

Correlative duty of user.

The owner of a wharf is liable for the sinking of a steamer at the slip due to injuries received from a sunken rock, although its existence was known to both parties, since the boat owner had a right to rely upon the better information of the wharfinger, who was responsible for the concealed danger which he knew or should have known, and those in charge of the steamer were not required to anticipate. *The Stroma, 1 C. C. A. 576, 1 U. S. App. 161, 50 Fed. 557, Reversing 42 Fed. 922.*

juries sustained by its barge, the *Western Belle*, in the defendant's dock at Rockland, Maine. The plaintiff was under contract to carry a quantity of coal to the defendant. The *Western Belle* had been loaded for another port, but the plaintiff found it necessary to change her destination. Inquiry was made by telephone from the plaintiff's office concerning the depth of water in the defendant's dock. There is a conflict in the testimony, but, if we accept the plaintiff's version, the plaintiff was then informed by the defendant that its dock would accommodate a vessel drawing 20 feet of water; and, upon receipt of this information, it sent the *Western Belle*, drawing 22 feet of water, to deliver her cargo to the defendant at Rockland. When the barge arrived, she lay in the harbor a few days, awaiting her turn; and during that time there were conversa-

tions between the master of the barge and the defendant's representative on the wharf, and the question was considered whether she could be got safely into the dock. The captain of the harbor tugboat employed by the barge told her master that he thought it doubtful whether there was enough water. The depth of the water in the dock was in fact 20 feet at high tide, and 11½ feet at low tide. The plaintiff does not contend that it was misinformed concerning the depth of water. The defendant's representative told the master of the barge that the dock had a muddy bottom, informed him of the size and draught of vessels which had lain in the dock, and showed him the berth in which he wished the barge to lie for unloading. It does not appear that any vessel had ever been in the dock before, drawing more than 20 feet of water, nor is it contended that any

The damages sustained by a schooner taking cargo at a wharf, due to her settling upon a bed of sawdust and edgings of which both the master and wharfinger were aware, but assumed that it was safe enough for the schooner to cut into without injury, will be equally divided, since both were at fault as to the unsafe berth. *Union Ice Co. v. Crowell*, 5 C. C. A. 49, 5 U. S. App. 270, 55 Fed. 87.

II. Where wharfinger assigns berth.

A stricter rule of liability prevails where the wharfinger assumes control of the location of the vessel. In such cases it is his duty to select a safe berth, and he will be liable for not doing so.

A lessee of a wharf who, for his own purposes, induces a vessel to be brought up to it, is bound to keep the basin in suitable order for the business to be carried on. *Leary v. Woodruff*, 4 Hun, 99.

While wharfingers may not generally be bound to moor safely and securely, yet, if they, in consideration of the profit, attempt the mooring, and assume charge and control of the vessel while so doing, they are liable for injuries resulting from their negligence. *Curling v. Wood*, 16 Mees. & W. 628, 17 L. J. Exch. N. S. 301, 12 Jur. 1055.

Where the proprietor of a wharf assumes the duty of mooring vessels to it, he must exercise due care in so doing; and where he places a vessel over an obstruction in the bottom of the river, which it strikes in the fall of the tide, he is liable for the injury inflicted. *Ibid.*

A master directed by a wharfinger to place his boat in a specified berth at a dock may recover for damages sustained by his vessel, which rested at low tide upon inequalities in the surface of the bottom alongside the wharf, and of which he was not notified. *Sawyer v. Oakman*, 7 Blatchf. 290, Fed. Cas. No. 12,402.

The owner of a dock, in front of which a barge loaded with a cargo consigned to him was fastened by direction of such owner's agent, is liable for an injury sustained by the barge, which grounded at low tide upon pilings projecting from the bottom, and of the existence of which the owner should have known. *Pennsylvania R. Co. v. Atha*, 22 Fed. 920.

One in the possession and use of a wharf, which he uses for the shipping of coal, is liable for an injury sustained by a boat lying at the pier under his directions, which settled at ebb-tide upon a hidden pile of which he had knowledge. *Onderdonk v. Smith*, 21 Fed. 588. This case was reversed in 23 Blatchf. 562, 27 Fed. 61 L. R. A.

874, because of contributory negligence of the master.

But the fact that a wharfinger, who is the consignee of a cargo on a vessel, directed the master to place his vessel in the berth at the wharf without informing him that the dock was not deep enough to float the vessel at low tide, is not equivalent to an express notification that the water is deep enough at all times to float the vessel. *Nelson v. Phoenix Chemical Works*, 7 Ben. 37, Fed. Cas. No. 10,113.

III. What are defects.

In general it may be said that anything which renders the dock unsafe is a defect; but certain conditions have been expressly adjudged to be so.

Mud.

A wharfinger is liable for injuries to a vessel caused by its striking on a ridge of mud which had accumulated between two of the berths at the wharf, as it is the duty of the wharfinger to keep the berths in a fit state. *The Calliope*, 61 L. T. N. S. 656.

Dock trustees, permitting the use of the docks by the public, are liable for injuries to a vessel caused by an accumulation of mud in the dock, though they are ignorant of the accumulation, but of which they have the means of knowing and remain negligently ignorant. *Mersey Docks & Harbour Board v. Pennhallow*, 7 Hurlst. & N. 329, 30 L. J. Exch. N. S. 329, 8 Jur. N. S. 486, 5 L. T. N. S. 112.

A dock company having knowledge of the existence of a bar of earth across one of its basins, which is covered at high water, is liable for an injury inflicted by it upon a vessel using the basin. *Thompson v. North Eastern R. Co.* 31 L. J. Q. B. N. S. 194, 2 Best & S. 106, 8 Jur. N. S. 991, 6 L. T. N. S. 127, 10 Week. Rep. 404.

Rock.

Negligence is imputed to a wharf owner who permits a rock to remain in his dock to the injury of a vessel invited to moor at his wharf. *Smith v. Burnett*, 10 App. D. C. 469.

It is the duty of the owner of a slip to which canal boats are brought to discharge cargo, to remove flat stones lying at the bottom, or give notice of them to persons about to move their boats up to the bulkhead, where their presence makes a temporary grounding more likely to do injury, and makes the removal of the boat more difficult. *Christian v. Van Tassel*, 12 Fed. 884.

misrepresentation was made to the master upon this point. The first attempt to get the barge into her berth was made at high tide, Sunday night. She stuck in the mud about 30 or 40 feet away from her destination, and while there sustained some injury about her rudder post. The next night, after she had been lightened somewhat, a line was made fast to the wharf and carried to the barge's steam windlass, and, with the aid of the harbor tug, she was warped into her berth. The next day, after the tide had gone out, it was found that the barge had sprung a leak, and that some of her deck beams were broken a little forward of amidships. The injuries were due to the fact that the keel rested at this point upon a ledge of rock imbedded in the mud at the bottom of the dock. Her bow and stern, not being so sustained, sank into the mud under

their load as the tide receded. The main contention on the plaintiff's part is that the defendant was negligent in not having discovered the ledge which caused the damage. It appears that a diver had walked over the bottom of the dock a number of years before, and that vessels drawing from 16 to 18 feet of water had lain there before without injury, and the ledge was discovered for the first time after the accident by divers, who walked over the bottom and sounded the mud with iron bars. Upon all the evidence, it must be assumed that the master of the barge knew that, in order to reach the berth designated, his keel must plow the mud a depth of 2 feet, and that the bottom would be searched by his barge as it had not been searched by a vessel before. I am of opinion that the loss should rest where it has fallen."

Spiles and beams.

A municipal corporation is liable for damage resulting from its negligence in permitting a beam to run out from its wharf 4 feet under water. *Maxwell v. Philadelphia*, 7 Phila. 137.

But the owner of a dock newly dredged with proper care is not liable for injury to a barge which strikes a pile displaced extraordinarily in the dredging. *Hagan v. Brockle*, 15 Phila. 432.

Shallow water.

A wharfinger is not bound to maintain a depth of water in the berth at his wharf sufficient for all vessels at all tides; nor has a ship owner the right to assume that the water in the dock is sufficient for the draught of his vessel; but it is his duty to ascertain the fact. *Nelson v. Phoenix Chemical Works*, 7 Ben. 37, Fed. Cas. No. 10,113.

The duty of a wharfinger to give information as to inequalities in the surface of the bottom, when that is material to the safety of a vessel about to moor at his wharf, does not require him to warn a ship master that the water in the berth is insufficient to float the vessel at low tide. *Ibid.*

But wharfingers are liable for an injury sustained by a schooner drawing 11 feet 8 inches of water and consigned to their dock under a bill of lading guaranteeing 12 feet, where she grounded at high tide on a ledge of rock extending from the lower end of the wharf across the channel, when the wharfinger, who was present, gave no warning, and had dredged the channel and occupied it as a berth for vessels. *The Annie R. Lewis*, 50 Fed. 556.

Insufficient fastenings.

A municipal corporation, being the proprietor of a wharf on a river and charging wharfage therefor, is bound to exercise reasonable care and skill in the construction of the same, and in providing proper fastenings for boats when lying thereat, so as to protect such boats from the dangers of the ordinary floods of such river which occur periodically; and is liable for the sinking of a boat where the same resulted as the proximate and natural consequence of the omission of such corporation to provide the proper means of fastening such boat to the wharf so as to secure it from the dangers of a flood, by means of which it was sunk. *Shinkle v. Covington*, 1 Bush, 617.

In *The Francisco R. v. The Waterloo*, 79 Fed. 113, it was held that a wharfinger is liable for damages inflicted by vessels carried away by the 61 L. R. A.

flood when the posts of his wharf, to which the vessels were moored, gave way, where the wharf was old and not properly maintained, and the posts were so short that an insufficient length was embedded to withstand a strong vertical strain.

But it was subsequently held that the owner of a wharf is not liable, on the ground of negligence, for damage to a ship, sustained by collision with a boat which broke adrift from the wharf during a flood, when the mooring post to which she was fastened pulled out, where the wharf, but a few months before, had been extensively repaired, and was considered by wharf builders as constructed in the most approved manner, staunch and strong. *Girard Point Storage Co. v. Roy*, 35 C. C. A. 454, 63 U. S. App. 652, 93 Fed. 574.

A city is not liable for the loss by a lessee of one of its public wharves of coal floats and barges swept away by a flood, although a railroad company, granted a right of way, had cut down some of the check posts, where the lessee had made no complaint of this, and the loss of his floats was due to a break in the fastenings, while the post and ring bolt to which they were tied stood firm. *Jackson v. Allegheny*, 41 Fed. 886.

IV. Defects outside of dock.

A wharfinger is not liable for an injury to a vessel caused by its striking on a ridge of mud surrounding the berth which she was trying to enter, where the berth itself was safe, but the injury arose from the vessel trying to get into it when the tide was too low for a vessel of her draft to attempt to enter, and where, had she waited for the tide to rise, she might have entered safely. *Tredegar Iron & Coal Co. v. The Calloope* [1891] A. C. 11, Reversing L. R. 14 Prob. Div. 138.

This case was distinguished by the court from the *Moorcock* Case, L. R. 14 Prob. Div. 64, 58 L. J. Adm. N. S. 73, 60 L. T. N. S. 654, 37 Week. Rep. 439, 6 Asp. Mar. L. Cas. 373, as in that case the bottom of the berth was uneven and unsafe, so that a vessel taking the ground was injured. In this case the berth itself was safe, and the injury would not have resulted had those in charge of the vessel waited for a later time of the tide before attempting to enter the berth. The obstruction was not an unusual one, but was common in muddy soil and of the nature of that forming the bed of the river, it consisting of ridges formed by vessels which had taken the ground.

A wharfinger is not liable for an injury sus-

Messrs. Hutchins & Wheeler, for plaintiff:

The owner or occupier of a dock is liable to a person who, by his invitation, express or implied, and in the exercise of due care, places a vessel in the dock, for an injury caused to the vessel by any defect in the dock, or by its unsafe condition, which the owner or occupant negligently permits to exist, and the existence of which he knows, or in the exercise of ordinary care ought to know.

Nickerson v. Tirrell, 127 Mass. 236; *Smith v. Havemeyer*, 32 Fed. 844, On Appeal, 36 Fed. 927; *Sawyer v. Oakman*, 7 Blatchf. 290, Fed. Cas. No. 12,402; *Christian v. Van Tassel*, 12 Fed. 884; *The Moorcock*, L. R. 13 Prob. Div. 157, L. R. 14 Prob. Div. 64; *Manhattan Transp. Co. v. Mayor*,

37 Fed. 160; *Smith v. Burnett*, 173 U. S. 430, 43 L. ed. 756, 19 Sup. Ct. Rep. 442.

The master may rely upon anyone who is in charge of the dock.

Pennsylvania R. Co. v. Atha, 22 Fed. 920. **Messrs. Gaston, Snow, & Saltonstall and Malcolm Donald**, for defendant:

A wharf owner is not liable, even though he is negligent in not giving warning of a defect in his dock, if the owner of the vessel which is injured by such defect has also been negligent.

Smith v. Burnett, 173 U. S. 430, 43 L. ed. 756, 19 Sup. Ct. Rep. 442; *The John A. Berkman*, 6 Fed. 535; *Union Ice Co. v. Crowell*, 5 C. C. A. 49, 5 U. S. App. 270, 55 Fed. 87; *Thompson v. Northeastern R. Co.* 2 Best & S. 106; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Nickerson v. Tirrell*, 127 Mass. 236.

tained from grounding at low tide by a boat which was moored at high water nearly in the middle of the stream and outside of three boats which had preceded her, where such position was not taken by direction of the wharfinger, and the boat, while so situated, was not liable to pay wharfage, and the person in charge of her knew that the bottom at that place was uneven. *Eiting v. East Chester*, 50 Fed. 112.

A wharfinger will not be liable for the loss of a vessel which strikes a rock in approaching the wharf, the presence of which is not known to him, and which the evidence shows had fallen there accidentally, where all other ways of approach are safe, and no accident of similar nature has occurred at that place, and he has recently had the basin in front of the wharf dredged. *McCaldin v. Parke*, 142 N. Y. 564, 37 N. D. 622.

Where a wharfinger's jetty is such that a vessel cannot use it without grounding, the wharfinger must exercise reasonable care to ascertain that the bottom is in such a condition as not to cause injury to a vessel; and, where it fails to do so, it will be liable for a vessel sustaining injury from the uneven condition of the bed of the river. *The Moorcock*, L. R. 14 Prob. Div. 64, 58 L. J. Adm. N. S. 73, 60 L. T. N. S. 654, 37 Week. Rep. 439, 6 Asp. Mar. L. Cas. 373.

Wharf.

The owner of a wharf is liable for an injury inflicted upon a vessel by its striking against a camp shed improperly constructed in the river by his grantor for the benefit of the wharf, it being the duty of the owner of the wharf, either to repair and properly construct the camp shed, or give notice of the danger arising from it. *White v. Phillips*, 33 L. J. C. P. N. S. 33, 15 C. B. N. S. 245, 10 Jur. N. S. 425, 9 L. T. N. S. 388, 12 Week. Rep. 85.

Dock owners who erect a jetty to prevent mud and refuse from being carried into the dock by the tide, and allow it to become pressed out of line by the deposits of mud accumulated against it, so that at high water nothing indicates its position except a group of piles at one end, are liable for damages sustained by a boat which, while attempting to back out of the dock at high tide, strikes a submerged portion of the jetty. *Tracy v. Baltimore & O. R. Co.* 98 Fed. 633.

V. Defect in surface of wharf.

The rule requiring care to maintain the wharf in a safe condition extends to its surface, so 61 L. R. A.

that persons resorting there for business may recover for injuries received through its unsafe condition.

The owner of a public pier is under obligation to keep it in a safe condition for those who rightfully attempt to use it. *Macauley v. New York*, 67 N. Y. 602.

Wharf owners are liable for failure to provide safe places for persons having business at the wharf at all places where vessels are allowed to lie. *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503.

The wharves of the city of New York are open to the public, and are, for all the purposes of an action to recover for personal injuries sustained thereon, subject to the same rules as those governing highways. *Reynolds v. Starin*, 50 App. Div. 535, 64 N. Y. Supp. 141.

The occupant of a wharf which the public are accustomed to use at pleasure is liable for the death of one walking thereon, who, without notice of the danger, or that the use of the wharf is forbidden, falls through an underground hole in the platform, and is drowned. *Delaney v. Pennsylvania R. Co.* 78 Hun, 393, 29 N. Y. Supp. 226.

A wharf owner inviting and making it necessary for carters to come upon his premises is bound to provide ways which are reasonably safe for horses and vehicles, but is not liable for accidents which a carter might escape by a proper exercise of his own judgment. *Philadelphia & R. R. Co. v. Ervin*, 89 Pa. 71, 33 Am. Rep. 726.

A common carrier should maintain its wharf in reasonably safe condition for the embarking or landing of passengers, and cannot be held liable for not maintaining conditions which virtually amount to insurance. *Bacon v. Casco Bay S. B. Co.* 90 Me. 46, 37 Atl. 328.

A railroad company is liable for damage caused by a defective wharf which it uses as a place of crossing for its passengers from its train to its boat, it being a part of the route over which it has agreed to transport such passengers, where the passengers cannot reasonably be supposed to have information of the defect. *Knight v. Portland, S. & P. R. Co.* 56 Me. 234, 96 Am. Dec. 449.

A night inspector of customs, whose duty requires him to visit a wharf while a foreign going vessel is tied thereat for the discharge of cargo, may recover for damage resulting from negligence of the wharf owners to provide against accident to those going thereon in connection with the business which has been established there. *Low v. Grand Trunk R. Co.* 72 Me. 313, 24 Am. Rep. 331.

A wharf owner is subject to the same liabilities as any other landowner. If a vessel is injured by reason of a defect in the wharf owner's premises, the owner of such vessel, in order to recover for his loss, must establish,—

1. That he was invited by the owner to use the premises.

Carleton v. Franconia Iron & Steel Co. 99 Mass. 216; *Nickerson v. Tirrell*, 127 Mass. 236; *Sweeny v. Old Colony & N. E. Co.* 10 Allen, 368, 87 Am. Dec. 644.

2. That he was invited to use them for the purpose for which, and in the manner in which, he was using them at the time of the accident.

Phillips v. Schlesinger, 137 Mass. 338; *Holbrook v. Aldrich*, 168 Mass. 15, 36 L. R. A. 493, 46 N. E. 115.

The owner of a wharf is not an insurer

One who establishes a wharf for the use of the public for compensation is bound to keep it safe for such use, and one who, when properly on the wharf in the exercise of reasonable care and diligence, is injured through a defect in the wharf, is entitled to recover, unless the defect is so hidden that it cannot be discovered by such examination and inspection as the construction, uses, and exposures of the wharf reasonably require. *Wendell v. Baxter*, 12 Gray, 494.

The keeping of a pier built into or adjacent to navigable water for the purposes of loading and unloading vessels gives a general license to all persons to go upon and use it in the manner and for the purposes contemplated, and the owner is bound to keep it in a safe condition for use. *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295, 44 How. Pr. 139.

Those in control of a public pier are bound to exercise the same care for the safety of the public and all having occasion to use it as is required of those in control of public streets. *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 184 N. Y. 461, 81 N. E. 897.

Loss of property.

Wharfingers who permit the spiles upon which a wharf rests to decay, whereby the dock becomes unsuitable for the purpose to which it is put, are liable for damage to an unloaded cargo, precipitated into the water when the wharf gives way. *The City of Lincoln*, 25 Fed. 885.

A state operating a public wharf, and, in consideration of payment of wharfage, receiving coal thereon, is responsible for its loss from the sinking of the wharf by reason of the negligent omission and carelessness of its officers and agents in failing to keep the wharf in good and sound condition and repair. *Chapman v. State*, 104 Cal. 690, 38 Pac. 457.

The liability of a wharfinger for goods delivered to him is probably like that of a warehouseman, who is responsible alone for want of ordinary diligence, and not like that of a common carrier. *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175.

Liability denied.

The liability of the wharfinger is not absolute in all cases, but is governed by the rules of due care, duty, and contributory negligence, so that in some cases no recovery can be had because the liability of the wharfinger has not been established.

"The wharf being for the use of both teams
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against losses by reason of defects in his property or the access thereto. He is only liable in case he has not given warning of known defects, or failed to use due care to discover unknown defects.

Wendell v. Baxter, 12 Gray, 494; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Nickerson v. Tirrell*, 127 Mass. 236; *Phillips v. Schlesinger*, 137 Mass. 338; *Barrett v. Black*, 56 Me. 498, 96 Am. Dec. 497; *The Moorcock*, L. R. 14 Prob. Div. 64; *Mersey Docks & Harbour Board v. Penhallow*, 7 Hurlst. & N. 329; *Smith v. Burnett*, 173 U. S. 430, 43 L. ed. 750, 19 Sup. Ct. Rep. 442; *The John A. Berkman*, 6 Fed. 535.

Lathrop, J., delivered the opinion of the court:

The justice of the superior court, who tried this case without a jury, found for the

and freight, each must be used with a reasonable regard to the safety and convenience of the other." It is not negligence for the wharf owner to unload gravel intended for freight where freight is usually unloaded, and not to indicate the danger by lights; and "additional care" must be used by a person driving upon the wharf with a knowledge that the obstruction might have been expected there. *Hall v. Tillson*, 81 Me. 362, 17 Atl. 302.

A city is not liable to one whose trunk is thrown in the water when the wheel of the coach in which he is riding sinks through a plank in the pier, where the plank outwardly appears sound, and the accident first discloses the defect. *Garrison v. New York*, 5 Bosw. 497.

An owner of a horse and cart cannot recover from dock owners for their loss caused by backing them into the river over a pile of refuse material which had been permitted to accumulate on the dock and reaching within 2 inches of the upper surface of the string piece provided to prevent carts from being backed off the dock, where the danger was obvious, and the driver, by expending a little labor, might have uncovered the stringer, which would have presented a sufficient barrier. *Fitzpatrick v. Tweddle*, 78 Hun, 105, 25 N. Y. Supp. 904.

The owner of a wharf boat, which was the only landing for boats at that point, and was used for receiving and transferring freight and the landing and taking on of passengers, although the owner received no compensation for the use as a passageway for passengers, is not a common carrier or liable as such, and is not liable for injury to a person as the result of falling through a hole in the wharf boat at a part not used or intended as a passageway for passengers, but into which such person fell while going around the outside of the boat at night in order to communicate with a boat approaching the landing, instead of waiting until the passageway was opened so that he might go through in the usual way, and which was opened in time to transact business with the boat when it reached the landing. *Grand Tower Mfg. Co. v. Hawkins*, 72 Ill. 386.

The owner of a wharf is not liable for personal injuries received by a person in stepping into a hole in the planking of a roadway leading to the wharf, where the wharf was built by his grantor at the foot of a street under a license from the city to build at a certain width in the center of the street, and subsequently the abutting owners on each side extended the planking so as to connect with the wharf in the center, thus forming a solid roadway the entire width of the street, and the hole resulted

defendant, and stated the reasons for his finding. Some of these reasons do not appear to be in accordance with the evidence, nor to be warranted by it; and the judge concludes his subsidiary findings by the statement that the master of the vessel "knew that, in order to reach the berth designated, his keel must plow the mud a depth of 2 feet, and that the bottom would be searched by his barge as it had not been searched by a vessel before." And he ends by saying: "I am of opinion that the loss should rest where it falls." There is no finding that the master of the vessel was not in the exercise of due care, and the theory on which the decision apparently rests is that the master took the risk. We will now point out wherein it seems to us that the judge was not warranted by the evidence in some of his subsidiary findings. In the first

place, the judge states: "It does not appear that any vessel had ever been in the dock before, drawing more than 20 feet of water." Crockett, a witness for the defendant, who was interested in the defendant company, and had charge of its local business at Rockland, testified that prior to June, 1900, when the accident occurred, "the wharf had been used for loading and unloading vessels of all sizes,—from small schooners to large ships drawing more than 20 feet." Norton, an employee of the defendant, testified in its behalf that he had seen a vessel in this dock, drawing more than the plaintiff's vessel,—"a vessel that drew 23 feet, at least." The judge further says: "The captain of the harbor tugboat employed by the barge told her master that he thought it doubtful whether there was enough water." Holmes, the master of the

from the joining, by an abutting owner, of his planking to that of the wharf, but outside the width originally granted for the wharf, which was all that the present owner acquired, or was under obligation to keep in repair. *Morgan v. Morley*, 1 Wash. 464, 25 Pac. 333.

A warehouseman doing a private business and keeping a private wharf in connection therewith, acting under no license or statutory authority burdening him with any public duty with reference either to the wharf or the warehouse, is bound to exercise only reasonable care and diligence with reference to the means provided for approaching such warehouse and wharf, and therefore is not liable to the owner of a team and wagon for their loss by backing into the river while at the warehouse for grain, which might have been prevented if guards had been placed on the wharf, or hitching places had been provided, such warehouseman being under no legal obligation to place guards on the wharf, or to provide means for hitching horses at his warehouse. *Buckingham v. Fisher*, 70 Ill. 121.

VI. Liability as between owner and lessee.

A wharf being in a sense public, there is a tendency to hold the owner to a stricter liability for its safety than he is subject to in respect to property of a purely private character which has gone into possession of a lessee. One who has devoted his property to public use, and invited the public upon it, should not be permitted entirely to lay aside his responsibility for its safe condition by placing it in the possession of a tenant who may be utterly careless and irresponsible. If the wharf is leased in a defective condition, or is not wholly out of the owner's possession, there can be no question of his liability.

A city is liable for injuries sustained because of the defective construction and dangerous condition of a pier owned by it, and which it has leased with the defects complained of, although the tenant has covenanted to keep it in repair. *Moody v. New York*, 43 Barb. 282.

A city which has granted the right of wharfage for a specified time is not thereby released from the duty to repair the wharf, or absolved from liability for personal injuries due to such want of repairs. *Taylor v. New York*, 4 E. D. Smith, 559.

Where the owner of a wharf leases or rents it, and at the time of such renting the wharf is in an unsafe condition for the use to which he knows it is to be put, and he knows, or by the exercise of reasonable diligence could know, its condition, he is liable for injury to one who, 61 L. R. A.

while lawfully upon the wharf, is injured in consequence of its condition. *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697.

Even though the injured person is an employee of the tenant. *Wendell v. Baxter*, 12 Gray, 494.

An executor who, in a lease of property belonging to the estate, reserves the right to construct a bulkhead, which he does in such an improper manner that a boat lying at the bulkhead is sunk by striking a timber projecting under water and out of sight, and not embraced within the lines of any street, is liable for the injury, and also for further damage to the boat caused by an attempt to raise her by proper means. *Mason v. Rhineland*, 8 Ben. 163, Fed. Cas. No. 9,251.

A wharf owner granting wharf licenses or privileges at a stipulated rent does not relinquish his general supervision and control of the property; and he is liable for failure to maintain it in a safe condition for the use of the lessee. *Allegheny v. Campbell*, 107 Pa. 530, 52 Am. Rep. 478.

That a wharf is in a safe condition when the right to collect wharfage and cranes is assigned does not relieve the owner from his duty to keep it in safe condition. *Cleary v. Oceanic Steam Nav. Co.* 40 Fed. 908.

Both the owner and lessee of a pier are liable for injuries sustained because of its want of repair, where they are in possession of it jointly. *Cannavan v. Conklin*, 1 Daly, 509.

Where one owns a defective wharf used in connection with a place of public resort, and, knowing the defect, leases the place and wharf to another, who learns of the wharf defect after accepting the lease, but continues to use the wharf and place for public resort, an action for damages to a person who is injured by the wharf defect is maintainable against the lessor and lessee jointly. *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620.

There are decisions which apply the ordinary rule of landlord and tenant in such cases. Under that rule, the lessor of a wharf is not liable for its unsafe condition if it was in proper condition at time of lease. *Towt v. Philadelphia*, 173 Pa. 314, 83 Atl. 1084.

A lessor of a wharf is not liable for an injury to a boat caused by an obstruction subsequently existing, of which he has no notice, where exclusive possession of the property has been transferred to the lessee, who covenanted to keep it in repair. *Moore v. Oceanic Steam Nav. Co.* 24 Fed. 237.

Persons who become full owners of a pier

tugboat, testified that he told the master of the barge that he thought it was doubtful if there was water enough to go into that berth, and that the master asked him if the bottom was all right there, and Holmes said that it was, as far as he knew. This puts a somewhat different light upon what the judge evidently considered a warning. We are also of opinion that the judge was not warranted in finding that "the master knew that his keel must plow the mud a depth of 2 feet." There was evidence that the vessel drew 21 feet forward, and 22 feet aft, and that there were figures on the bow and stern indicating the draught. The principal damage to the vessel was just forward of amidships, where the draught would be less than 21 feet 6 inches. The judge found that other vessels "have lain there before without injury." There was evidence to war-

rant a finding that vessels had lain at the dock before without injury, but it does not appear that these vessels had rested on the ledge. While such evidence is often admitted in this class of cases, its admissibility is very questionable. It would seem to come within the rule that the fact that other persons have not suffered by an alleged defect is immaterial. *Aldrich v. Pelham*, 1 Gray, 510. But if such evidence is admissible, to entitle it to any weight it should appear that the other vessels were of the same length, breadth, and flatness as was the plaintiff's vessel, and were as heavily loaded as she was. The defendant made no attempt to prove any of these things. The value of such evidence is to show the existence of no defect, but, as was said by Judge Wallace in *Smith v. Havemeyer*, 36 Fed. 927, 928, it becomes quite unimportant when it

upon the death of a life tenant, subject to a valid outstanding lease, will not be liable for injuries caused by the pier being in such a condition as to be a nuisance, of which they have no notice, and which it was the duty of the lessee to remove; and the fact that they have the right to go upon the pier and make repairs is immaterial. *Ahern v. Steele*, 115 N. Y. 208, 5 L. R. A. 449, 22 N. E. 193, *Reversing* 48 Hun, 517, 1 N. Y. Supp. 259, where the court held that, since the defendants took the pier by a devise, and since it had been a nuisance when it was leased, they took subject to the liability of the testator, and were therefore liable for the injury.

A municipal corporation owning a pier is not liable for injury caused by piles driven in front of it by its lessee, and permitted to fall off into the water so as to be dangerous to navigation, in the absence of anything to show that it had notice of the obstruction. *Seaman v. New York*, 80 N. Y. 239, 36 Am. Rep. 612.

A municipal corporation which has leased its wharf and wharf boat to an individual is not liable in damages to a shipper whose goods, deposited on the wharf boat, were damaged by reason of the negligence of the lessee in permitting the boat to fill with water and sink, in the absence of allegations and proof showing that such damage was in any way caused by the acts or omissions of such municipality. *Carrollton Furniture Mfg. Co. v. Carrollton*, 104 Ky. 526, 47 S. W. 439, 885.

A lessee of a pier, who has covenanted with the owner to repair, and has sublet without any covenant with the subtenant to repair, is not liable to a person rightfully on the pier for injuries to his horse caused by a defect in the pier which arises after the lease was made. *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 891, *Reversing* 65 Barb. 844. In that case the fact that defendant was not the owner, but an intermediate tenant who had assigned his interest, is probably sufficient to relieve him from liability for the insufficient condition of the wharf, but the decision is not placed on that ground. The court says that defendant was not the occupier at the time of the injury, but rather, stood in the position of landlord to the actual occupant and to third persons. As between him who is the landlord and owner, and him who is the lessee and occupant, of premises, there is, in general, no obligation upon the former to keep them in repair when he has made no express contract to that effect. If the premises are in good repair when demised, and afterwards become ruinous and dangerous, the landlord is not responsible therefor, either to 61 L. R. A.

the occupant, or to the public, unless he has expressly agreed to repair, or has renewed the lease after the need of the repair has shown itself.

If the wharf is a private one, its owner is not liable for injuries sustained by an employee of the lessee in consequence of the breaking of a rotten plank, unless it appears that such owner knew, or by reasonable care and diligence could have known, the unsafe condition of the wharf when he leased it. *State use of Bashe v. Boyce*, 73 Md. 469, 21 Atl. 322.

Liability of lessee.

Lessees in the possession and control of a wharf are liable to the owner of a boat damaged by bolts projecting from the pier, the presence of which is known, or ought to be known, by such lessees; and they are not absolved from liability by reason of the duty of the lessor to keep the wharf in repair. *Leonard v. Decker*, 22 Fed. 741.

The lessee of a dock will be liable for damages to a vessel injured without its owner's fault and in consequence of the dangerous condition of the dock, which the owner represented as safe and convenient, when the vessel is at his wharf at his request, and for the convenience of loading ice. *Barrett v. Black*, 56 Me. 498, 96 Am. Dec. 497.

Occupants of a wharf under a lease reserving rights of wharfage, and imposing on the lessees the duty of making requisite alterations and repairs, are liable to the owner of a boat sunk because of the uneven and dangerous condition of the bottom, although such boat was at the wharf on the invitation of a company to which the rights reserved by the lease had been granted. *O'Rourke v. Peck*, 29 Fed. 223.

A pier in the city of New York is a part of its public streets, and a recovery may be had against the lessee for an injury due to a hole existing in the pier, and which had remained there for a long period of time. *Gluck v. Ridge-wood Ice Co.* 31 N. Y. S. R. 99, 9 N. Y. Supp. 254.

VII. Liability of public corporation.

A dock company is not relieved from liability for injuries inflicted by a negligent operation of the docks by the fact that it is merely acting as a public trustee, receiving the tolls and disbursing them in the maintenance of the docks, and receiving no profit itself from such toll. *Mersey Docks & Harbour Board v. Gibbs*, 11 H. L. Cas. 686, L. R. 1 H. L. 93, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N.

appears beyond doubt that there are defects, capable of producing mischief, which could have been readily discovered by proper examination. The general rules of law which are applicable in cases of this character are the same in England and in this country, and are the same at common law and in admiralty. They are as well stated in the case of *Nickerson v. Tirrell*, 127 Mass. 236, 239, as perhaps in any case: "The owner or occupant of a dock is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable care to keep his dock in such a state as to be

reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care—if there is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him—he is guilty of negligence, and liable to the person who, using due care, is injured thereby. *Wendell v. Baxter*, 12 Gray, 494; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Thompson v. Northeastern R. Co.* 2 B. & S. 106; *Mersey Docks & Harbour Board v. Gibbs*, L. R. 1 H. L. 93." Other cases bearing upon this point are *Smith v. Burnett*, 173 U. S. 430, 43 L. ed. 756, 19 Sup. Ct. Rep. 442; *Barber v. Abendroth Bros.* 102 N. Y. 406, 55 Am. Rep. 821, 7 N. E. 417; *Barrett v. Black*, 56 Me. 498, 96 Am. Dec. 497; *Sawyer v. Oakman*, 1 Low. Dec. 134, Fed. Cas. No. 12,404, 7 Blatchf. 290, Fed. Cas. No. 12,-

8. 877, 14 Week. Rep. 872, Affirming *Gibbs v. Liverpool Docks*, 8 Hurlst. & N. 164, 4 Jur. N. S. 636, 27 L. J. Exch. N. S. 321, where it was held that dock trustees are liable for an injury inflicted upon a vessel by the dangerous and defective condition of the docks, of which defect they had knowledge, although they derived no benefit from the operation of the docks, and by statute were vested with a discretion as to the application of the funds received by them, as, if, in the exercise of their discretion, they determine not to expend the funds for the repair of the docks, it becomes their duty to close the dock to the public.

Trustees of docks who receive tolls for a purely fiduciary purpose, owe the same duty to those using the docks as a company operating the docks for a private or beneficial purpose, and are liable to the same extent for acts of negligence resulting in injury to vessels. And the court, in so deciding, said that the decision of *Gibbs v. Liverpool Docks*, is in effect grounded on the same principle. *Mersey Docks & Harbour Board v. Penhallow*, 7 Hurlst. & N. 329, 30 L. J. Exch. N. S. 329, 8 Jur. N. S. 486, 5 L. T. N. S. 112.

A municipal corporation charged with the duty of keeping a dock in repair will be liable for injuries caused by its neglect of that duty. *Kennedy v. New York*, 73 N. Y. 365, 29 Am. Rep. 100.

A city in control of the wharves and landing places along its front, and which collects wharfage for their use, is liable to one whose freight, while being unloaded from a boat, is lost by the breaking of the wharf. *Fennimore v. New Orleans*, 20 La. Ann. 124.

A municipal corporation is liable for injuries to boats caused by its failure to keep a wharf free from obstructions, where such corporation, under its charter, is in possession of such wharf, and exercises exclusive control and jurisdiction over it, charges and collects tolls or wharfage, and regulates and controls the manner of its use, and has provided by ordinance how it is to be kept; and the fact that the wharf master in charge thereof is, by its charter, elected to such office, does not relieve it from this responsibility. Such duty being a corporate one, absolute in its nature, and the corporation having an interest in its performance, makes such officer its agent for its faithful performance. *Memphis v. Kimbrough*, 12 Helsk. 133.

A municipal corporation controlling and receiving wharfage for the use of a public landing is liable for failure to keep the adjoining waters in safe condition for the use of vessels. *Pitts-* 61 L. R. A.

burgh City v. Grier, 22 Pa. 54, 60 Am. Dec. 65. A municipality owning a public wharf which receives wharfage charges is bound to use at least ordinary care and diligence in keeping the adjacent waters in which moored vessels will lie free from obstructions, and is liable for damages resulting from its neglect to do so. *Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357.

The right of a municipal corporation to collect wharfage carries with it the correlative duty of keeping the wharves in repair, and the legal transfer of such right to another subrogates such person to the performance of the duty. *Radway v. Briggs*, 37 N. Y. 256.

The city of New York is liable for damages sustained by a canal boat because of the defective condition of a wharf not for general public use, but for the use of the department of charities and corrections, where the boat went to the wharf to deliver a load of coal for that department. *Philadelphia & B. R. Co. v. New York*, 38 Fed. 159.

VIII. Defences.

If the wharf or dock is closed or is put to a use not intended, the owner will not be liable for injuries resulting from use.

A wharfinger is not liable for injuries received by a boat, due to the unsafe condition of a pier which had been closed for repairs, when the boat arrived on Sunday in the absence of the wharfinger, and took up a berth without his knowledge, and at a point other than that where it expected to unload. *Merritt & C. Derick & Wrecking Co. v. Schermerhorn*, 39 C. C. A. 257, 98 Fed. 746.

But, to close a wharf which has been open to the access of the public so as to absolve the owner from liability for injuries to a person going there, notice must be given of its changed character, and that the rights of passers are terminated. *New Orleans, M. & C. E. Co. v. Hanning*, 15 Wall. 649, 21 L. ed. 220.

A dock company is liable for injuries suffered by a vessel in taking the ground, in a lock, the water of which was drawn off so as to permit repairs to be made to it, where the vessel did so under the directions of the harbor master or one acting in his place, who ought to have known of the uneven condition of the ground; and the dock company is liable for his act and representations, although the dock was not a dry dock. *The Apollo* [1891] A. C. 499, Reversing 61 L. T. N. S. 286; and 60 L. T. N. S. 112, where it was held that a dock company is under no duty to have the bottom of a lock leading into one of

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We have examined all the cases cited by the counsel on each side, and also other cases, but we have found none in which the doctrine of the assumption of the risk has been applied. It may, however, be true that where a master of a vessel knows of a hidden obstruction in a dock, and takes his vessel in, he acts so carelessly that he may be said to assume the risk. The case of *Chris-*

tian v. Van Tassel, 12 Fed. 884, was decided upon the general principles we have stated; but Judge Brown, in giving the opinion, apparently in answer to an argument of counsel, said: "The libellant, in voluntarily moving the boat forward upon what was known to be shoal water, took the risk of whatever might result from grounding upon the usual mud bottom; . . . but he did not take the additional risk resulting from the stones, of which he was not apprised, and for which the respondent must be held responsible."

It is clear that the vessel was in the defendant's dock on business, and was therefore there by invitation. The judge has found, and the evidence shows, that the injury was caused by a ledge of rocks imbedded in the mud at the bottom of the dock. The questions of fact which he did not care

its docks in the same condition as that of a dry dock; and the master of a ship was guilty of negligence in allowing his vessel to be placed in the lock by the foreman of the dock company with the intention of using it as a dry dock, without informing himself of the condition of the lock, and he cannot recover for injuries inflicted upon the vessel by its settling upon obstructions in the lock when the water was turned out.

The lessees and occupants of a wharf having the general possession and control of it are under obligation to keep the premises in a reasonably safe condition, and are liable for the sinking of a canal boat caused by the uneven condition of the bottom of the river alongside the wharf, although the boat is discharging coal, and the defendant's lease excepted and reserved the right to use the premises for such purposes, which had been granted to others. *O'Rourke v. Peck*, 24 Blatchf. 473, 40 Fed. 907.

Assumed risk.

A wharfinger is not liable for the sinking of a vessel while moored to his dock, where the agent of the vessel knew of the obstruction due to a sunken dredge which caused the accident, and undertook to avoid it. *The Stroma*, 42 Fed. 922.

A vessel which goes to an oil wharf for a cargo of oil assumes the risk incident to the fact that the water is unavoidably covered with floating oil, and the wharfinger is not liable for the loss of the vessel by fire communicated to the vessel from premises not owned by him, by means of escaping oil from sources over which he had no control. *Hustede v. Atlantic Refining Co.* 68 Fed. 669.

The owner of a pier is not liable for injury to a vessel while entering a berth at the pier by a spindle of a sunken dredge the location of which was not known, where he merely assented to the occupation of the berth, and the agent of the vessel, who was acquainted with the danger, or might have been upon inquiry respecting it, assumed the responsibility of providing the vessel with a safe berth. *Panama R. Co. v. Napier Shipping Co.* 166 U. S. 280, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572.

Contributory negligence.

Contributory negligence is a defense to actions for injuries received on a pier. *Clancy v. Byrne*, 58 Barb. 449.

A boat owner who voluntarily remains at a dock after discovering that the bottom of the slip is uneven and liable to injure his boat when

she grounds at low tide cannot recover for injuries sustained by such cause. *Washington v. Staten Island Rapid Transit R. Co.* 68 Hun, 87, 22 N. Y. Supp. 599.

Dock owners are not liable for injuries sustained by a canal boat which, while discharging cargo, settled upon rocks, of the existence of which the master had been warned, and the location of which he had examined, where he acted on the assumption that the tide would rise as high as on the previous day, which it failed to do. *Peterson v. Great Neck Dock Co.* 75 Fed. 683.

Wharfingers are not liable for the injury received by a boat which grounded upon an obstruction at the dock and sank, where they had been unable to effect its entire removal, but notified the master of it, and directed him to breast his boat off from the dock, and furnished him a breast plank for that purpose, which he failed to use, and left his boat close alongside. *Leo v. McCollum*, 107 Fed. 742.

A master who knows that he is about to enter a dock where his vessel cannot float at all conditions of the tide, is at fault in attempting to enter such dock after the tide has fallen, whereby the vessel grounds and sustains injury. *The John A. Berkman*, 6 Fed. 535.

A wharf owner and consignee who does not know of the presence of a vessel at his wharf is not liable for an injury sustained when she grounded at low tide, where the captain voluntarily placed his vessel partly at the wharf and partly upon an unwharfed outland of a third person, without making request for a berth, or making inquiry, which would have disclosed the changed condition of the bottom in that neighborhood since the boat had last lain at the wharf. *The Niantic*, 6 Fed. 632.

The owner of a boat is negligent in tying it up for the night at a dock in Harlem river at 155th street without sounding or inquiring as to the depth of the water, or breasting off. *The Dave & Mose*, 49 Fed. 389.

Persons not lessees of a wharf, but who enjoy the exclusive privilege from the owners of using the pier and the adjoining slip for shipping, assume the duty of not exposing those they invite there for the transaction of business to hazard from any defects in the condition of the premises, but are not liable for an injury sustained by a scow which settled at low tide upon a spile projecting from the bottom of the slip, the existence of which was known to them, where the scow remained in the slip for five hours after discharging her cargo, and might have departed earlier without

to pass upon are whether the master was in the exercise of due care, and whether the defendant knew of the defect, or could, by the exercise of reasonable care and diligence, have ascertained its existence. If the master exercised reasonable care, and the defendant was negligent, it cannot be said that the master took the risk of the ledge merely because he had to go through some mud. We are of opinion, therefore, that the case was not decided upon the application of proper principles of law, and that there must be a new trial.

The first request, we are of opinion, should have been given. We are not aware of any case in which it has been held that the master of a vessel which is to lie in a regular berth at a wharf is obliged to take soundings, though such an obligation may be held to exist where a vessel is to take ground at a place where vessels do not usually lie. As to the authority of Norton, it is plain from the evidence that he was the agent of the defendant on the wharf, and gave all the directions to the master that were given in respect to the berth the vessel was to lie at. The master reported to him before the vessel was hauled in, and inquired the depth of the water and the character of the bottom. He was assured that there was

plenty of water and the bottom was good. This bears directly upon the question of the due care of the master. There was some attempt to show that Norton was only the general superintendent of certain branches of business, such as loading cars and vessels with lime, "discharging vessels with coal, taking account of cooperage, etc." There is nothing in the evidence to show that the defendant had anyone else on the wharf with authority to give directions to vessels coming there, and to answer questions in regard to the depth of water and the nature of the bottom. Indeed, there is no evidence that the defendant directly denied Norton's authority to do all that he did in this case. Norton was ostensibly the person in charge of the wharf, and, by a familiar principle of agency, the defendant cannot show that he had only limited authority. *Pennsylvania R. Co. v. Aika*, 22 Fed. 920. The request, therefore, should have been given.

The second request states a correct principle of law, but it is rendered immaterial by the judge's finding. The third request is perhaps stated too broadly. The fourth request should have been given. See cases cited above.

Exceptions sustained.

injury. *Onderdonk v. Smith*, 28 Blatchf. 562, 27 Fed. 874.

A dock company is not relieved from liability for injuries to a vessel caused by its striking against a bar in the basin covered at high tide by water, by the fact that those in charge of the boat were aware of the state of the basin, unless the basin was in such a condition that an ordinarily prudent person would not have attempted to navigate the ship therein. *Thompson v. North-Eastern R. Co.* 2 Best & S. 106, 31 L. J. Q. B. N. S. 194, 8 Jur. N. S. 991, 6 L. T. N. S. 127, 10 Week. Rep. 404.

That the master of a vessel hauled it into a dock on Sunday in violation of a state statute against the performance of work and labor on that day does not prevent a recovery for damages suffered from inequalities in the bottom of the dock. *Sawyer v. Oakman*, 1 Low. Dec. 134, Fed. Cas. No. 12,404.

Care.

The owner of a barge which was sunk by contact with two spiles projecting under water from a wharf, the dock of which had been newly dredged, and to which he proceeded by order of the charterer, cannot recover damages from him or the owner of the wharf, neither of which had knowledge or notice of the danger. *Hagan v. Brockie*, 11 Fed. 745.

But the owner of a wharf is not relieved from liability for the condition of the water adjoining it by the fact that the government has made appropriations for the improvement of the water, and has occasionally dredged it. *Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357.

The mere fact that no wharfage is taken from the vessel which is injured by obstructions in the water adjacent to a wharf will not absolve 61 L. R. A.

the wharf owner from liability if the wharf is a public one, and wharfage is usually taken from vessels using it. *Ibid*.

A wharfinger is not liable for damages alleged to have been occasioned to a vessel by reason of obstructions at the wharf, unless the fact of the existence of the obstructions, and that the damage arose from that cause, is clearly shown. *Crossan v. Wood*, 44 Fed. 94.

IX. Other matters.

Damages by reason of a public nuisance in the obstruction of a public wharf cannot be recovered by an individual in the absence of special damages. *Gordon v. Baxter*, 74 N. C. 470.

The unsafe condition of a berth alongside a wharf at which a vessel was taking a load of ice, and by reason of which she was strained when grounded, is the proximate cause of a subsequent injury due to the shifting of the ice in the hold after she is beached for repairs. *Union Ice Co. v. Crowell*, 5 C. C. A. 49, 5 U. S. App. 270, 55 Fed. 87.

The measure of damages for the loss of goods precipitated into the sea by reason of the rotten condition of a wharf, upon which they were deposited for hire, is the value of the goods at the time of loss. *Oregon Improv. Co. v. Seattle Gaslight Co.* 4 Wash. 684, 30 Pac. 672.

Owners of a ship damaged by inequalities in the bottom alongside a dock at which the vessel was placed may recover, as part of their damages, the fees paid competent men for surveys of the injured vessel; but cannot recover for depreciation where the vessel has been restored to her former condition, although the fact of the accident might affect her market value. *Sawyer v. Oakman*, 7 Blatchf. 290, Fed. Cas. No. 12,402. H. F. F.

WEST VIRGINIA SUPREME COURT OF APPEALS.

John ARBENZ, Sr.,

v.

EXLEY, WATKINS, & COMPANY, Plffs.
in Err.

(52 W. Va. 476.)

*1. A tenant of land, not merely of a room or apartment, must pay rent for his term, though a building on it, included in the lease, without fault on his part is totally destroyed by fire, unless the lease otherwise provide.

2. One who enters into possession under a written lease without seal for a term greater than five years is a tenant at will, but if he pays periodical rent the tenancy is by law one from year to year, and he must pay rent accordingly. The lease does not vest an estate for the term, but it is admissible evidence to prescribe the rent, and the rights of the parties, and all things save duration of the tenancy. The tenant can only end the tenancy by notice to quit, and must pay rent as a tenant from year to year, and cannot discharge himself from rent by abandoning the premises.

3. Unless a lease provide for repairs by a landlord, he is not bound to either repair or rebuild in case of accidental destruction. He is bound only so far as his covenant goes. His covenant to repair is independent, and does not release from rent, and is to be enforced by recouping damages in an action for rent, or by a separate action for damages.

(March 21, 1903.)

ERROR to the Circuit Court for Ohio County to review a judgment in favor of plaintiff in an action brought to recover rent alleged to be due and unpaid. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry M. Russell, for plaintiffs in error:

Our statute provides that no estate for a term of more than five years in lands shall be conveyed, unless by deed or will. The lease in this case was for a term in excess of five years, and, consequently, was void under the provisions of the statute.

James v. Kibler, 94 Va. 165, 26 S. E. 417; *Jordan v. Greensboro Furnace Co.* 126 N. C. 143, 35 S. E. 247; *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642; *English v. Marvin*, 128 N. Y. 380, 28 N. E. 634.

Occupancy of premises by a tenant under a void lease creates only a tenancy at will, which may be repudiated by either party at any time.

12 Am. & Eng. Enc. Law, pp. 671, 673, 674;

*Headnotes by BRANNON, J.

NOTE.—As to rights and liabilities of tenant on destruction of leased building, see also *Porter v. Tull* (Wash.) 22 L. R. A. 613, and *note*; *Taylor v. Hart* (Miss.) 30 L. R. A. 710; and *Wattles v. South Omaha Ice & Coal Co.* (Neb.) 36 L. R. A. 424.

As to tenancy from year to year; how created,—see *Talamo v. Spitzmiller* (N. Y.) 8 L. R. A. 221, and *note*.
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English v. Marvin, 128 N. Y. 380, 28 N. E. 634; 2 Minor, Inst. 196; *Peters v. Balke*, 170 Ill. 304, 48 N. E. 1012; *Dunne v. Trustees of Schools*, 39 Ill. 578; *Davis v. Thompson*, 13 Me. 209; *Harrison v. Middleton*, 11 Gratt. 527.

A tenancy from month to month is not converted into a tenancy from year to year by the mere fact that it continues longer than a year.

The court ought to have left to the jury the answer to the question whether the facts showed the tenancy to be one from year to year, or one from month to month.

Lehman v. Nolting, 56 Mo. App. 549; *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642; *Simmons v. Jarman*, 122 N. C. 195, 29 S. E. 332; *Utah Loan & T. Co. v. Garbutt*, 6 Utah, 342, 23 Pac. 758; *Warner v. Hale*, 65 Ill. 395; *Bets v. Maxwell*, 48 Kan. 142, 29 Pac. 147.

If the tenancy was at will, as in the case of one holding under a void lease, it could be terminated at any time by either party. The abandonment of the premises by the tenant was sufficient to bring the term to an end.

2 Minor, Inst. 196; *Chesebrough v. Pingree*, 72 Mich. 438, 1 L. R. A. 529, 40 N. W. 747.

But, even if the tenancy was from year to year, a destructive fire such as this, whereby the premises became untenable, authorized the tenants to abandon the premises, and thus put an end to their further liability for rent.

Edwards v. Etherington, Ryan & M. 268. *Messrs. Hubbard & Hubbard and John Arbenz, Jr.*, for defendant in error:

A lease by parol, though void under the statute, may yet be referred to for ascertaining all the other terms regulating and controlling the tenancy, except as to its duration.

Doe ex dem. Rigge v. Bell, 5 T. R. 471, 2 Smith, Lead. Cas. 1342.

Such lease may inure from year to year. *Clayton v. Blakey*, 8 T. R. 3, 2 Smith, Lead. Cas. 1347.

Presumptively the amount of rent to be paid, the time of payment, etc., in fact everything except duration, are as agreed in the oral contract.

Clayton v. Blakey, 2 Smith, Lead. Cas. 1356, 1357, note 2; *Allen v. Bartlett*, 20 W. Va. 46; *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237.

Brannon, J., delivered the opinion of the court:

John Arbenz, Sr., made a written lease, but not under seal, to Exley, Watkins, & Co., leasing for a term of five years and three months a brick building, including vacant parts of certain lots, in the city of Wheeling, the term commencing January 1, 1896, and ending March 31, 1902, for the annual rent of \$700, commencing April 1, 1896, payable in monthly instalments. The lessees took possession the first week of

January, and occupied the premises, paying rent monthly. On September 15, 1898, a fire totally destroyed said building. The lessees paid rent for that September and also for October, but with the rent for October sent a letter, October 31, 1898, to Arbenz, informing him that they thereby vacated the premises, and surrendered them to him. In November, 1898, Arbenz sued out a distress warrant against said lessees for rent from November 1, 1898, to October 31, 1899, and, the same having been levied, a forthcoming bond was given, and in the proceeding upon it in the circuit court of Ohio county a verdict was rendered for the plaintiff for \$502.54, after deducting for failure to repair an engine, and judgment given thereon, and the defendants took a writ of error. The defendants filed pleas denying grounds of attachment, and denying all liability for the rent claimed.

Counsel for defendants contends that the destruction of the building by fire discharged the tenants from further obligation to pay rent. He does not base this position on common law, as it requires the tenant to pay rent notwithstanding it is wholly destroyed by accidental fire, flood, or the like, unless there be stipulation otherwise. 18 Am. & Eng. Enc. Law, 2d ed. p. 306; 2 Rob. Pr. 52; *Scott v. Scott*, 18 Gratt. 165; 2 Minor, Inst. 762. Where the lease carries no interest in the land, but is a room or apartment merely, total destruction of the thing leased discharges the tenant from future rent. 18 Am. & Eng. Enc. Law, p. 308; 2 Taylor, Land. & T. § 520. Counsel rests the position that the fire absolved the tenants from rent upon Code 1899, chap. 72, § 22, that "no covenant or promise by a lessee that he will leave the premises in good repair shall have the effect, if the buildings are destroyed by fire or otherwise, without fault or negligence on his part, of binding him to erect such buildings again, or to pay for the same or any part thereof, unless there be other words showing it to be the intent of the parties that he should be so bound." This statute was made to change the common-law rule that bound the tenant, in case of destruction by fire, to rebuild, if the lease bound him to leave the premises in good repair. *Ross v. Overton*, 3 Call (Va.) 309, 2 Am. Dec. 552; *Maggort v. Hansbarger*, 8 Leigh, 532; *Thompson v. Pendell*, 12 Leigh, 591. It does not change the common law as to rent. The revisers of the Code of 1849 proposed that section so as to release the tenant from rent proportionally when destruction deprived him of the use of the tenement, but the legislature struck out the clause as to rent. 2 Rob. Pr. 54. Counsel says that the words, "or to pay for the same or any part thereof," in the section, can refer to nothing but rent. They plainly in terms refer to "buildings," not rent. It does not deal with rent.

The lease in the present case is for a term beyond five years, and, being not a deed, it falls under Code 1899, chap. 71, § 1, providing that "no estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed, unless by deed

or will." It is argued that the lease is void by the statute, and the basis of no demand for rent. The court gave an instruction, which controls the case, to the effect, for present purpose, that the jury should find for the plaintiff \$700 rent for the one-year claim. If that instruction is right, others in the case are immaterial, as is conceded on both sides, because, that being right, others, if erroneous, would not affect the result. The defendants took possession by reason of the lease, and paid rent. They were then tenants. The lease did not pass to them the term which it purported to pass, it is true. It passed no distinct term. The statute makes the lease ineffectual to pass the term of over five years, or any term; but it does not say it is void, or void for all purposes. It simply does not pass an estate. But when, under its color, the lessees became tenants, a tenancy was established. What kind of tenancy? The decided weight of authority is that when a lease is made not complying with the statute of frauds, and possession is taken, there arises, by operation of law, a tenancy from year to year. "This implied tenancy from year to year will arise in the cases where occupation is had under a parol demise for years, void because exceeding the periods allowed by the statute of frauds." Taylor, Land. & T. § 56. "An entry under a lease for a term at the annual rent, void for any cause, and a payment of rent under it, creates a tenancy from year to year upon the terms of the lease except at its duration." Wood, Stat. Fr. § 22, p. 56. The lease is admissible evidence not to pass a term, not to give title for the term it names, but to show some kind of a tenancy exists, and to show its terms and conditions. So says Wood, *ubi supra*. See 1 Washb. Real Prop. § 823; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597; *Schuyler v. Leggett*, 2 Cow. 660; *Coudert v. Cohn*, 118 N. Y. 309, 7 L. R. A. 69, 23 N. E. 298. In *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567, the court says such a void lease may be repudiated as soon as made by either party, because it does not of its own force bind them, but possession and payment of rent make it a tenancy from year to year, and that then, though the lease is void as to term and interest in the land, yet it regulates the relation of the parties in other respects, and may be resorted to to determine their rights in all things consistent with, and not inapplicable to, a tenancy from year to year. But our own court, in *Allen v. Bartlett*, 20 W. Va. 46, said: "Although a parol lease for more than one year is invalid under the statute of frauds, . . . yet if a person enters into possession under a parol lease for four years, and holds over into a second year, he becomes a tenant from year to year upon the terms of the parol lease, and so continues as long as he remains in possession without any new or other agreement."

In *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237, we said that though a contract for service more than one year was void, yet after service there could be action for compensation, and the contract could be used

to furnish measures of recovery. Just so in this case, it fixes the rent. Many cases hold this view. *Nash v. Berkmeir*, 83 Ind. 539; *Larkin v. Avery*, 23 Conn. 315; *Garrett v. Clark*, 5 Or. 464; and others. Counsel for defendants relies upon *Unglish v. Marvin*, 128 N. Y. 380, 28 N. E. 634, holding apparently different views. In reference to this case I may safely say that, if to be construed as holding counter to the position above stated, it is counter to numerous New York cases. Apparently, it does hold hostile doctrine, but the judge delivering the opinion does not think so, because he says the relation of the landlord and tenant did not arise under the particular agreement in that case, and also because he expressly states the law to be that an occupancy under a void parol lease for more than a year does create a tenancy from year to year, and cites as proving this cases cited above. He distinctly says that these cases settled the above stated doctrine, and does not hint any dissatisfaction with them. He based the ruling on the peculiar contract in the case. All I need say of that case is that it admits the above law. We are referred to *Jordan v. Greensboro Furnace Co.* 128 N. C. 143, 35 S. E. 247. It was an action to recover damages for refusal to execute a lease pursuant to an oral contract to lease premises for five years. That was an action direct upon the void contract, which alone could give existence to the contract. There being no contract, there was no right of action. The case is not in point. The case of *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642, seems to hold against the doctrine stated; but it admits that the current of English and American authority does hold that entry and payment of rent under a void lease creates a tenancy from year to year. I just now met with a later case, *Steele v. Anheuser-Busch Brewing Asso.* 57 Minn. 18, 58 N. W. 685, holding that a lease void under the statute of frauds "will, nevertheless, regulate the terms as to rent, if the tenant goes into possession and occupies the premises." The *Johnson Case* seems to me no more than that the void lease cannot fix duration of the term. I think 1 McAdam, Land. & T. 66, lays down sound law thus: "Where a lease is void by reason of the provisions of the statute, that does not render the contract an illegal or unlawful one, if the parties choose to perform it. If the lease is verbal, and the term is for a longer time than one year, it is void in the limited sense that neither party can compel the other to perform it. The landlord need not, in such a case, give the tenant possession of the premises, if he chooses not to do so; and no action will lie by the tenant against the landlord in consequence thereof. Nor need the tenant take possession in such case. No action will lie against him, if he does not. The parties may, however, go on and perform the agreement, though they could not be compelled to do so. And in such case if the tenant goes into possession of the demised premises, and occupies them, he will then be bound to perform the agreement, by paying the rent agreed for such time as he 61 L. R. A.

may remain in possession in the same manner as though the lease had been reduced to writing. And if, by reason of the manner of paying rent, as by the year, a yearly tenancy is implied by law, the tenant may make himself liable for the year's rent. During the time which the tenant occupies the premises, or in case a yearly tenancy is implied by law, the tenant will be bound to perform the terms of the agreement." A "tenant in possession under a parol lease for two years void by the statute of frauds is a tenant at will, or from year to year." *Duke v. Harper*, 6 Yerg. 280, 27 Am. Dec. 462.

Thus far I have written on the theory, conveyed by the words of authority, that a lease not conforming to the statute not only brings into being a tenancy, but one from year to year; but my mind has raised again the question, Is it a tenancy at will, or one from year to year? If at will, the recovery in this case is wrong, because it is one for a year on the theory of a tenancy from year to year, which requires a notice to terminate the tenancy for three months terminating on the terminal day of the current year, which was not given in this case; whereas, if a tenancy at will, no notice is required, and the letter of defendants surrendering the premises would, I think, be sufficient. An examination upon this question has brought me to the conclusion that mere entry into possession under such a lease creates what technically is a tenancy at will, but payment of rent periodically makes the tenancy a periodical one, not one merely at will; and, further, the authorities say that the law implies a tenancy from year to year, or quarter to quarter, or month to month, as the case is. In England and many of our states are statutes to the effect that one entering under a lease void under the statute of frauds is a tenant at will, and even under these statutes it is held that occupancy and payment of rent do away with the feature of tenancy at will, and make it a periodical tenancy. 18 Am. & Eng. Enc. Law, p. 194. "The mere fact that a person goes into possession under a lease void because for a longer term than a year does not create a yearly tenancy. If he remains in possession with the consent of the landlord for more than one year under circumstances permitting the inference of his tenancy from year to year, the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year. And the terms of the lease void as to duration of term would control in respect to the rent." *Talamo v. Spitzmiller*, 120 N. Y. 37, 8 L. R. A. 221, 23 N. E. 980, quoted and approved in *Hellams v. Patton*, 44 S. C. 454, 22 S. E. 608. Such a tenancy under a void lease is at first a tenancy at will, but by remaining in possession for several years paying rent the tenancy becomes one from year to year. "The tenant cannot at any time during the year, at pleasure, surrender the premises against the will of the landlord, and thus excuse himself from the payment of accruing rent," nor can he defend an action for the rent by showing that he abandoned the premises, as he is

liable whether he in fact occupies the premises or not; and the parol agreement which is acted on by the parties "until the estate becomes a tenancy from year to year will still govern their rights as to the amount of rent and the time of payment." *Barlow v. Weinwright*, 22 Vt. 88, 52 Am. Dec. 79. In Vermont the statute declared that one holding under a void lease should be a tenant at will; but the continuance of possession and payment of rent "expands into a holding from year to year," said the court. Here the tenants held far into the third year, paying rent every month, and many cases make them tenant from year to year. Such a tenancy, though at first one at will, "for purposes of notice to quit, and some other purposes, has been by judicial constructions converted into a tenancy from year to year." *Cody v. Quarterman*, 12 Ga. 386; *Wallace v. Scoggins*, 17 Am. St. Rep. 752, note [18 Or. 502, 21 Pac. 558]; *Kerr v. Clark*, 19 Mo. 132; *Larkin v. Avery*, 23 Conn. 316.

It is suggested that this is a tenancy from month to month, and then the letter from the tenants surrendering would close the lease at once or a month thereafter; but the lease covenants for rent of "\$700 per annum for each and every year commencing from and after the 1st day of April, 1896, payable in equal monthly instalments." This is a yearly rent, payable monthly, and does not make it a monthly tenancy, in face of another clause making the term begin January 1st. *Scully v. Murray*, 34 Mo. 420, 86 Am. Dec. 116; *Irving v. Thomas*, 18 Me. 418; 18 Am. & Eng. Enc. Law, 2d ed. p. 196.

It is hardly necessary to extend this opinion beyond this point in view of instruction 5; but it may be expected that this opinion should refer to that provision in the lease that the lessor "agrees to put and keep the roof of said building in good order." I do not understand that failure of Arbenz to repair the roof before the fire gave cause of abandonment and released lessees from rent, because failure to repair does not warrant abandonment, unless the property is therefrom untenable, which is not claimed, and remaining in possession after breach is a waiver of right to abandon. The lessees kept on in possession and paying rent. 18 Am. & Eng. Enc. Law, p. 231; *Gear, Land. & T. § 107*. This theory would show instruction 5 to be wrong. But why speak of this when there was no abandonment, or claim or show of it, before the fire, for want of repair of the roof? I do not see that the question of abandonment is material. But the claim under this clause was that after the fire it released from rent, as the defendants asked, but were refused, instruction 9,—"that the failure of the plaintiff to restore the roof of the building after the fire freed the defendants from any further obligation to continue to occupy the building or pay rent for the same." This is a claim that Arbenz was bound to rebuild, as there can be no roof without a house. The law does not require a lessor to rebuild a house destroyed by fire without a covenant to do so in terms or a

general covenant to repair. 18 Am. & Eng. Enc. Law, 2d ed. p. 226; *Kline v. McLain*, 33 W. Va. 32, 5 L. R. A. 400, 10 S. E. 11; *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776. This lease contained no general covenant to repair or rebuild, but only the limited one to keep the roof in order. As neither the written lease nor the law required Arbenz to rebuild, of course, this clause as to repair of the roof had no application after the fire. The case of *Thompson v. Pendell*, 12 Leigh, 608, is cited to support the argument that the covenant as to the roof is as strong to relieve the tenant from rent as the covenant in that case. There a mill was leased, and destroyed by fire during the term, and the lease said that the lessee should make repairs, "except heavy repairs, such as if the dam or forebay should be injured by high water, or the main shaft or wheel should give away so as to require a new one," in which case the lessor was to repair the same, and the lessor "is not to lose the rent if he should go on to do the work here according to contract." It was held that this did not bind the lessor to rebuild, but, as he refused to do so, the tenant was discharged from rent, because it was to be inferred that, as the lease released the tenant from the rent for refusal of the landlord to make heavy repairs, for a stronger reason it ought to release him for a total failure to rebuild. The reason of decision there was that the lease itself was held to mean and provide for a release of rent for failure to rebuild, but in our case there is no hint of release of rent for any cause. But this roof covenant is an independent one. The lease does not express or imply that repair is a condition precedent to obligation to pay rent; that repair must be made before payment of rent. The covenant could not apply after the fire. For its breach, if there had been any shown, the defendants could sue for damages in a separate action, or recoup from the rent. "The landlord's covenant to repair and the tenant's to pay rent are independent covenants, and at common law a breach of the former is no defense to an action on the latter. And this still remains the law, both in England and the United States." 1 Taylor, Land. & T. § 332; 18 Am. & Eng. Enc. Law, p. 230. But there can be no question that the tenant may, in a suit for rent, recoup damage for failure of a lessor's covenant to repair. *Cheuvront v. Bee*, 44 W. Va. 103, 28 S. E. 751; 18 Am. & Eng. Enc. Law, p. 230. There was no notice of recoupment for this cause, and one would not have availed. There was no error in refusing defendants' instruction. There was no evidence to prove a breach of the covenant, and really this discussion of it is useless, except as it raises a question of law. It follows that there was no error in plaintiff's instruction 3 that failure to repair roof was no release of the obligation to pay rent. It adds to the strength of the plaintiff's case that the defendants continued on the premises from the 15th September to 31st October.

Judgment affirmed.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1903. Classified as Follows.

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND PARTNERSHIP.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARY RELATIONS.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

A statute authorizing the question of the good faith of the prosecuting witness in instituting the prosecution to be tried and determined at the same time that the defendant is tried, and the taxation of costs against him in case it is found that, in filing the information, he acted maliciously or without probable cause, is held to be unconstitutional and void. (Neb.) 489.

Eminent domain.

A corporation authorized to develop and use the water power of a river, and generate electric or other power, light or heat, and utilize, transmit, and distribute it for its own use or the use of other individuals or corporations, is held to be for a private, and not a public, purpose, and, therefore, not entitled to exercise the right of eminent domain. (Va.) 129.

Under statutory authority to exercise the right of eminent domain to secure land for a park, it is held that land needed for an addition to a free library building located in a public park may be taken. (Pa.) 332.

Copyright.

An author who permits the publication in a magazine of chapters of a book on which he has secured a copyright, without any notice other than the general notice by the publishers of the magazine of a copyright of its matter, is held to lose his exclusive rights under his copyright. (C. C. App. 1st C.) 134.

Executors and administrators.

An administrator who, at the time of his appointment, was hopelessly insolvent, and who continued so during all the time of his administration up to and including the time of his final settlement, is held to be entitled to turn over the evidence of his uncollectible debt to his successor or other proper authority, and to be discharged from his official liability therefor. (Neb.) 313.

Building and loan association.

A statute giving mortgages to building and loan associations priority over other

liens upon the mortgaged property filed subsequent to the recording of the mortgage is held not to be void as depriving anyone of the equal protection of the laws. (Wis.) 608.

Public improvements.

An agreement by a contractor for a street improvement that he will look, alone, to the property assessed, and in no event be entitled to recover from the city, is held not to prevent such recovery, where the city had no authority to make the improvement at the cost of the abutting property, where the agreement was made under a statute which contained a similar exemption, and was re-enacted by the legislature after it had been construed not to be applicable to such cases. (Ky.) 434.

Where a city charter requires that contracts for public work must be let to the lowest bidder after advertising for bids, it is held that any contract entered into with the best bidder, containing substantial provisions beneficial to him which were not included in the specifications, is void. (Minn.) 448.

Public money.

An appropriation of public money by the legislature to redeem warrants issued under an invalid law providing for the treatment of inebriates at public expense, which are in the hands of innocent purchasers, is held to be unauthorized, as being for a private, and not for a public, purpose. (Wis.) 345.

An appropriation to cover the expenses incurred and paid by a municipal officer in the discharge of his duty is held not to be within a constitutional prohibition of the granting of public money to an individual. (Mo.) 593.

Public lands.

Land in possession of persons prospecting for oil thereon with the intention of locating it as mineral land is held not to be vacant and open to settlement, within the meaning of an act of Congress permitting the exchange thereof for land within a forest reserve, although no oil or mineral is known to exist therein, and no claim

thereto appears on the records of the land office. (C. C. A. 9th C.) 230.

Street railways.

A chartered street railroad is held to be a "railroad company," within the meaning of a statute making railroad companies liable to one servant for injuries inflicted by the negligence of a fellow servant. (Ga.) 249.

A street railway company is held not to be within the provisions of a statute making corporations owning or operating railroads liable for injuries to one servant by the negligence of another while engaged in the work of operating such railroad. (Mo.) 475.

Taxes.

A "seat" in an unincorporated stock exchange, which can only be disposed of subject to the regulations of the exchange, is held not to be taxable under a statute which makes no direct provision for its assessment, where the provision for the assessment of tangible personal property "at its cash value without looking to a forced sale" is inapplicable, and no attempt has been made to assess such seat since the organization of the exchange,—a period of fifty years. (Md.) 568.

Schools.

Public property owned by a sub school district, and used exclusively for purposes of public education, is held not to be subject to local assessment for a municipal improvement, where the statute does not expressly make it so, but provides for the collection of such assessments by sale of the property. (Pa.) 183.

Intoxicating liquors; dispensaries.

A statute making void all sales of intoxicating liquors, and providing for a return of the price paid, is held not to apply to sales consummated in another state, although they were made in response to an order procured by a local agent, and were delivered by the carrier to the purchaser in the state where the statute exists. (Iowa) 417.

The legislature is held to have a right to permit a town to establish a dispensary for the exclusive sale of ardent spirits, although in so doing it may render necessary the expenditure of money, and ultimately the imposition of a tax. (Va.) 125.

A municipal corporation having by charter exclusive power to "control and direct" the sale of liquors within its limits is held to have no authority to organize a dispensary by appointing commissioners and authorizing them to sell liquors under certain terms and conditions prescribed in an ordinance. (Ga.) 150.

State election; power of Congress as to.

The punishment of merely lawless acts of individuals in preventing colored persons from voting at purely state elections is held not to be within the power of Congress. (C. C. A. 6th C.) 437.

Navigable waters.

The provision in the act of Congress, for-
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bidding obstructions in navigable rivers which are not authorized by Congress, is held not to apply to an obstruction placed in the bed of a river for the purpose of repairing a bridge which had been placed across the river under state authority prior to the passage of that act. (Miss.) 578.

The title to lands under tide waters is held to be vested in the respective states, and to be subject to grant by them to individuals. (N. C.) 937.

Water rates.

A provision in a charter of a water company that the municipality shall have power by ordinance to regulate the price of water is held to give the municipality the continuing right to regulate the charges, limited only by a condition that such rates shall not be unreasonable or oppressive. (Tenn.) 888.

Water meters.

An ordinance for the protection of water-works, which requires all consumers using large service pipes to provide meters, while giving other consumers an option to do so, is held not to be void for unreasonableness. (Wis.) 33.

Alimony.

A provision for alimony in a judgment granting a divorce, which cannot be changed under existing laws, is held to be a vested right which cannot be impaired by a subsequent statute conferring power upon the courts to modify it. (N. Y.) 800.

Disorderly persons.

An ordinance providing for the punishment of persons loitering about the streets and barrooms in idleness, without habitation or visible means of support, is held to be within the power of a municipal corporation. (Mich.) 763.

Sale of trespassing animals.

A statute permitting the sale at auction of trespassing animals, after the posting for ten days by the proper officer of notice that the animals had been impounded, and are detained for a certain amount of damages and costs, without providing any judicial proceeding to ascertain, either the damages to be paid, or whether or not the animals were in fact running at large within the meaning of the statute, is held to be void as depriving the owner of his property without due process of law. (Ariz.) 408.

Limiting hours of labor.

A limitation of the hours of labor of employees of a public-service corporation, such as a street railway company, to not more than ten out of twenty-four, to be performed within twelve consecutive hours, is held to be a valid exercise of the police power of the legislature. (R. I.) 612.

Payment of laborers on public works.

A statute which requires municipal corporations to pay more for common labor employed on public improvements than it is worth in the market is held to unconstitutionally deprive the taxpayers of their privi-

leges and immunities, and of their property without due process of law, to interfere with their right of contract, and to be invalid as class legislation. (Ind.) 154.

Exclusive privilege to hackmen.

A railroad company is held to be entitled to give the exclusive right to solicit patrons within its station to one hackman. (C. C. App. 7th C.) 140.

Attorneys' liens.

A statute giving attorneys a lien on the cause of action for their fees in suits instituted by them is held not to deprive the plaintiff of the right to dismiss the suit against their will, or entitle them to be made parties with the right to prosecute the action to protect their own interests. (Tenn.) 340.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Where a contract of employment is made for one year at a stipulated salary per month, an agreement during the term to receive less or to pay more than the contract price is held to be void unless supported by some change in place, hours, character of employment, or other consideration. (Ga.) 148.

One who has sold his property to a combination, and been placed in possession as agent of the purchaser, is held to have no right, after years of service under that agreement, to repudiate the contract and reclaim the property, on the ground that the contract under which the sale was effected was in restraint of trade. (C. C. App. 7th C.) 253.

Validity; definiteness.

A contract between husband and wife to secure a divorce a *vincolo matrimonii* is held to be contrary to public policy, and void. (Utah) 641.

A contract for the purchase and sale of phosphate rock is held not to be void for lack of mutuality, where one party agrees to take from the other all his consumption of such rock in his business as a fertilizer manufacturer, for a term of years at a stipulated price, which the other agrees to supply, it being stated that the annual consumption is estimated at a certain amount under normal conditions, but that the purchaser shall be entitled to demand double that quantity if required. (C. C. A. 6th C.) 402.

Deed of married woman.

The law of the place where the land is located, respecting the privity examination of a married woman, and not that of her residence, is held to govern in determining the validity of her deed of real estate. (N. C.) 878.

Bills and notes.

A contract of indorsement of a promissory note is held to be governed by the law of the state where it is made, although the note itself is executed and payable in another state, unless the intention is to negotiate the instrument elsewhere. (N. Y.) 193.

An application for insurance, on a single sheet containing at the bottom a promissory note intended to secure assessments, is held to be a single contract, of which the removal of the note is a material alteration, so that it is void even in the hands of a bona fide holder, although the note is written below a perforated line, if the general appearance

of the paper is such that the applicant is not guilty of negligence in signing it. (S. D.) 335.

Notice of protest of a bill of exchange to a drawer who has executed an assignment for benefit of creditors is held to be sufficient to bind his estate in the hands of the assignee. (Ky.) 900.

Carriers.

One who pays a brakeman on a passenger train a sum of money to be carried to a certain point, and is told to ride upon the platform of the baggage car, and get off the train at all stops, and keep out of sight, and who follows such instructions, is held not to be a passenger. (Kan.) 120.

A passenger going upon a railroad train is held to have a right to rely upon the representations of a local ticket agent that such train will stop at a certain point to which he has purchased a ticket and desires to ride; and the company is held to be liable if he is compelled to leave the train before reaching his destination, because, by the general rules of the company, unknown to the passenger, such train is not scheduled to stop at such station. (Kan.) 122.

A railroad company which refuses to receive fruit for transportation because it is not in a properly iced refrigerator car is held not to be able to relieve itself from liability for the breach of its duty to transport the fruit on the ground that it did not hold itself out to the public as furnishing such cars for that purpose. (S. C.) 824.

Insurance.

Compelling issuance of policy, see *infra*, VIII.

Surrender of the right to extended insurance for the term earned by the premiums paid is held not to be effected by failure to pay a premium note, a clause in which provides that such failure shall work a forfeiture of the policy, "except as to the right to a surrender value, . . . which may be provided in the policy," where the policy provides, under the heading of surrender values, for either a paid-up policy or extended insurance, and states that, in case of a failure to demand a paid-up policy within a certain time, the policy shall be extended without request for the time specified in the schedule annexed. (Conn.) 714.

The requirement in a policy of insurance against loss by accidental discharge of an automatic fire extinguishing apparatus, that assured must use all reasonable means to

RÉSUMÉ OF DECISIONS.
(CORPORATIONS AND PARTNERSHIPS.)

save and preserve the property insured, is held to refer to care to be taken after an accidental discharge of the apparatus, and not care to prevent an accident. (Mo.) 766.

Where a certificate of a fraternal beneficiary society is payable only to certain specified persons, and the member dies without leaving anyone who is entitled to be made a beneficiary under his certificate, it is held that no equitable rights accrue to either the creditors or the estate of the deceased member, and that the fund contemplated by the certificate will revert to the society. (Neb.) 603.

A contract by which an insurance company loaning money on the security of a paid-up policy issued by it may, at its option, require a surrender of the policy for its cash value upon default in payment of the loan or interest thereon, is held to be void. (Ky.) 208.

Good faith on the part of an applicant for insurance in denying the existence of a bodily infirmity is held not to prevent its rendering the policy void, where the policy expressly states that, if a statement of its nonexistence shall be untrue in any respect, the policy shall be null and void. (C. C. A. 6th C.) 337.

The mere fact that an applicant for insurance is receiving a pension from the government for alleged physical injuries is held not to show that he has a bodily infirmity within the meaning of a warranty in the policy. (C. C. A. 3d C.) 500.

The fact that an accident ruptured a kidney because of its cancerous condition is held not to prevent the accident from being the cause of the ensuing death of the injured person, "independent of all other causes," within the meaning of a policy of accident insurance held by him. (Mo.) 459.

Under a policy of insurance against injury caused solely by external, violent, and accidental means, which provides that it shall not cover injury resulting from any poison, or from anything accidentally or

otherwise taken, administered, absorbed, or inhaled, it is held that no recovery can be had for injury resulting from inflammation of the eyes in consequence of accidentally coming in contact with poison ivy, whereby the irritating poison was absorbed into the eye. (Fla.) 145.

The effect of a mortgage clause in an insurance policy on mortgaged property, making the loss, if any, payable to the mortgagee as his interest may appear, is held to make the mortgagee the simple appointee of the mortgagor, to receive the proceeds of the amount of his interest, and to place his indemnity at the risk of every act and omission of the mortgagor that would avoid, terminate, or affect the insurance of the latter's interest under the terms of the policy. (C. C. A. 8th C.) 137.

Failure to effect a change of beneficiary in a mutual benefit certificate, because of refusal of the one in whose favor it was issued to surrender the old one, is held not to give the original beneficiary any right to the proceeds as against the claim of the one in whose favor the new certificate was to be issued, where, by statute and the rules of the society, there is an absolute right to make the change, and everything required by the rules is done except the surrender of the old certificate. (N. Y.) 791.

Landlord and tenant.

Landlord's liability to third persons, see *infra*, VI.

A tenant of land, not merely of a room or apartment, is held to be liable to pay rent for his term, though a building on it included in the lease is totally destroyed by fire without fault on his part, unless the lease otherwise provides. (W. Va.) 957.

Subscription to cost of railroad.

A subscription contract to pay money for the cost of a railroad in consideration of its equipment and the running of trains on or before a specified date is held not to be enforceable if the road is not completed by the time specified, since time is of the essence of the contract. (Tex.) 342.

III. CORPORATIONS AND PARTNERSHIPS.

A director of the corporation who has transferred mortgaged property to it upon its agreement to assume and pay the mortgage, is held not to consent to a negotiation by the treasurer of an extension of the time for payment, so as not to be discharged thereby, by permitting the treasurer to act on behalf of the corporation in the management of its fiscal affairs. (Mass.) 700.

The relation of officers and directors of a corporation to it and its stockholders is held not to be such as to prevent their taking the benefit of the statute of limitations in an action to hold them liable for misfeasance or malfeasance in office. (Wis.) 918.

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A sale by an officer of a corporation of stock therein, nominally made to other officers, but in reality made, as he knew, to the corporation itself, and paid for, as he knew, out of the assets of the company, is held to be void as against the corporation's creditors, as a gift to him of the company's assets, whether it is insolvent or not. (Ala.) 621.

Partnership.

As between a surviving partner and the executor of the deceased one, the firm name is held to be an asset of the partnership which the executor has a right to have sold for the settlement of the partnership affairs. (N. Y.) 796.

Charging alimony, see *supra*, I. Validity of wife's deed, see *supra*, II.

Entireties.

The giving of a note secured by deed of trust to a husband and wife jointly to secure repayment of a loan, a portion of which was advanced by each, is held not to create an estate by entirety, where, by statute, a man has no control of his wife's property. (Mo.) 166.

Partnership of husband and wife.

The right of a woman to enter into a partnership agreement with her husband under statutory authority to acquire, own, and dispose of property to the same extent as her husband may do, and to make con-

tracts and incur liabilities to the same extent as if unmarried, is sustained. (Iowa) 756.

Trespass by husband on wife's property.

The right to prosecute a man for criminal trespass in entering upon his wife's land with intent to make his residence there is denied, although she has left him and removed from the premises upon good grounds for believing that he has been guilty of adultery, and has forbidden him again to enter upon them, and the Constitution provides that property shall be and remain her sole and separate estate. (N. C.) 777.

V. FIDUCIARY RELATIONS.

Where a trustee under a will, in disregard of the testator's directions, used trust funds in her hands, together with her own funds, to buy real estate, and took the title in her own name, it is held that the *cestuis que trust* are entitled, in equity, to elect whether they will claim a charge upon the real estate for the amount of trust funds so invested, or will claim the real estate itself, as owners, subject to a charge for the trustee's own money so used. (N. J. Err. & App.) 323.

A trustee for holders of bonds secured by a railroad mortgage is held to have no right to create a pool for the purpose of buying in property for the exclusive benefit of a

favored and chosen number of bondholders; but it is held that all must be given a fair opportunity to share on equal terms. (Ky.) 270.

Wherever one person is placed in such a relation to another by the act or consent of such other, or of a third person, or of the law, that he becomes interested for him, or with him, in any subject of property or business, he is held to be in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated. (C. C. A. 8th C.) 176.

VI. TORTS; NEGLIGENCE; INJURIES.

A manufacturer who, without giving notice of its dangerous character, supplies to another a machine which at the time of delivery he knows to be imminently dangerous to the life or limbs of anyone using it for the purpose for which it is intended, is held to be liable to an employee of the vendee who sustains injury from its dangerous condition. (C. C. A. 8th C.) 303.

Injury to servant.

A brakeman on a railroad is held not to assume the risk of accident from the proximity of a jigger stand to a switch, where he does not know of it, and is not chargeable with such knowledge in the exercise of ordinary care in the performance of his duties. (N. H.) 495.

Failure of loaders to perform their duty and remove loose coal hanging in a mine, which renders the place unsafe for other employees to work in, is held to be the negligence of the master, and not of the fellow servant of a machine man's helper. (Ky.) 161.

Violating statute against employing children.

Violation of a statute forbidding the employment in factories of children of a certain age is held to be evidence of negligence which will support a civil action for injury. 61 L. R. A.

ries resulting therefrom, although it is punishable under the statute as a misdemeanor. (N. Y.) 811.

Injury to passenger.

Riding in the coach set apart for colored passengers, contrary to the rules of the carrier and provisions of the statute, is held not to be negligence on the part of a white person which will prevent a recovery for his death through the negligence of the carrier, although he would not have been injured had he not been in that coach. (C. C. A. 5th C.) 410.

Injury to boy in street.

A boy who stops in the street on his way home, to rest and cool off after finishing a game which he has been playing in a vacant lot, is held not to be a loungeur, as matter of law, so as to prevent his recovering for injuries by the fall upon him of lumber illegally piled in the highway. (Pa.) 611.

Explosion of boiler under street.

A prima facie case of negligence, rendering a city liable to a traveler injured by the explosion of a boiler under the sidewalk, in the absence of evidence that it exercised reasonable care in the premises, is held to be made out by showing that it consented to the maintenance of the boiler there under conditions which were a violation of a city

ordinance prescribing the structural work to be used in case the space under the walk was to be utilized. (Wash.) 583.

Obstruction of street.

Delay in the construction of a bridge because of inability to procure the necessary steel work on account of strikes and labor troubles is held not to render one who has undertaken to construct the bridge liable for injuries caused by the continued obstruction of the street, where there is nothing to show that the material could have been procured from any other source any quicker. (Wash.) 506.

Temporary occupation of a highway with rails, by a railroad company for its convenience while elevating its roadbed to abolish a grade crossing over a highway, is held to entitle the abutting owner, whose access to and from his property is thereby destroyed, to compensation. (Conn.) 730.

Injury to property by grading street.

Injury caused to abutting property by the original establishment of the grade of a street is held to be as much within the prohibition of a constitutional provision that property shall not be taken or damaged for public use without compensation as that caused by subsequent changes of grade. (Mont.) 601.

Negligence in crossing railroad.

The cutting of a train of cars on a side track, leaving some on one side and some on the other of a highway, where the view of the other tracks is partially obscured thereby, is held not to be an invitation to the public to cross without using ordinary precaution to ascertain if such crossing can be safely made. (N. J. Err. & App.) 609.

Injury to person near track.

A railroad company which permits a car to break loose from a train on a grade, and run down into collision with another car at the foot of the decline in such a way as to be hurled off of the right of way, to the injury of a bystander, is held to be liable for the injury thereby caused to him, unless it is shown that the accident was unavoidable. (Md.) 574.

Street railways.

A street railway company is held not to be guilty of negligence in building in a public street, for the accommodation of its passengers, a platform around the stump of a pole which had been left by an electric light company, and which the railroad company had no right to remove, so as to render it liable to one who stumbles over it, and is injured in attempting to board a car. (Mo.) 452.

Fire escapes.

The owner of the building required by statute to be provided with fire escapes is held not to be relieved from liability for their absence by the fact that the building was in possession of a tenant, where the statute requires notice to be given to him in case they are found to be unsafe and imposes a penalty upon him for neglect to 61 L. R. A.

comply with recommendations in regard to them. (Me.) 163.

Bite by dog.

That one bitten by a dog was attempting to climb upon the owner's cart without leave is held not to relieve the owner of liability for the injury, under a statute making the owner of a dog liable, whether or not he knew of its vicious propensity, if it shall bite any person traveling on the highway or out of his inclosure. (R. I.) 351.

Dangerous dock.

The mere fact that a vessel owner has to go through mud to reach a berth in a dock is held not to cast upon him the risk of injury from a ledge of rocks of which he has no notice, and of which the owner of the dock knows, or by the exercise of reasonable care could know. (Mass.) 946.

Defect in leased structure.

The owner of a structure to be used as a toboggan slide at a bathing resort is held to be liable for resulting injuries in case a person attempting to use it falls from it by reason of insufficiency of the railing, although it is in possession of a tenant. (N. Y.) 829.

Injury by widening canal.

Injuries caused by the widening of the canal are held not to be included in the original condemnation of the right of way for the canal, so as to prevent the subsequent recovery of damages for them. (N. C.) 833.

Libel.

That defamatory matter in a pleading refers to a stranger to the record is held not to deprive it of its absolute privilege if it is pertinent and relative to the issue. (Tenn.) 914.

Conspiracy.

A combination to fix prices in restraint of trade is held to be properly shown by acts on the part of several competing dealers in the same line of trade, such as selling at a fixed price, from which rebates are given in goods or weights, giving notice of coming advances in price, which always follow as announced, securing concessions from competitors of the right to sell shop-worn goods, gathering evidence of sales under price, and abandoning such conduct as soon as legal proceedings are instituted to punish them. (Mo.) 464.

Nuisance.

The construction of a roundhouse for the housing of engines, and leasing it for that purpose, are held not to render the owner liable for a nuisance created by the manner in which it is used, if improper, and not ordinary, use of it is necessary to make it a nuisance. (Tenn.) 188.

A municipal corporation is held not to be subject to indictment for failure to compel the abatement of a nuisance to which it has not contributed, consisting of the emptying of filth into an open drain on private property within its limits. (Ky.) 673.

Accretions.

Where a small strip of land which lies between a government grant and a river is washed away so that the granted land becomes riparian, and then accretions to the granted land carry the river boundary far beyond its old location, it is held that the accretions will belong to the grantee, and that no title will vest in the government which it can grant to a third person. (Mo.) 309.

Appropriation of water.

So long as a prior appropriator's use of water is neither interfered with nor abridged, he is held to have no just cause of complaint, although another appropriator above him also uses the same water for a beneficial purpose. (Utah) 648.

Wills.

The destruction of a will expressly revok-

ing a former one is held to revive the earlier, under a statute providing that a will can be revoked only by a subsequent will declaring the revocation of former ones. (Ill.) 258.

A devise to one absolutely and forever is held to convey a fee simple, which cannot be cut down by a subsequent clause directing the disposition of any remainder which may be undisposed of at the death of the devisee. (Mo.) 455.

Under a bequest to one or more persons living, and to the children of another who is dead, it is held that the legatees will take *per capita* unless it appears from the context or some clause in the will, or from the circumstances in view of which it was made, that the testator intended a stirpital distribution. (W. Va.) 660.

VIII. CIVIL REMEDIES.

Where property intended to be covered by the policy has been destroyed, and its owner has received from other insurers more than its value, it is held that equity will not compel the issuance of a policy of insurance in accordance with the provisions of a contract to insure. (Md.) 300.

A judgment for plaintiff in an action to remove from his land a permanent wall erected by defendant, which cannot be removed by legal process, in which action the plaintiff asks only for the relief appropriate in a legal action to recover real property, is held to be a bar to a subsequent suit in equity to compel the removal of the wall under statutes establishing one form of action, and requiring the complaint to state the facts constituting the cause of action, and demand the judgment to which plaintiff supposes himself entitled. (N. Y.) 226.

Appeal.

A writ of error from the supreme court of Florida to review a judgment rendered by an individual justice thereof in a habeas corpus proceeding is held not to lie. (Fla.) 734.

Opening and closing.

To entitle the defendant to the opening and conclusion of the argument in the trial of a case arising *ex delicto*, when the act complained of was not one which, under the law, could be justified, it is held to be necessary that defendant admit, not only the commission of the act, but also such other facts as would entitle plaintiff to have a verdict, without proof, for the amount claimed in the petition. (Ga.) 513.

Notice.

A message containing a notice of the sanction of a writ of certiorari and of the time and place of hearing, signed by the plaintiff in certiorari, or by another as his attorney, and sent by telegraph, and properly delivered in writing, is held to be a sufficient notice. (Ga.) 933.

Aliens; actions by.

Nonresident aliens are held to be entitled 61 L. R. A.

to maintain an action, under statutes authorizing actions to recover damages for injuries causing death, for the benefit of certain of the relatives of decedent, to be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all. (Ariz.) 563.

Damages.

In computing the damages for the breach of a contract to furnish the dresses for the trousseau of a bride of wealth and high social standing, it is held that the court will take into consideration, not alone the disappointment of the bride, and her mortification and humiliation in going to her husband unprovided with a suitable trousseau, but also the fact that entertainments had been planned in her honor on her wedding tour, and at her arrival at the home of her husband, which entertainments she was obliged to forego for want of the dresses. (La.) 274.

Garnishment.

The defense of a suit to recover damages from a police officer for assault while acting in the line of his duty, under an adverse judgment in which he would be liable to an arrest, is held to be necessary, so as to bring a claim for legal services rendered therein within an exception of claims for necessities in a statute forbidding the garnishment of wages. (Me.) 567.

Execution.

The death of a plaintiff in execution after execution has been issued and placed in the hands of the levying officer is held not to prevent the officer from enforcing the same, nor from making any entries thereon that may be necessary to prevent the dormancy of the judgment, even though there be no legal representative of the estate of plaintiff in execution, and no request be made by anyone interested in the judgment to have such entries made. (Ga.) 353.

Mandamus.

Mandamus is held to be a proper remedy

to compel a railroad company to furnish cars to a shipper, which it refuses to do except on compliance with illegal conditions. (Pa.) 502.

Injunction.

Although a receiver has been illegally appointed by a state court in excess of its jurisdiction, to aid the enforcement of its own judgment, it is held that he cannot be enjoined from acting by a United States circuit court, being protected by U. S. Rev. Stat. § 720, forbidding an injunction by any Federal court to stay proceedings in any state court, except when authorized by any law relating to proceedings in bankruptcy. (C. C. A. 6th C.) 717.

The matter in dispute in an injunction suit brought to restrain the seizure of a homestead on execution is held to be the homestead, and not the amount of the judgment sought to be executed. (La.) 781.

A suit in equity to enjoin a judgment creditor from prosecuting a multiplicity of proceedings in garnishment to subject exempt wages of laborers, mechanics, and clerks to the payment of his judgment is held to be maintainable. (Neb.) 319.

Where a city determines that the public welfare will be best subserved by removing to another portion of the city a large amount of water mains upon which there are seventeen fire hydrants maintained at public expense, and where there is no demand for fire protection and but one private consumer, it is held that an injunction will not lie at the suit of such private consumer to restrain the removal of such mains, notwithstanding the removal thereof would render his property practically valueless for the purpose for which it was improved. (Kan.) 52.

The prohibition on Federal courts against

IX. CRIMINAL LAW AND PRACTICE.

Bastardy.

An unmarried woman who is an imbecile, and incompetent to testify, is held to have no right to institute and prosecute a proceeding in bastardy. (Kan.) 265.

Rape.

Procuring a woman's consent to sexual intercourse by means of a sham marriage is held to constitute rape, under statutes defining rape as carnal knowledge of a woman without her consent, obtained by force or fraud. (Tex. Crim. App.) 904.

Convicts.

The right to work convicts in private chain gangs controlled by private individuals is denied, and a convict confined on such a chain gang is held to be entitled to be released from the custody of the individuals controlling it, and remanded to the custody of the authorities lawfully entitled thereto. (Ga.) 739.

Manslaughter.

In a prosecution for manslaughter on the ground that deceased was killed unintentionally while the slayer was in the commission of an unlawful act, it is held that it 61 L. R. A.

staying proceedings of a state court, or of its officers, is held not to prevent a Federal court from enjoining the plaintiff, in an unconscionable judgment of a state court, from using it to extort money from a defendant who ought not, in equity and good conscience, to pay it. (C. C. A. 8th C.) 394.

Covenants.

An assignee is held not to be deprived of the benefit of a covenant of warranty in a conveyance of real estate by the fact that he is not named in the covenant, if assigns are named in the habendum clause of the deed. (N. C.) 772.

Release of one tortfeasor.

A reservation of the right to proceed against the others is held not to prevent a settlement with, and release of, one of several joint tortfeasors from operating as a discharge of all. (Mich.) 445.

A settlement with part of several joint tortfeasors, which expressly reserves the right to pursue the others, is held not to be technically a release which will discharge the other tortfeasors from liability. (N. Y.) 807.

Opening default judgment.

The defense of the statute of limitations is held to be a meritorious one, which will justify the opening of the judgment taken by excusable default in order to let in such defense. (N. D.) 746.

Third party enforcing contract.

If a person makes a contract with another for the benefit of a third person, the latter is held to be entitled to enforce it at law regardless of his relations with the first person, or whether he had any knowledge of the transaction at the time of its occurrence, and regardless of any formal assent thereto on his part prior to the commencement of the action. (Wis.) 509.

must be shown that the alleged unlawful act is prohibited by law. (Ohio) 277.

A conviction of manslaughter upon the second trial of an indictment for murder, upon which there was a conviction of manslaughter at the former trial, which was set aside and a new trial granted, is held to be sustainable, although the evidence establishes murder on the second trial, where the evidence does not prove a case where the verdict must be for murder or acquittal as justifiable homicide. (Cal.) 245.

Forgery.

The uttering as true of a forged mortgage and a forged note which the mortgage purports to secure, at one time and to the same party, is held to constitute but one offense, so that a conviction on an indictment for uttering the mortgage is a bar to a subsequent conviction for uttering the note. (Minn.) 819.

Challenging juror.

The right to challenge a juror for disqualification is held not to be a constitutional right which cannot be waived, but to be a statutory right which may be waived by defendant or his counsel. (Okla.) 324.

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TO

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(Separate Index to Notes Precedes this.)

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- Enforcement of Contract Made for Benefit of Third Person, see CONTRACTS, 1, 2.
- Right to Bring Second Action where Judgment in First Action Cannot be Enforced by Execution, see EJECTMENT.
- On Covenants of Warranty by Assignee of Covenantee, see COVENANT.

1. A single cause of action upon which but one action can be maintained under statutes abolishing the distinctions between actions at law and suits in equity, and requiring a complaint to contain a plain and concise statement of the facts constituting each cause of action, and to demand the judgment to which plaintiff supposes himself entitled, is presented by the encroachment of a permanent wall upon another's property, the removal of which cannot be effected by legal process, but requires the aid of equitable remedies. *Hahl v. Sugo* (N. Y.) 226

2. A cause of action in favor of the receiver of a corporation is not properly

joined with causes of action in favor of its creditors. *Boyd v. Mutual Fire Assn.* (Wis.) 918

3. A statute giving attorneys a lien on the cause of action for their fees in suits instituted by them does not deprive the plaintiff of the right to dismiss the suit against their will, or entitle them to be made parties, with a right to prosecute the action to protect their own interests. *Tompkins v. Nashville C. & St. L. Ry.* (Tenn.) 340

Joinder of parties.

4. Trustees are entitled to bring suits as such in their own names, without joining or naming the *cestuis que trust*. *Hall v. Henderson* (Ala.) 621

5. When both husband and wife are parties plaintiff to a suit, and the claim sued on belongs to one or the other, the defendant is without interest to urge that the claim belongs to one of the spouses in particular, and that the suit should have been brought distinctively in the name of the owner of the claim. *Lewis v. Holmes* (La.) 274

6. An employer from whom exempt wages sought to be garnished by a judgment creditor are due, and who has been served with garnishee process, is a proper and necessary party to a suit to enjoin the prosecution of a multiplicity of proceedings in garnishment for such purpose, in order to authorize the court to make a decree which will afford plaintiff suitable, adequate, and complete relief. *Siever v. Union P. R. Co.* (Neb.) 319

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1. That one bitten by a dog was attempting to climb upon the owner's cart without leave does not relieve the owner of liability for the injury, under a statute making the owner of a dog liable, whether or not he knew of its vicious propensity, if it shall bite any person traveling on the highway or out of his inclosure. *Peck v. Williams* (R. I.) 351

2. One who wilfully provokes a dog to bite him is not entitled to the protection of a statute making the owner of a dog liable in case it injures any person traveling on the highway or out of his inclosure. *Id.*

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1. Failure to provide for an appeal from the order of removal does not render void a statute providing that, when a plaintiff is entitled to some relief, but not in the court in which he has brought his action, the cause may, in the discretion of the court, be removed to the proper tribunal, where such amendments may be made as may be necessary to a hearing of the case according to its practice. *Insurance Co. of N. A. v. Schall* (Md.) 300

2. An order reversing an order modifying the direction as to alimony contained in a judgment which dissolved the marriage of the parties is appealable. *Livingston v. Livingston* (N. Y.) 800
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Appellate jurisdiction.

3. A statute allowing a writ of error to the supreme court of Florida to review the judgment of an individual justice thereof in a habeas corpus proceeding is invalid, where such right of review is not granted by the Constitution, which created the court and prescribed its jurisdiction; and no power to confer additional jurisdiction upon such court is delegated by the Constitution to the legislature. *Ex parte Cox* (Fla.) 734

4. A writ of error does not lie from the supreme court of Florida to review a judgment rendered by an individual justice thereof in a habeas corpus proceeding. *Id.*

Record.

5. In considering a cause on appeal the court may properly look into the record of another appeal in a suit between the same parties which it has recently decided. *Salt Lake City v. Salt Lake City Water & E. P. Co.* (Utah) 648

Questions not raised below.

6. Objections to the report of a commissioner appointed to purge the usury from bills of exchange cannot be taken for the first time on appeal. *Taylor v. Citizens' Sav. Bank* (Ky.) 900

Discretionary decision.

7. An application made under N. D. Rev. Codes 1899, § 5298, to vacate a judgment entered by default, is addressed to the sound judicial discretion of the trial court, and in such cases the order of the court below will not be disturbed unless it clearly appears that the same involves an abuse of discretion. *Wheeler v. Castor* (N. D.) 740

Presumptions.

8. Since no response will satisfy a writ of habeas corpus unless accompanied with the body of the person held in custody, or unless a satisfactory reason for his nonproduction is given, it will be presumed in a given instance, where a writ has been issued, and the respondents have appeared at the time appointed in the writ, and a hearing is had, nothing to the contrary appearing, that the person claimed to be illegally restrained of his liberty was before the court at that time. *Simmons v. Georgia Iron & Coal Co.* (Ga.) 739

Review of finding or verdict.

9. A finding of facts affirmed by the appellate division is binding on the court of appeals. *Lahey v. Lahey* (N. Y.) 791

10. The verdict is conclusive as to the value of property in a building at the time of an accidental discharge of an automatic fire extinguisher, in determining whether or not there shall be an apportionment of the loss under a policy insuring against such loss, but providing that, in case the value of the property is more than a certain amount, the insurer shall be liable only for such proportion of the face of the policy as the amount named bears to the value of the property in the building. *Wertheimer-Swarts Shoe Co. v. United States Casualty Co.* (Mo.) 780

11. What may be the law which is to be applied to a contract made in a foreign state is a question of fact, upon which the finding of the trial court, followed by a judgment based thereon, which is affirmed by the appellate division, is binding on the court of appeals. *Spies v. National City Bank* (N. Y.) 193

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2. Failure to preserve the slip upon which the noting of protest of a bill was entered will not discharge the person sought to be held liable thereon, if the noting was actually made, the instrument of protest executed, and notice duly given to him. *Id.*

3. Notice of protest of a bill of exchange, to a drawer who has executed an assignment for the benefit of creditors, is sufficient to bind his estate in the hands of the assignee. *Id.*

4. A bill of exchange reading, "One hundred and eighty days, pay to the order of," is payable one hundred and eighty days after date. *Id.*

5. The liability of the indorser of a note cannot be preserved by a reservation of the rights and claims against him by the holder, when he releases a judgment against the maker upon payment of less than the amount due. *Spies v. National City Bank* (N. Y.) 193

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2. Action by the municipal authorities is not necessary to charge the owner of a building with liability for failure to provide 61 L. R. A.

fire escapes, under a statute requiring buildings to be equipped with them, and directing such authorities to make, annually, careful inspection of the safeguards provided, pass upon their sufficiency, and notify the owner of the building in case they are insufficient, and imposing a penalty on him for failure to comply with their recommendations. *Id.*

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CANAL.

As Constituting Proper Purpose for Exercise of Power of Eminent Domain, see EMINENT DOMAIN, 4, 5.

Measure of Damages in Condemning Right of Way for Canal, see DAMAGES, 10.

1. The title of one in possession of a right of way for a canal will, in the absence of evidence showing how the right was acquired, or its extent, be presumed to be a mere easement limited to the extent to which it has been used. *Mullen v. Lake Drummond Canal & W. Co.* (N. C.) 833

2. The submission to the jury, in an action to recover damages for injuries to adjoining land by the widening of a canal, of an issue as to permanent damages, is, in effect, a statutory condemnation of an additional easement, and cannot be demanded by either party if the injury can be remedied at reasonable expense without interfering with the performance by the canal company of its public duties. *Id.*

3. A canal company cannot divert water into its canal, and permit it to injure adjoining proprietors by soaking through the embankments. *Id.*

NOTES AND BRIEFS.

See also WATERS.

Construction and operation of canals:—(I.) As public improvement; (II.) acquisition of rights: (a) what may be acquired; (b) what is taken or acquired; (c) extent of title; (d) compensation: (1) in general; (2) amount; (3) how paid; (e) remedy: (1) in general; (2) procedure; (f) other matters; (III.) location; (IV.) use of: (a) as highway; (b) other uses: (1) in general; (2) for water power: (a) right to use; (b) grant of right; (V.) injury by construction and use; (VI.) duty to patrons; (VII.) adjuncts to canal; (VIII.) rights of owner; (IX.) abandonment and transfer; (X.) repair and improvement; (XI.) riparian rights; (XII.) prescription. 833

CARRIERS.

Amount of Damages for Refusing to Receive Fruit for Transportation, see DAMAGES, 6.

Right to Restrain Hackmen and Hotel Runners from Obstructing Entrance to Stations, see INJUNCTION, 1.

Mandamus to Compel Furnishing of Cars, see MANDAMUS, 1-4.

Personal Injuries, see PROXIMATE CAUSE.

1. A railroad company may give the exclusive right to solicit patrons within its station to one hackman. *Donovan v. Pennsylvania Co.* (C. C. App. 7th C.) 140

Duty and liability towards passengers generally.

2. There is no negligence on the part of a street car company in building in a public street, for the accommodation of its passengers, a platform around the stump of a pole which had been left by an electric light company, and which the railroad company had no right to remove, which will render it liable to one who stumbles over it and is injured in attempting to board a car. *Lucas v. St. L. & Suburban R. Co.* (Mo.) 452

3. A street car company does not maintain the stump of an electric-light pole in its platform so as to render it liable for injuries thereby caused to a person attempting to board its car, where, for the accommodation of its passengers, it merely builds in a public street a platform around the stump, which had been left there by an electric light company, and which it had no right to remove. Id.

4. A passenger going upon a railroad train has a right to rely upon the representations of a local ticket agent, and upon those of the railroad company's agent in charge thereof, that such train will stop at a certain point to which he has purchased a ticket and desires to ride; and the company is liable in damages if he is compelled to leave the train before arriving at his destination, because by the general rules of the company, unknown to the passenger, such train is not scheduled to stop at such station. *Kansas City, Ft. S. & M. R. Co. v. Little* (Kan.) 122

5. One who pays a brakeman on a passenger train a sum of money to be carried to a certain point, and is told to ride upon the platform of the baggage car, and get off the train at all stops, and keep out of sight, and who follows such instructions, is not a passenger. *Mendenhall v. Atchison, T. & S. F. R. Co.* (Kan.) 120

Carriers of freight.

6. The question whether or not the owner of refrigerator cars which are to be used for shipping fruit is a common carrier does not determine the liability of a railroad company for breach of its contract to furnish such cars for a particular shipment. *Mathis v. Southern R. Co.* (S. C.) 824

7. A railroad company which contracts to furnish a refrigerator car for the transportation of fruit cannot relieve itself from liability because of failure to have the car properly iced, on the ground that it belongs to another company. Id.

8. A railroad company which refuses to receive fruit for transportation because it is not in a properly iced refrigerator car cannot relieve itself from liability for breach of its duty to transport the fruit on 61 L. R. A.

the ground that it did not hold itself out to the public as furnishing such cars for that purpose. Id.

9. The liability of a railroad company for refusal to accept fruit for transportation does not depend upon its having made an agreement to furnish properly refrigerated cars. Id.

10. A railroad company which contracts to furnish a refrigerator car in which to transport fruit cannot relieve itself from liability for failure to do so on the ground that such cars are only furnished by another company, and that the railroad company did not solicit the business, but an agreement for the cars was made between the shipper and the owner of the car. Id.

11. A shipper who tenders fruit for transportation in excess of the capacity of the refrigerator cars which he has notified the carrier he will need may recover for the carrier's refusal to accept the excess, unless such refusal is excused by the circumstances of the case. Id.

12. A railroad company cannot refuse to accept fruit for transportation because refrigerator cars are necessary therefor, which are provided and furnished only by another company. Id.

NOTES AND BRIEFS.

Carriers; right to make reasonable regulations in management of train; to require white and colored races to ride in separate cars; disobedience of regulations as defense in action for negligent killing; effect of unreasonableness of regulation; duty to furnish equally safe cars for both races; effect of violation of regulation which does not contribute to injury; right to recover for injury negligently inflicted while injured person engaged in violating the law; proximate cause of injury where track is left unfenced and animal straying thereon causes derailment of train; drunkenness or disorderliness as ground for expulsion of passenger. 412

Negligence in building platform for accommodation of passengers around stump in street; contributory negligence of passenger injured by. 454

Ejection of passenger because train does not stop at his station; punitive damages where passenger takes train upon direction of employee; allowance for humiliation and insult; mental anguish. 124

Duty of railroad to furnish transportation for passengers and freight. 503

Duty to furnish cars; right to refuse to carry perishable goods; responsibility for defaults of others. 827

CERTIORARI.

1. Certiorari will not be granted to review the action of a municipal corporation in fixing water rates merely because the schedule did not originate with the executive board as required by charter, where it is not inequitable, and has received the approval of the legislative department, whose

approval would have been necessary had it originated in the manner pointed out by statute, and the irregularity may be cured by ordinary means. *State ex rel. Hallauer v. Gosnell* (Wis.) 33

2. A message containing a proper notice, and signed by plaintiff in certiorari, or by another as his attorney, sent by telegraph and properly delivered in writing, is a sufficient notice, within the meaning of a law requiring plaintiff in certiorari to cause written notice of the sanction of the writ, and of the time and place of hearing, to be given the defendant therein. *Western U. Teleg. Co. v. Bailey* (Ga.) 933

CIVIL RIGHTS.

NOTES AND BRIEFS.

Constitutional right of negroes to vote. 438

COLLATERAL ATTACK.

See JUDGMENT, 4-6.

COLORED PERSON.

Infringement of Elective Franchise of, see VOTERS AND ELECTIONS, 1-4.

COMBINATIONS.

See CONTRACTS, 8-10.

NOTES AND BRIEFS.

See also CONSPIRACY.

Combinations; to prevent competition and secure monopoly; validity of; right to inquire into, collaterally. 255

COMMERCE.

Public Waters, see WATERS, 4-10.

COMMON-LAW MARRIAGE.

See HUSBAND AND WIFE, 2.

COMPLAINT.

See PLEADING, 4-7.

CONCLUSIVENESS.

Of Judgment, see JUDGMENT, 1, 2.

CONFLICT OF JURISDICTION.

See COURTS, 17-20.

CONFLICT OF LAWS.

Determination of Question by Trial Court as Being One of Fact, see APPEAL AND ERROR, 11.

1. A contract for a final separation of husband and wife, and procurement of a divorce, will not be enforced by the courts of a state under whose laws it is invalid, although it was valid where made. *Palmer v. Palmer* (Utah) 641

2. A contract of indorsement of a promissory note is governed by the law of the state where it is made, although the note itself is executed and payable in another state, unless the intention is to negotiate the instrument elsewhere. *Spies v. National City Bank* (N. Y.) 193
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3. The recovery and disposition of a fund for the negligent killing of a person are governed by the laws which give the right of action. *Florida C. & P. R. Co. v. Sullivan* (C. C. App. 5th C.) 410

4. An administrator appointed in one state is not prevented from suing in another state for the negligent killing of his intestate there, by the fact that the statutes of the two states providing for the recovery and distribution of damages in such cases are dissimilar and in substantial conflict. *Id.*

5. A statute making void all sales of intoxicating liquors, and providing for a return of the price paid, does not apply to sales consummated in another state, although they were made in response to an order procured by a local agent, and were delivered by the carrier to the purchaser in the state where the statute exists. *Brown v. Wieland* (Iowa) 417

6. A sale of liquors is subject to the laws of the state of the purchaser's residence, where, although the order is sent to another state, and they are there delivered to a carrier for transportation to the purchaser, the seller makes delivery to him conditional on his complying with the terms of the contract and obtaining the bill of lading, which the seller takes in his own name and transmits to a bank for delivery when the contract is complied with, the shipper retaining full control until that time. *Id.*

7. The law of the place where the land is located, respecting the privity examination of a married woman, and not that of her residence, will govern in determining the validity of her deed of real estate. *Smith v. Ingram* (N. C.) 878

NOTES AND BRIEFS.

Conflict of laws; as to sale of intoxicating liquors; when sale completed. 419

As to sales of intoxicating liquor:—(I.) General principles; (II.) where executed contract consummated; delivery to carrier generally; (III.) when executory contract consummated in one state and executed contract in another; (IV.) effect of soliciting order within state having prohibitory law; (V.) public policy of forum; intention to violate prohibitory statute of forum; (VI.) new or substituted contract; (VII.) when sale invalid by law of place where made, but valid by law of forum. 418

Between law of place of accident and place of appointment of administrator suing for negligent killing. 411

What law governs action for damages. 274

What law governs contract; contract of indorsement of promissory note. 193

As to negotiable paper:—(I.) Scope; explanation of terms; (II.) general commercial principles as opposed to local law; (III.) time of payment; (IV.) mode of acceptance of bill; (V.) collateral effect of instrument; (VI.) character and liability of irregular indorser; (VII.) character of

holder; (VIII.) negotiability in general: bill or note fraudulently transferred; (IX.) liability of, and defenses available to, maker or acceptor: (a) in general; (b) as between the law of the substantive contract and the law of the remedy; (c) as between the law of the original contract and the law of the contract of indorsement; (d) as between the law of the place where the contract is made, and that of the place where it is payable; (X.) liability of, and defenses available to, drawer or indorser: (a) the nature of the drawer's or indorser's contract; (b) substantive liability; (c) conditions precedent to liability of the drawer or indorser: (1) in general; (2) demand and protest: (a) necessity of; (b) time and manner of; (3) notice: (a) necessity of; (b) time and mode of; (4) necessity of suing primary obligor as condition of holding drawer or indorser; (XI.) who may bring action; and herein, of the sufficiency of the indorsement or assignment; (XII.) right to join primary and secondary obligors. 193

As to contracts of married women. 878

As to validity of agreement for divorce. 643

CONGRESS.

An act of Congress which covers acts without, as well as within, the jurisdiction of that body, will not be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit and punish. *Karem v. United States* (C. C. App. 6th C.) 437

CONSIDERATION.

See CONTRACTS, 4-6.

CONSPIRACY.

NOTES AND BRIEFS.

Conspiracy; combination to fix prices of meat; necessity of proving that agreement was made in express terms; sufficiency of implied understanding; acts and declarations of one of conspirators as evidence against all; refusal to sell except for cash to delinquent debtors as evidence of unlawful combination; limiting judgment to particular illegal act. 468

CONSTITUTIONAL LAW.

Impairment of Obligation of Contracts, see CONTRACTS, 17.

Constitutionality of Statute Subjecting Prosecuting Witness to Payment of Costs, see COSTS.

Vested rights.

1. A provision for alimony in a judgment granting a divorce, which cannot be changed under existing laws, is a vested right which cannot be impaired by a subsequent statute conferring power upon the courts to modify it. *Livingston v. Livingston* (N. Y.) 800

Equal protection of the laws.

2. A statute giving mortgages to building and loan associations priority over other liens upon the mortgaged property filed subsequent to the recording of the mortgage is 61 L. R. A.

not void as depriving anyone of the equal protection of the laws. *Julien v. Model Building, L. & I. Asso.* (Wis.) 668

3. The wisdom of a particular classification for purposes of legislation is a matter exclusively for legislative discretion. *Id.*

4. The exemption of existing written contracts from the operation of a statute limiting the hours of labor of employees of a public-service corporation is not on its face so arbitrary, partial, or oppressive as to render it unconstitutional. *Re Ten-Hour Law for Street Ry. Corps.* (R. I.) 612

Due process of law.

5. A statute permitting the sale at auction of trespassing animals, after the posting for ten days by the proper officer of notice that the animals had been impounded, and are detained for a certain amount of damages and costs, without providing any judicial proceeding to ascertain either the damages to be paid, or whether or not the animals were in fact running at large within the meaning of the statute, is void as depriving the owner of his property without due process of law. *Greer v. Downey* (Ariz.) 408

6. Municipal corporations cannot be required by the legislature to pay more for common labor employed on public improvements than it is worth in the market. Such legislation unconstitutionally deprives the taxpayers of their privileges and immunities, and of their property without due process of law, interferes with their right of contract, and is invalid as class legislation. *Street v. Varney Electrical Supply Co.* (Ind.) 164

Police power.

Power of State to Authorize Railroad Company to Use Temporarily Highway without Compensating Abutting Owner, see EMINENT DOMAIN, 8.

7. The legislature may, under its police power, properly limit the hours of labor of employees of a public-service corporation, such as a street railway company, to not more than ten out of twenty-four, to be performed within twelve consecutive hours. *Re Ten-Hour Law for Street Ry. Corps.* (R. I.) 612

NOTES AND BRIEFS.

Constitutionality of ordinance to reimburse city officials against liability incurred in performance of duty. 594

Constitutionality of ordinance providing for punishment of persons loitering about streets; effect of unconstitutionality of portion of ordinance. 763

Right of legislature to add to powers of court of appeals; to subtract from appellate jurisdiction of such court. 300

What constitutes a "taking" of property for which compensation may be claimed; acts done in exercise of police power. 731

Legislative power of territory; conferring power to impound and sell animals running at large upon county. 408

Power of legislature to give foreign ad-

ministrators right to sue within its jurisdiction. 412

Right of legislature to determine when private property may be taken for public use; taking for private purpose under pretext that it is for public purpose; deprivation of life, liberty, or property without due process. 130

Powers of state legislature; effect of legislative construction of Constitution during long period, in determining constitutionality of law; what constitutes giving or loaning credit of the state; sufficiency of claim founded on moral obligation to support tax; taking private property for private use. 346

Constitutionality of statute authorizing costs of prosecution to be imposed upon prosecuting witness. 489

Constitutional provision against abridging right of citizens to vote. 438

Delegation of legislative power to an executive board. 39

Power of legislature to regulate rates for services rendered to public; delegation of power to municipalities; power of city to surrender right; contract for particular schedule of rates; as exhausting power to regulate. 888

Minimum wage law as class legislation; right of municipal corporation to protection of Constitution; power of legislature to regulate wages of laborers on municipal works; legislative discretion in regulating trade or business affecting public safety or prosperity; effect of 14th Amendment to create new rights; police powers; discretion of legislature as to exercise of; right of contract; equal protection of laws; class legislation; due process; local self-government; taxation for private use. 154

Equal protection of the laws; discrimination between different classes of persons; reasonableness of classification; setting apart building associations in class by themselves. 669

Requirement that taxation be equal and uniform; imposition of local tax for other than local purpose; construction of Constitution; validity of act requiring municipality to contract debt against its will; deprivation of property without due process of law. 125

Constitutionality of Missouri anti-trust acts. 468

Constitutionality of statute permitting modification of judgment for alimony. 801

CONTRACTS.

Breach of Contract to Furnish Refrigerator Cars, see *CARRIERS*, 6-12.

Breach of Contract to Furnish Dresses, Preventing Attendance at Entertainment, as Element of Damages, see *DAMAGES*, 3.

Admission in Evidence of Lease Void under Statute of Frauds, see *EVIDENCE*, 4.

For Public Improvements, see *PUBLIC IMPROVEMENTS*.

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1. Upon the making of a contract by one person with another for the benefit of a third person, the law operates upon the acts of the immediate parties thereto, at once creating all the relations of privity between the one making the promise and the one to be benefited thereby requisite to binding contractual relations between them, and neither one nor both of the immediate parties to the transaction can rescind the same or in any way interrupt or prejudice the rights of such third person without his consent. *Tweeddale v. Tweeddale* (Wis.) 509

2. If a person makes a contract with another for the benefit of a third person, the latter may enforce it at law regardless of his relations with the first person or whether he had any knowledge of the transaction at the time of its occurrence, and regardless of any formal assent thereto on his part prior to the commencement of the action. *Id.*

3. Lack of mutuality does not render void a contract for the purchase and sale of phosphate rock, where one party agrees to take from the other all his consumption of such rock in his business as a fertilizer manufacturer, for a term of years at a stipulated price, which the other agrees to supply, it being stated that the annual consumption is estimated at a certain amount under normal conditions, but that the purchaser shall be entitled to demand double that quantity if required. *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* (C. C. App. 6th C.) 402

Consideration.

4. Courts cannot enforce promises binding on the conscience, except in those cases where some pecuniary damage flows from the breach, or where, in addition to the moral obligation, the promise is also supported by a legal consideration. *Davis v. Morgan* (Ga.) 148

5. An agreement during the term to receive less or to pay more than the price named in a contract of employment for one year at a stipulated salary per month is void, unless supported by some change in place, hours, character of employment, or other consideration. *Id.*

6. Where a conveyance of property is made in consideration of a contract by the vendee to perform certain services for the vendor, and in case of a sale of the property to pay certain specified sums to the vendor and to two other persons, strangers to the transaction, a mortgage being taken to secure the performance of the contract, though the amounts agreed to be paid to such third parties are in effect gifts to them, the consideration between the immediate parties to the transaction supports the promise as between the vendee and the beneficiaries as effectually as if they were actual parties to such transaction and parted with a consideration to either the vendor or the vendee to support the promise made for their benefit, the effect thereof being to vest in them the absolute right to the benefit of the promise, regardless of anything the immediate parties to such transaction subsequently did

without their consent. *Tweeddale v. Tweeddale* (Wis.) 509

Validity.

7. A contract between husband and wife to secure a divorce *a vinculo matrimonii* is contrary to public policy, and void. *Palmer v. Palmer* (Utah) 641

8. One who has sold his property to a combination, and has been placed in possession as agent of the purchaser, cannot, after years of service under that agreement, repudiate the contract, and reclaim the property, on the ground that the contract under which the sale was effected was in restraint of trade. *Gilbert Use of Bishop v. American Surety Co.* (C. C. App. 7th C.) 253

9. Proceedings against jobbers for the punishment of a combination in restraint of trade cannot be defeated by showing employment of many persons, payment of large amounts in wages, improvement in the business of furnishing the raw material, regulation of prices by the cost of raw material, and that the retailers had a combination among themselves which was more effective in fixing the prices to consumers than that of the jobbers because the combination among the latter could not be made effective. *State ex rel. Crow v. Armour Packing Co.* (Mo.) 464

10. A combination to fix prices in restraint of trade may be shown by acts on the part of several competing dealers in the same line of trade, such as selling at a fixed price from which rebates are given in goods or weights, giving notice of coming advances in price, which always follow as announced, securing concessions from competitors of the right to sell shop-worn goods, gathering evidence of sales under price, and abandoning such conduct as soon as legal proceedings are instituted to punish them. *Id.*

Construction.

11. Under a conveyance of land in consideration of a contract obligating the vendee to perform certain services for the vendor, conditioned upon the vendee's retaining the title to the property during the term the services are to be performed, and further obligating himself in case of a sale thereof to pay the vendor a certain sum of money and to two other persons, strangers to the transaction, other specified sums, the vendor taking a mortgage on the land to secure the performance of the contract, the total consideration named therein being the aggregate of all the contingent payments, and the mortgage being so drawn as to indicate the terms of such contract, though it went to the vendor only,—the vendee, upon selling the property, immediately became absolutely indebted to the vendor and the two other persons named for the sums agreed to be paid. *Tweeddale v. Tweeddale* (Wis.) 509

12. A contract to purchase and sell all the phosphate rock consumed by a manufacturer of fertilizer for a series of years is entire. *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* (C. C. App. 6th C.) 402
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Performance; breach.

13. A contract by a fertilizer manufacturer whose principal business is to manufacture acidulated phosphate from crude rock, both for sale, and for the production of higher grades of fertilizer, to take his entire consumption of rock from the other party to the contract, does not give him the right to avoid taking the crude rock by purchasing in the market rock already acidulated, when he finds it to his advantage to do so, on the ground that when he purchases such rock he does not require any of the crude material. *Id.*

14. The party who commits the first breach of a contract cannot maintain an action against the other for a subsequent failure to perform. *Id.*

15. Waiver of a breach by a fertilizer manufacturer, of his contract to procure his crude rock from the other party, by his failure to do so for two years, is not shown by neglect absolutely to refuse further compliance until after orders for a large amount have been received, where they were all rushed in within a few months, and full knowledge of the facts was not shown. *Id.*

16. Time is of the essence of a subscription contract to pay money for the cost of a railroad in consideration of its equipment, and the running of trains on or before a specified date, and the subscription cannot be enforced if the road is not completed by the time specified. *Garrison v. Cooke* (Tex.) 342

Impairment of obligations.

17. A judgment is not a contract within the meaning of the Federal Constitution forbidding the passage of laws impairing the obligation of contracts. *Livingston v. Livingston* (N. Y.) 800

NOTES AND BRIEFS.

Contract; of employment at stipulated salary for certain time; agreement to increase salary during term; sufficiency of consideration for; moral obligation as consideration. 148

When time is essence of; subscription toward cost of constructing railroad on certain conditions; necessity of performance of conditions to make contract binding. 342

In restraint of trade; when illegal; to control prices of meat. 468

What law governs; indorsement of promissory note; where payable; proof of oral conditions or terms upon which written instrument delivered; parol evidence to prove independent agreement of parties. 193

Effect of invalidity of part; between husband and wife to procure divorce; presumption of legality of estoppel to contest validity; conflict of laws as to; necessity of prompt rescission upon discovery of misrepresentations. 643

Failure to perform within stipulated time; damages due only from time party put in default; putting in default as prerequisite to recovery. 274

For purchase of all phosphate rock needed or used in business; breach of, by purchaser; duty of seller to prepare rock for shipment and make tender thereof; severability of; right of seller to rescind for breach of part; waiver of right to rescind; breach by purchaser as bar to action to compel performance by seller. 403

CONVICTS.

Time for Discharge, see CRIMINAL LAW.

Convicts cannot be worked in private chain gangs controlled by private individuals, and a convict confined on such a chain gang should be released from the custody of the individuals controlling it, and remanded to the custody of the authorities lawfully entitled thereto. *Simmons v. Georgia Iron & Coal Co. (Ga.)* 739

COPYRIGHT.

1. An author who permits the publication in a magazine of chapters of a book on which he has secured a copyright without any notice other than the general notice by the publishers of the magazine of a copyright of its matter loses his exclusive rights under his copyright. *Miffin v. R. H. White Co. (C. C. App. 1st C.)* 134

2. An author who, after publishing a manuscript in a magazine under a copyright notice in the name of the publisher, publishes it in book form with a copyright notice in his own name, making no reference to the former one, abandons the work to the public. *Id.*

NOTES AND BRIEFS.

Copyright; right to, for part of work; sufficiency of magazine copyright to protect author's rights in articles published therein; sufficiency of notice of; literal compliance with terms of statute; object of statute; assignability of; effect of change of title on; publishers of magazine as agents of author in securing copyright; registration in name of publisher; author's right to action for infringement in such case; construction of copyright statute. 134

CORPORATIONS.

Binding Effect on Treasurer of Books Kept by Him, see EVIDENCE, 5.

Limitation of Actions to Enforce Director's Liability, see LIMITATION OF ACTIONS, 4-9.

Right to Exercise Power of Eminent Domain, see EMINENT DOMAIN, 1.

1. The application of the funds of an insurance company, by its directors, to the purchase of the interest of the incorporators of another company, with a view of transferring its business to their own, is a waste of funds which will render the directors personally liable in damages to a subsequently appointed receiver of their company, when the other company has no stock, and therefore nothing to transfer, so that all that is accomplished is a substitution of the purchasing directors as officers in the other company. *Gilbert v. Finch (N. Y.)* 807
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2. The officers of an insurance company which has no stock are wrongdoers in accepting money which they appropriate to their own use to substitute the officers of another company in their places, with a view of transferring the business of the company to the other one. *Id.*

3. The court may impose a fine in lieu of the forfeiture of the charters of corporations found guilty of entering into a combination in restraint of trade, if the unlawful combination has been abandoned, although the statute provides for the forfeiture of the rights of corporations found guilty of such conduct. *State ex rel. Crow v. Armour Packing Co. (Mo.)* 464

4. A corporation is bound by the act of its treasurer in contracting to pay a mortgage upon property which has been transferred to the corporation, where the directors have ceased to hold meetings, and permit the treasurer to attend to the management of the financial and fiscal affairs of the company. *Frankline Sav. Bank v. Cochran (Mass.)* 760

5. A sale, by an officer of a corporation, of stock therein, nominally made to other officers, but in reality made, as he knew, to the corporation itself, and paid for, as he knew, out of the assets of the company, is void as against its creditors, as a gift to him of the company's assets, whether it is insolvent or not. *Hall v. Henderson (Ala.)* 621

NOTES AND BRIEFS.

Corporations; implied authority of officer having charge of financial affairs of company to grant extension on mortgage. 761

Binding effect on, of acts of managers, salesmen, and agents; admissibility of declarations of agent in evidence; where not part of *res gestæ*; unauthorized acts of agents; necessity of proving agency. 468

Liability of officers for acts done in good faith; use of funds of insurance company to purchase interest of incorporators of other company; legality of; estoppel to raise question of *ultra vires*. 808

Right of, to purchase its own shares of stock:—(I.) Introductory; (II.) in the absence of statutory authority: (a) in general; (b) taking shares in payment of indebtedness due corporation; (III.) statutory grant of power; (IV.) statutes forbidding purchase; (V.) rights of creditors: (a) in general; (b) creditors who are entitled to protection; (VI.) what constitutes a purchase within meaning of rule forbidding same. 621

Sale by officer to, of stock of; officer chargeable with knowledge of what appears on books of; right to purchase shares of its own stock; transfer of stock to insolvent person; use of assets of, to pay private debt of officer; liability of directors for acts of officials; what necessary to charge seller of stock with notice that corporate funds were used in payment thereof. 630

Public service corporations; duty to serve public. 503

Foreign; statute appointing state officer as agent to receive service of process; failure of officer to notify corporation of service of summons; effect on rights of corporation; jurisdiction of court in such case. 395

Winding-up suit to settle affairs of; necessity that all rights and liabilities of creditors, officers, and stockholders be settled in one suit; enforcement of subscription liability of stockholder in equity; conclusiveness of assessments made upon stockholders of bankrupt corporation by assignee; assessments upon members of insurance corporation to pay losses; appointment of receiver for; power of receiver to maintain action to wind up affairs of; running of limitations against liability of officers for malfeasance; commencement of action against corporation to sequester assets; suit against company to stop running of limitation against officers; when right of action to wind up affairs of insolvent corporation accrues; laches of creditors in seeking relief; corporate property as trust fund for benefit of creditors. 922

COSTS.

A statute which authorizes the question of the good faith of the prosecuting witness in instituting a prosecution to be tried and determined at the same time that the defendant is tried, and the taxation of costs against him in case it is found that in filing the information he acted maliciously or without probable cause, is unconstitutional and void. *Rickley v. State* (Neb.) 489

NOTES AND BRIEFS.

Costs; of prosecution or defense of suits rendered necessary by breach of contract or wrongful act; right to recover as part of damages. 255

Constitutionality of statute authorizing costs of prosecution to be imposed upon prosecuting witness. 489

COURTS.

Appellate Jurisdiction, see APPEAL AND ERROR, 3, 4.

1. After a court, by reason of the residence of one of several codefendants living in different counties, has obtained jurisdiction of a suit against the mayor and aldermen of a city and dispensary commissioners to enjoin the maintenance of a dispensary for the sale of intoxicating liquors, such jurisdiction is not lost by the death, removal, or resignation from office of the resident defendant. *Lofton v. Collins* (Ga.) 150

2. A petition against a telegraph company, alleging that it has an office and agent in the county doing business therein, sufficiently shows jurisdiction in the courts of the county, under Ga. Civ. Code, § 2348, authorizing suit in any county where the telegraph company may have an agency or place of business. *Western U. Teleg. Co. v. Bailey* (Ga.) 933
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3. The matter in dispute in an injunction suit to restrain the seizure of a homestead on execution is the homestead, and not the amount of the judgment sought to be executed; and the injunction suit must be filed in another court than that of the seizure, if the latter court has not jurisdiction *ratione materiae*. *Speyrer v. Miller* (La.) 781

4. Land and movables claimed as homestead having been seized in a justice-of-the-peace court, and an injunction sued out in the district court, the movables may be included in the injunction, notwithstanding that the justice-of-the-peace court would have jurisdiction as to them. Id.

5. The judge of a city court, the jurisdiction of which extends over the whole of the county in which it is located, has power to grant a writ of habeas corpus directed to any person having another in illegal custody within the territorial limits of the county, and to make it returnable to any place within the county, notwithstanding such person may be a nonresident of the county. *Simmons v. Georgia Iron & Coal Co.* (Ga.) 739

6. The fact that the application for a writ of habeas corpus may show that the person held in custody is detained under a void sentence of the superior court would not prevent the judge of a city court having power to grant the writ from taking jurisdiction of the proceeding. Id.

Federal courts.

7. The Federal courts are without jurisdiction to entertain a suit to determine the respective rights of the parties to any land the title to which remains in the government of the United States, in regard to which a contest is pending in the Land Department of the government. *Cosmos Exploration Co. v. Gray Eagle Oil Co.* (C. C. App. 9th C.) 230

8. A Federal court of equity has no jurisdiction of a suit to try the title to land of which defendant is in possession. Id.

9. A Federal court of equity may issue an injunction to preserve *in statu quo* real property, a controversy with respect to the title to which is pending in the Land Department. Id.

10. A Federal circuit court, sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a state or of a national court for new causes, such as fraud, accident, or mistake, which prevented the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment. But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree. *National Surety Co. v. State Bank* (C. C. App. 8th C.) 394

11. The Federal courts sitting as courts of equity have the same power to prevent

the enforcement of unjust judgments at law procured by accident or mistake that they have to prevent the collection of those obtained by fraud. Id.

12. The equitable jurisdiction of the Federal courts vested in them under the judiciary act of 1789, and, where it has not been subsequently changed by act of Congress, the test of that jurisdiction is the adequacy of the remedy at law for wrongs of the character under consideration in the year 1789, when the judiciary act was adopted. Id.

13. The states did not grant, and they cannot by their legislation revoke, impair, or destroy, the equitable jurisdiction of the national courts. Id.

14. While state legislation may not impair or destroy, it may enlarge, the rights and remedies in equity in the national courts. Id.

15. A state statute authorizing an original suit in the court in which an unconscionable judgment that the defendant was prevented by unavoidable casualty from defending against was rendered, to enjoin its collection and to annul it, provides a cumulative remedy, and does not impair the original equitable jurisdiction of the circuit courts of the United States to grant appropriate relief for a like cause in cases in which the citizenship of the parties and the amounts in controversy give those courts jurisdiction. Id.

16. The decision of a state court in a replevin suit in which the construction of a state statute is not involved is not binding on a Federal court in a subsequent suit upon the replevin bond. *Gilbert Use of Bishop v. American Surety Co.* (C. C. App. 7th C.) 253

Conflict of jurisdiction.

17. A receiver, although illegally appointed by a state court in excess of its jurisdiction to aid the enforcement of its own judgment, cannot be enjoined from acting by a United States circuit court, being protected by U. S. Rev. Stat. § 720 (U. S. Comp. Stat. 1901, p. 581), which provides that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. *Phelps v. Mutual Reserve Fund L. Asso.* (C. C. App. 6th C.) 717

18. An injunction by a Federal court to restrain plaintiff in an unconscionable judgment of a state court from using it to extort money from a defendant who ought not in equity and good conscience to pay it, is not a violation of U. S. Rev. Stat. § 720 (U. S. Comp. Stat. 1901, p. 581), prohibiting Federal courts from staying proceedings of a state court or of its officers, since such an injunction acts on the person of the judgment plaintiff, and not upon the state court or its officers. *National Surety Co. v. State Bank* (C. C. App. 8th C.) 394

19. The national courts, sitting in equity, 61 L. R. A.

have the same jurisdiction and power to restrain judgment plaintiffs in unconscionable judgments of the state courts from using them to extort money from defendants who ought not to pay them, that they have to enjoin such plaintiffs in like judgments of the Federal courts. Id.

20. The existence of a remedy at law in the state courts to prevent the enforcement of an unconscionable judgment of a state court does not deprive a Federal court having jurisdiction of the parties by reason of diverse citizenship from enjoining the collection of such judgment, where there is no adequate remedy at law in the Federal courts. Id.

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COVENANT.

Time of Running of Statute of Limitations against Action on, see LIMITATION OF ACTIONS, 3.

1. An assignee is not deprived of the

benefit of a covenant of warranty in a conveyance of real estate by the fact that he is not named in the covenant, if assigns are named in the habendum clause of the deed. *Wiggins v. Pender* (N. C.) 772

2. The reconveyance of land deeded with a covenant of warranty by way of mortgage containing like covenants will not prevent an action on the original covenants in favor of one who purchases at the foreclosure sale. *Id.*

3. That no real assets had descended to the heirs of one who warranted the title to real estate will not prevent the recovery of a judgment against his administrator for breach of the covenant. *Id.*

4. Assignees of one who has taken a deed to real estate with covenant of warranty which does not include assigns cannot rely on the covenant to prevent the original grantor from reclaiming the land because of the invalidity of his grant; at least they cannot if there was no assignment of the benefit of the covenant to them. *Smith v. Ingram* (N. C.) 878

NOTES AND BRIEFS.

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Of warranty; in deed of married woman; estoppel by; warranty to man and his heirs without word "assigns;" right of assignee or tenant to rebut; covenants for quiet enjoyment and warranty running with the land. 878

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Constitutionality of Statute Subjecting Prosecuting Witness to Payment of Costs, see *COSTS*.

Conviction for Manslaughter under Information Charging Murder, see *INDICTMENT*, ETC.

Criminal Trespass, see *TRESPASS*.
See also *EVIDENCE*; *TRIAL*.

1. The uttering as true of a forged mortgage and a forged note, which the mortgage purports to secure, at one time and to the same party, is a single act, and constitutes only one offense, and a conviction on an indictment for uttering the mortgage is a bar to a subsequent conviction for uttering the note. *State v. Moore* (Minn.) 819

2. The granting of a new trial after conviction of a lower offense than is charged in the indictment will not authorize a conviction of the offense originally charged, under a statute providing that no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and acquitted. *Id.*

3. A constitutional right cannot be waived by the defendant or his counsel in a felony case, but a statutory right may be waived. *Queenan v. Territory* (Okla.) 324

4. Where four sentences in misdemeanor cases are imposed against the same person on the same day, each one after the first 61 L. R. A.

providing that the term of service should begin to run at the expiration of the time fixed by those preceding, the convict is not entitled to be discharged from custody until he has served the aggregate time fixed by the four sentences. *Simmons v. Georgia Iron & Coal Co. (Ga.)* 739

NOTES AND BRIEFS.

As to Costs of Prosecution, see *COSTS*.
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Right of state to split crime and prosecute it in parts; uttering of forged mortgage and forged note at one time and to the same party as single crime; conviction upon indictment for uttering mortgage as bar to subsequent indictment for uttering note. 819

DAMAGES.

On Dissolution of Injunction, see *INJUNCTION*, 8.

1. An indignity need not be done to one in the presence of a number of people, in order to entitle the person wronged to recover damages for the humiliation and disgrace suffered. *Kansas City, Ft. S. & M. R. Co. v. Little* (Kan.) 122

2. Damages are recoverable for deprivation of intellectual enjoyment and for mental suffering, resulting from the breach of a contract. *Lewis v. Holmes* (La.) 274

3. In computing damages for the breach of the contract of a fashionable milliner to furnish the dresses for the trousseau of a bride of wealth and high social standing, the court will take into consideration, not alone the disappointment of the bride in not having the dresses in time for the wedding, and her mortification and humiliation in going to her husband unprovided with a suitable trousseau, but also the fact that entertainments had been planned in her honor on her wedding tour, and at her arrival at the home of her husband, which entertainments she would have to forego for want of the dresses. *Id.*

4. In assessing the damages for the maintenance of a nuisance in the neighborhood of a residence, the jury may look to such injury as occurs to the use of the property as a residence, taking into consideration the discomfort and annoyance which the owner has suffered from the nuisance. *Louisville & N. Terminal Co. v. Jacobs* (Tenn.) 188

5. Counsel fees incurred in defending the title cannot be included in the damages to be awarded for breach of warranty of real estate, unless the covenantor has been notified to come in and defend. *Wiggins v. Pender* (N. C.) 772

6. A railroad company is liable for all damages which are the direct and proximate

mate result of its refusing to receive fruit for transportation, and cannot limit its liability to such, only, as result from unreasonable delay in the transportation. *Mathis v. Southern R. Co.* (S. C.) 824

7. The measure of damages in an action by an administrator for the negligent killing of his intestate, recovery in which will be a general asset of the estate applicable to payment of debts and administration expenses, is the present cash value of the estimated reasonable net earnings and acquisitions of deceased for the period of his natural expectancy of life at the time immediately preceding his death. *Florida C. & P. R. Co. v. Sullivan* (C. C. App. 5th C.) 410

Punitive.

8. Exemplary or punitive damages may be awarded where a wrong has in it the element of negligence which is gross or wanton, or wilfully oppressive. *Kansas City, Ft. S. & M. R. Co. v. Little* (Kan.) 122

9. Exemplary damages may be recovered for the expulsion of a passenger from a train before arriving at his destination, because by the rules of the company, unknown to the passenger, the train is not scheduled to stop at such station, where the passenger has relied on the representation of the ticket agent that the train would stop at such station. *Id.*

Condemnation or depreciation in value by eminent domain.

10. No injuries are contemplated in the original condemnation of a right of way for a canal for which damages must be allowed, except such as necessarily arise in the proper construction of the work. *Mullen v. Lake Drummond Canal & W. Co.* (N. C.) 833

11. Substantial damages may be awarded an abutting owner whose property is cut off from access to the street by the use of it as a roadbed by a railroad company, pending the elevation of its tracks, which may include actual loss of rent, depreciation of rental value, permanent injury to buildings from the jar of passing trains, injury to the sidewalk, and the cost of keeping horses employed in his business, of which no use can be made while the tracks are in the street. *McKeon v. New York, N. H. & H. R. Co.* (Conn.) 730

12. In determining the damages to be awarded an abutting owner because of the temporary occupation of a street with railroad tracks, the fact may be considered that, by reason of the elevation of the tracks above the grade of the street, puddles of water from rain and melting snow were formed on the sidewalk to the inconvenience of such owner. *Id.*

13. There is no abuse of discretion on the part of the trial court in limiting an abutting owner who sues for injuries to his business by the unreasonable closing of a street to a period of three months after the street is reopened in showing the difference in profits between the times when the street was

open and closed. *Lund v. St. Paul, M. & M. R. Co.* (Wash.) 506

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Measure of Damages for Negligent Killing, see DAMAGES, 7.

Action for Negligent Killing; Admissibility of Evidence as to Property Left by Decedent, see EVIDENCE, 15.

Effect of Death of Plaintiff after Issuance of Execution, see LEVY AND SEIZURE.

Sufficiency of Allegation as to Death, see PLEADING, 6.

Nonresident aliens may maintain the action, under statutes authorizing actions to recover damages for injuries causing death, for the benefit of certain of the relatives of decedent, to be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all. *Bonithron v. Phoenix Light & F. Co.* (Ariz.) 563

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Effect of the death of one of the parties after judgment upon remedy by execution. 353

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Construing habendum and warranty of, together. 773

DEMURREN.

See PLEADING, 8, 9.

DESCENT AND DISTRIBUTION.

1. Where, upon foreclosure of a deed of trust given to a husband and wife to secure loans, the husband bids in the property, and is permitted to credit the amount of the loan on the bid, the wife's money is traced into the property so that her heirs can claim an interest in it. *Johnston v. Johnston* (Mo.) 166

2. Persons who wait seven years after the deed is foreclosed before asserting their claim to the share of a deceased wife, in property bid in under a deed of trust given to secure money loaned by her and her husband, during which time money has been loaned by a third person on security of the whole property, in ignorance of their claim, will be subordinated to the rights of such person. Id.

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See TRIAL, 16.

DISCHARGE.

Of One Joint Tort Feasor by Release of the Other, see RELEASE, 1, 2.

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A wife is not barred of her dower rights in her husband's property at his death by having executed a void contract for divorce. *Palmer v. Palmer* (Utah) 641

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Necessity that Complaint Demand such Equitable Relief as may be Necessary to Enforce the Judgment when Rendered, see PLEADING, 5.

Error in striking out a prayer for equitable relief in an action to recover possession of real property must be cured by appeal, and does not justify plaintiff in proceeding with his execution, and then bringing another suit for equitable relief when his execution proves inadequate. *Hahl v. Sugo* (N. Y.) 226

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Assessment of Permanent Damages for Injuries to Adjoining Land by Widening of Canal, as Constituting a Statutory Condemnation, see CANALS, 2.

Measure of Damages for Taking or Injuring Property, see DAMAGES, 10-13.

Who may exercise right.

1. A corporation is for a private, and not for a public, purpose, and is, therefore, not entitled to exercise the right of eminent domain, which is authorized to develop and use the water power of a river and generate electric, or other power, light, or heat, and utilize, transmit, and distribute it for its own use, or the use of other individuals or corporations, and the mere fact that its charter recognizes it as an "internal improvement company" is immaterial. *Fallsburg Power & Mfg. Co. v. Alexander* (Va.) 129

For what purpose.

2. Land needed for an addition to a free library building which is located in a public park may be taken under statutory authority to exercise the right of eminent domain to secure land for a park. *Laird v. Pittsburg* (Pa.) 332

3. A library does not cease to be public, so as to prevent the taking of property by eminent domain for its enlargement, by the fact that one half of its directors are appointed by private persons, where it is located on public land, and the public appoints the other half. Id.

4. The rule permitting the acquisition

of an easement by the payment of permanent damages for injuries done to adjoining property by the construction of a public work is applicable in favor of canal companies. *Mullen v. Lake Drummond Canal & W. Co.* (N. C.) 833

5. The right to use a canal for the conveyance of water may be appropriated under the right of eminent domain. *Salt Lake City v. Salt Lake City Water & E. P. Co.* (Utah) 648

Additional burdens.

6. Injury caused to abutting property by the original establishment of the grade of a street is as much within the prohibition of a constitutional provision that property shall not be taken or damaged for public use without compensation as that caused by subsequent changes of grade. *Less v. Butte* (Mont.) 601

7. The temporary occupation of a highway with rails, by a railroad company, for its convenience while elevating its roadbed to abolish a grade crossing over a highway, entitles the abutting owner in whom resides the fee, and whose access to and from his property is thereby destroyed, to compensation. *McKeon v. New York, N. H. & H. R. Co.* (Conn.) 730

8. The state cannot, under its police power, authorize a railroad company to utilize a public highway as its roadbed while it is elevating its tracks to abolish a grade crossing without making compensation for destruction of the access of the abutting owner in whom resides the fee. *Id.*

9. Injury to other abutting owners by the deposit in the street by a railroad company, whose right of way abuts thereon, of machinery and building materials while it is engaged in elevating its tracks, in the exercise of due care and only for a reasonable time, does not entitle such owners to compensation. *Id.*

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EQUAL PROTECTION.

See **CONSTITUTIONAL LAW**, 2-4.

EQUITY.

Equitable Jurisdiction of Federal Courts, see **COURTS**, 8-15.

1. A prayer for equitable relief in an action to recover real property is properly 61 **L. R. A.**

stricken out when facts are not stated which entitle plaintiff to such relief. *Hahl v. Sugo* (N. Y.) 226

2. The principle, "He who comes into equity must do so with clean hands," repels a complainant only when his iniquity consists of wrongful conduct in the acts or transactions which raise the equity he seeks to enforce. *Trice v. Comstock* (C. C. App. 8th C.) 176

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Equity; right to equitable relief where remedy at law inadequate; where injury, if relief granted, would be greater than corresponding benefit. 141

Refusal of, to aid complainant in obtaining inequitable advantage, though based on claim valid at law. 168

When maxim, "He who comes into equity must come with clean hands," applies. 179

ESTATE BY ENTIRETY.

See **HUSBAND AND WIFE**, 5, 6.

ESTOPPEL.

By Judgment, see **JUDGMENT**, 1, 2.

1. A void deed cannot estop the grantor from reclaiming the land granted. *Smith v. Ingram* (N. C.) 878

2. A married woman who has undertaken to convey real estate without the formalities prescribed by law is not estopped from reasserting her title to the property by placing the grantee in possession, and permitting him to make valuable improvements. *Id.*

3. When the deed of a married woman fails because of failure to subject her to private examination, as required by statute, it is ineffectual for all purposes, and cannot be relied on as an estoppel or ground for recovery in any subsequent controversy. *Id.*

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Estoppel; of insurance company to plead invalidity of policy in violation of law, in suit thereon; where premiums have been paid and used by company. 335

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Of parties who have submitted to final adjudication in one court to contest afterward in other forum decision rendered; of agent to assert title adverse to principal; where property has been illegally acquired. 255

By acquiescence by complainants in wrongs committed by defendant. 232

By judgment at law to recover possession of land on which party wall erected, to maintain subsequent suit in equity for removal of wall. 226

Of married woman; by covenant of warranty in deed. 878

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1. Under a general denial in an action for negligence in keeping a street closed

for the construction of a bridge for an unreasonable time; evidence is admissible as to the condition of the steel and coal markets, as tending to show that the delay was caused by circumstances over which the defendant had no control. *Lund v. St. Paul, M. & M. R. Co. (Wash.)* 506

2. A witness cannot be permitted to testify as to statements by third persons that they had had carnal intercourse with the prosecuting witness prior to the commission of the alleged rape upon her, in a prosecution for such offense. *Lee v. State (Tex.)* 904

Burden of proof.

3. If an administrator seeks to be discharged from his official liability to pay over to the estate an antecedent debt due by him to his intestate on account of his insolvency and total inability to pay the same, the burden is upon him to establish that fact. *Re Howell (Neb.)* 313

Documentary evidence.

4. A lease void because not complying with the statute of frauds, although it does not vest an estate for the term, is admissible evidence to prescribe the rent and the rights of the parties and all things save duration of the tenancy. *Arbenz v. Exley, W. & Co. (W. Va.)* 957

5. The treasurer of a corporation cannot escape the probative effect of entries in books which it is his duty to keep, showing that a sale of stock which he claims to have made to other officers of the company was in fact made to the corporation itself,—especially where he was acting for the company in the acceptance of drafts which were paid out of its assets, and the checks which he received for his stock were drawn by other officers of the corporation against its funds. *Hall v. Henderson (Ala.)* 621

Declarations and statements.

6. The elapsing of a couple of minutes between the accident and the making of a declaration will not exclude from evidence, upon the question of the cause of the accident, a declaration by an employee of a railroad company, whose legs were cut off by a car, and who was found lying between planks forming a hand-car stand, that he stumbled over the planks. *Murray v. Boston & M. R. R. (N. H.)* 495

7. A declaration by an injured person as to cause of accident is not excluded from evidence as part of the *res gestæ* because in form of a narrative, and made in answer to a question. *Id.*

8. The owner of a wharf is bound by statements of one who is ostensibly in charge of it, as to the depth of water in the adjoining dock. *Garfield & P. Coal Co. v. Rockland-Rockport Lime Co. (Mass.)* 946

Opinion evidence.

9. On a trial for murder, where insanity is interposed as a defense, a nonexpert witness, after testifying to the acts, conduct, and appearance of the defendant, may state whether such acts, conduct, and appearance 61 L. R. A.

impressed him as being rational or irrational. *Queenan v. Territory (Okla.)* 324

Relevancy and materiality.

10. The title to engines cannot be proved by evidence of general reputation as to who owns them. *Louisville and N. Terminal Co. v. Jacobs (Tenn.)* 188

11. On a trial for murder, where the defense of insanity is interposed, the important issue to be determined is the sanity or insanity of the defendant at the time of the commission of the homicide; but it is permissible to receive evidence as to the condition of his mind both before, and for a reasonable period after, that time, as tending to show his mental condition at the time of the homicide. *Queenan v. Territory (Okla.)* 324

12. Upon a prosecution for rape alleged to have been committed by means of a sham marriage, evidence of marriage of defendant to another woman a few months later may be considered by the jury in passing upon the intention, purpose, and motive of defendant with regard to the ceremony through which he procured the consent of the prosecuting witness to sexual intercourse. *Lee v. State (Tex.)* 904

13. That defendant abducted the woman whom he subsequently married is not admissible on a prosecution for rape by means of a sham marriage ceremony. *Id.*

14. Statements made by the managers of "coolers" maintained for supplying local butchers by corporations engaged in preparing meat for the trade, and by solicitors in negotiating sales to the trade, as to reasons for prices and the method of billing goods, are admissible in evidence upon the question whether or not their principals have entered into an unlawful combination in restraint of trade. *State ex rel. Crow v. Armour Packing Co. (Mo.)* 464

15. In an action instituted by a widow for the homicide of her husband, caused by the negligent operation of a train of cars by a railroad company, evidence going to show that the deceased, at the time he was killed, left no estate or property, was inadmissible. *Brunswick & W. R. Co. v. Wiggins (Ga.)* 513

16. To entitle evidence that other vessels have used a dock without injury, to any weight, in an action to recover for injury to a vessel from a defective dock, it should appear that they were of the same length, breadth, and flatness as the vessel injured therein, and that they were as heavily loaded as she was. *Garfield & P. Coal Co. v. Rockland-Rockport Lime Co. (Mass.)* 946

Weight and sufficiency.

17. Evidence that witness knew defendant, and saw "them" going to a hotel late at night, does not sufficiently identify the prosecuting witness, so as to make evidence that a woman was seen in the room with defendant admissible upon a prosecution for rape alleged to have been effected by a sham marriage. *Lee v. State (Tex.)* 904

18. The jury may infer that a brakeman proceeding in the night towards a switch which he is required to set would do so in an ordinarily prudent manner, and find from such inference that he was in the exercise of due care, in the absence of evidence to the contrary. *Murray v. Boston & M. R. R.* (N. H.) 495

19. Direct evidence is not necessary to show due care on the part of a brakeman at the time of an accident by which he is injured. *Id.*

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Parol; admissibility to show intention of testator. 661

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Of habits and customs of notary in protesting paper; presumption that officer performed his duty. 901

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Right to Bring Second Action where Judgment in First Action Cannot be Enforced by Execution, see EJECTMENT.

1. Defendant in an action to recover real property brought to compel the removal of a permanent wall erected on plaintiff's property cannot, upon motion, be required to remove the wall, when the return of the execution states that it is impracticable for the sheriff to remove it. *Hahl v. Sugo* (N. Y.) 226

2. The rendition of a money judgment and award of execution does not exhaust the court's jurisdiction, but, in case the execution is returned unsatisfied, it may entertain an application for a receiver to impound the debtor's assets as a proceeding auxiliary to the primary suit. *Phelps v. Mutual Reserve Fund L. Asso.* (C. C. App. 6th C.) 717
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Right of Administrator to Sue in Foreign State for Recovery of Damages for Wrongful Death, see *CONFLICT OF LAWS*, 4.

Debt Due by Administrator to Decedent; Burden of Showing Inability to Pay, see *EVIDENCE*.

Limitation of Actions against Representatives of Deceased Officer of Corporation, see *LIMITATION OF ACTIONS*, 4.

1. The heir, and not the administrator, is the proper one to bring an action to declare a resulting trust in land, although it arises out of the bidding in of property covered by a deed of trust given to secure a loan of money, a part of which was advanced by the ancestor. *Johnston v. Johnston* (Mo.) 166

2. One who is indebted to a person who dies intestate, and who afterwards becomes administrator of his creditor's estate, if he be solvent and able to pay the debt at the time of his appointment, or at any time during the administration of his office, and before his final settlement and discharge, will be required to pay over to the estate, in cash, the amount of his antecedent debt. *Re Howell* (Neb.) 313

3. An administrator who is indebted to his intestate will be permitted to turn over the evidence of his uncollectible debt to his successor and will be discharged from his official liability therefor, where at the time of his appointment he was hopelessly insolvent, and remained so during all the time of his administration and up to and including the time of his final settlement. *Id.*

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The defense of a suit to recover damages from a police officer for assault while acting in the line of his duty, under an adverse judgment in which he would be liable to an arrest, is necessary, so as to bring a claim for legal services rendered therein within an exception of claims for necessities in a statute forbidding the garnishment of wages. *Fisher v. Shea* (Me.) 567

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Presumption on Appeal that Person Claimed to have been Illegally Detained was Produced in Court at Time of Hearing, see **APPEAL AND ERROR**, 8.

Jurisdiction of Judge of City Court to Issue Writ, see **COURTS**, 5, 6.

Applicability of Rules of Pleading in Habeas Corpus Proceedings, see **PLEADING**, 1.

1. The fact that the averments of a petition for habeas corpus, which it is claimed show the detention to be illegal, are made "on information and belief," is no ground for quashing the writ or refusing to issue it; especially where the application is made by a person other than the one alleged to be restrained of his liberty. *Simmons v. Georgia Iron & Coal Co.* (Ga.) 739

2. While there is no precedent for issuing a writ of habeas corpus directed to a corporation as such, yet where a writ is directed to a corporation, "and its officers, agents, and employees," and one or more of such persons respond by producing the body of the person detained, the irregularity in the address of the writ will be no ground for refusing to investigate the cause of the detention. *Id.*

3. Although a judge may have no authority to issue a writ of habeas corpus directed to a person holding another in custody beyond certain territorial limits, yet, where he does issue the writ thus directed, and the respondent obeys its mandate by producing into court the person detained, a plea that the court had no jurisdiction to issue the writ should be overruled, and the cause of the detention inquired into. *Id.*

4. While a motion to quash a writ of habeas corpus may be made for want of sufficient allegations, the better practice when the person detained is before the court is to inquire into the cause of the restraint, and

pass such order as the justice of the case requires. Id.

5. While the writ of habeas corpus is a "writ of right," it does not issue as a matter of course, but only when the application therefor contains allegations which, if true, would authorize the discharge of the person held in custody. Id.

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Closing of, for Purpose of Constructing Bridge, as Constituting a Nuisance, see NUISANCES, 5.

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1. Delay in the construction of a bridge because of inability to procure the necessary steel work, which has been ordered from the best-equipped plant in the country for furnishing such work, but which plant cannot fill the order because of strikes and labor troubles, does not render the one who has undertaken to construct the bridge liable for injuries caused by the continued obstruction of the street, where there is nothing to show that the material could have been procured from any other source any quicker. *Lund v. St. Paul, M. & M. R. Co.* (Wash.) 506

2. One to whom a municipal corporation has delegated the right to close a street for the purpose of constructing a new bridge is liable for injuries caused by such closing only when the municipality itself would be. Id.

3. The liability of one who has contracted to furnish the steel work for a bridge to respond to the builder for delay in complying with the contract cannot be considered in an action by abutting owners against the builder for injuries resulting from keeping the street closed for an unreasonable time. Id.

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Amount in Controversy in Suit to Restrain Seizure of, see COURTS, 3.

HOMICIDE.

Conviction for Manslaughter under Information Charging Murder, see INDICTMENT, ETC., 1.

1. A bicycle rider who unintentionally collides with a pedestrian, thereby causing his death, cannot be convicted of manslaughter under a statute permitting such conviction in case of unintentional killing while the slayer is engaged in an unlawful act, where, although he was grossly negligent in riding at an excessive speed, without giving any warning by bell or otherwise of his approach, he was doing nothing prohibited by law, there being no ordinance or statute regulating the riding of bicycles. *Johnson v. State* (Ohio). 277

2. In a prosecution for manslaughter, wherein the state relies for conviction on the ground that the deceased was killed unintentionally while the slayer was in the commission of an unlawful act, it must be shown that the alleged unlawful act is prohibited by law; and it is not sufficient to establish that such act, so engaged in, was a crime at common law, or one of gross and culpable negligence. Id.

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Validity of Contract between, to Secure Divorce, see CONTRACTS, 7.

Barring of Dower by Void Contract for Divorce, see DOWER.

1. A woman may enter into a partnership agreement with her husband, under statutory authority to acquire, own, and dispose of property to the same extent as her husband may do, and to make contracts and incur liabilities to the same extent as if unmarried. *Hoaglin v. Henderson* (Iowa). 756

2. A common-law marriage is not effected where a man, without any intent of consummating a marriage, procures the consent of a woman to casual and occasional cohabitation by means of a sham marriage, she living at the home of her parents, and not with him, and he never holding her out to the world as his wife. *Lee v. State* (Tex.). 904

3. A gift of money by a man to his wife makes it her separate estate as between them or their privies in blood or estate, where no rights of creditors are involved. *Johnston v. Johnston* (Mo.). 166

4. Money entering into a loan for which

a note and trust deed are made to husband and wife may be found to be the property of the wife, where the husband signed an account of the items in the loan, which stated that she advanced that amount, the loan is for a period of two years, and he made no attempt to collect it when due, nor until after her death, although he states that the note was made to himself and wife in order to make provision for her by survivorship in case he predeceased her. *Id.*

5. Estates by entirety may, under the Missouri statutes, be created in personal as well as in real property, and between husband and wife as well as between strangers. *Id.*

6. An estate by entirety is not created by the giving of a note secured by deed of trust to a husband and wife jointly to secure repayment of a loan, a portion of which was advanced by each, where by statute a man has no control of his wife's property; and it is immaterial that she knew of, and consented to, the form of the security. *Id.*

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An unmarried woman, who is an imbecile, and incompetent to testify, cannot institute and prosecute a proceeding in bastardy, under a statute giving the right to institute such a proceeding to "any unmarried woman." *State ex rel. Yilek v. Jehlik* (Kan.). 265

INDICTMENT, INFORMATION, AND COMPLAINT.

1. An information charging murder is sufficient to sustain a prosecution for manslaughter. *People v. McFarlane* (Cal.) 245

2. A conviction of manslaughter may be sustained, although the evidence establishes

murder on a second trial of an indictment for murder upon which there was a conviction of manslaughter at the former trial, which was set aside and a new trial granted, where the evidence does not prove a case where the verdict must be for murder or acquittal as justifiable homicide. *Id.*

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In Federal Courts Restraining Enforcement of Unconscionable Judgment of State Court, see COURTS, 18-20.

Restraining Illegal Sale of Intoxicating Liquors, see INTOXICATING LIQUORS, 1.

1. A railroad company is entitled to an injunction restraining hackmen, hotel runners, and baggagemen from congregating in and about the entrances to its stations so as to interfere with the ingress and egress of passengers and employees, although it has no right to complain of the obstruction of the public walks adjacent to such entrances, which does not interfere with such ingress and egress. *Donovan v. Pennsylvania Co. (C. C. A. 7th C.)* 140

2. A suit in equity may be maintained to enjoin a judgment creditor from prosecuting a multiplicity of proceedings in garnishment to subject the wages of laborers, mechanics, and clerks, which are absolutely exempt by law from attachment, execution, and garnishee process, to the payment of his judgment. *Siever v. Union P. R. Co. (Neb.)* 319

3. The removal of water mains upon which there are seventeen fire hydrants maintained at public expense from a section where there is no demand for fire protection, and but one private consumer, to another part of the city, will not be enjoined at the suit of such consumer, although his property will be thereby rendered practically valueless for the purpose for which it was improved, where the removal is made with the permission of the city after it has determined that the public welfare will be best subserved thereby. *Asher v. Hutchinson Water, L. & P. Co. (Kan.)* 52

4. An affidavit for injunction in these 61 L. R. A.

words, "I swear that all the facts contained in the foregoing petition are true," is sufficient. *Speyrer v. Miller (La.)* 781

5. An order requiring a bond to be given in favor of each of several defendants in an injunction suit is not complied with by giving bond in favor of the defendants jointly. *Id.*

6. An injunction must be dissolved where the amount in which bond should be given has not been fixed by the judge, and cannot be saved by invocation of the doctrine that an injunction will not be dissolved where it appears that another writ could be sued out immediately. *Id.*

7. The practice of including in one injunction several separate seizures made by creditors between whom there is no privity is not to be encouraged, and can be sanctioned only in highly exceptional cases, where evidently no inconvenience can be occasioned to the defendants in injunction, and no complication can possibly arise. *Id.*

8. Statutory damages on the dissolution of an injunction will not be allowed where, the merits not having been gone into, the court cannot say that the equitable remedy of injunction has been abused. *Id.*

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To restrain repeated garnishments of exempt wages. 320

Right to, where grant of will create greater wrong than it is intended to remedy; where damages are merely nominal. 227

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Time of Running of Statute of Limitations, in Action against Policy Holders of Insolvent Mutual Society, see LIMITATION OF ACTIONS, 2.

Specific Performance of Contract to Insure, see SPECIFIC PERFORMANCE, 1, 2.

1. An application for insurance, on a single sheet containing at the bottom a promissory note intended to secure assessments, is a single contract of which the removal of the note is a material alteration, so that it is void, even in the hands of a bona fide holder, although the note is written below a perforated line, if the general appearance of the paper is such that the applicant is not guilty of negligence in signing it. *Rochford v. McGee* (S. D.) 335

2. A contract by which an insurance company loaning money on the security of a paid-up policy issued by it may, at its option, require a surrender of the policy for its cash value upon default in payment of the loan or interest thereon, is void. *New York L. Ins. Co. v. Curry* (Ky.) 268

3. The requirement in a policy of insurance against loss by the accidental discharge of an automatic fire extinguishing apparatus, that assured must use all reasonable means to save and preserve the property insured, refers to care to be taken after an accidental discharge of the apparatus, and not to care to prevent an accident. *Wertheimer-Swarts Shoe Co. v. United States Casualty Co.* (Mo.) 766

Interest in proceeds.

4. A member of a fraternal beneficiary society has no such interest or property in the proceeds of a certificate therein as will impress such proceeds with a trust in favor of his estate or his creditors. *Warner v. Modern Woodmen of America* (Neb.) 603

5. No equitable rights accrue to either the creditors or the estate of a deceased member of a fraternal beneficiary association whose certificate is payable to his heirs where he dies without leaving heirs or designating any other beneficiary and there is no one in existence who, under the rules of the association could become such beneficiary; and the fund contemplated by the certificate will revert to the society. *Warner v. Modern Woodmen of America* (Neb.) 603

6. Failure to effect a change of beneficiary in a mutual benefit certificate, because 61 L. R. A.

of refusal of the one in whose favor it was issued to surrender the old one, gives him no right to the proceeds as against the claim of the one in whose favor the new certificate was to be issued, where there is, by statute and the rules of the society, an absolute right to make the change, and everything required by the rules is done except the surrender of the old certificate. *Lahey v. Lahey* (N. Y.) 791

7. The commencement of foreclosure proceedings defeats the interest of a mortgagee in a policy of insurance on the mortgaged property, containing a mortgage clause making the loss, if any, payable to the mortgagee as his interest might appear, but providing that the entire policy should be void if, with the knowledge of the insured, foreclosure proceedings should be commenced, although another clause provided that if, with the consent of the company, an interest under the policy should exist in favor of a mortgagee, the conditions thereinbefore contained should apply in the manner expressed in such provisions relating to such interest as should be written upon or attached to the policy, and there was no stipulation attached which declared that the insurance in favor of the mortgagee was subject to the same terms and conditions as that of the mortgagor. *Dela-ware Ins. Co. v. Greer* (C. C. App. 8th C.) 137

8. Where a certificate of a fraternal beneficial association provides that payment thereof shall be made only to the family, widow, heirs, blood relatives, affianced wife, or persons dependent upon the member, and the by-laws of the association, as well as the statutes of the state under which it is organized, contain the same provisions, the death of such member, without the existence of anyone who is entitled to be made a beneficiary under his certificate, creates no interest in his estate to the fund mentioned therein, and his administrator cannot recover against the association on such certificate. *Warner v. Modern Woodmen of America* (Neb.) 603

Cause of death, loss, or injury.

9. A prima facie case for recovery on an accident insurance policy is shown by proof that insured died of hemorrhage resulting from an accidental fall, without the necessity of proving the absence of any of the excepted causes in the policy. *Fetter v. Fidelity & Casualty Co.* (Mo.) 459

10. The fact that an accident ruptured a kidney because of its cancerous condition does not prevent the accident from being the cause of the ensuing death of the injured person, "independent of all other causes," within the meaning of a policy of accident insurance held by him. Id.

11. No recovery can be had for injury resulting from inflammation of the eyes in consequence of accidentally coming in contact with poison ivy, whereby the irritating poison was absorbed into the eye, under a policy of insurance against the effects of

bodily injury caused solely by external, violent, and accidental means, wherein it is provided that the insurance does not cover injury, fatal or nonfatal, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled. Preferred Acci. Ins. Co. v. Robinson (Fla.) 145

12. The discharge of an automatic fire extinguishing apparatus is not caused by a wilful act, within the meaning of an exemption clause in a policy insuring against loss caused by such discharge, where it is due to the placing of brace rods attached to window shutters upon the pipes so that, when the shutters are blown open by the wind, the hooks on the rods catch the pipes and break their connections, where there is nothing to show knowledge that such negligence would result in the discharge of the pipes. Wertheimer-Swartz Shoe Co. v. United States Casualty Co. (Mo.) 766

13. One insured against loss by the accidental discharge of automatic fire extinguishers is not guilty of negligence in failing to instruct an employee not to fasten window shutters to the pipes of the apparatus, where he is properly instructed how to fasten them, and there is nothing to cause the employer to anticipate that they will be fastened to the pipes. Id.

14. That an automatic fire extinguisher was discharged by the negligent act of the insured or his servant is not sufficient to defeat liability on a policy insuring against loss by its accidental discharge. Id.

Warranties; conditions.

15. The mere fact that an applicant for insurance is receiving a pension from the government for alleged physical injuries does not show that he has a bodily infirmity, within the meaning of a warranty in the policy. Black v. Travelers' Ins. Co. (C. C. App. 3d C.) 500

16. Good faith on the part of an applicant for insurance in denying the existence of a bodily infirmity will not prevent its rendering the policy void, where the policy expressly states that, if a statement of its nonexistence shall be untrue in any respect, then the policy shall be null and void. Standard L. & Acci. Ins. Co. v. Sale (C. C. App. 6th C.) 337

17. An applicant for life insurance may be required to warrant himself sound in health. Id.

18. The question whether or not an applicant for insurance was suffering from a bodily infirmity, within the meaning of a warranty in the policy, where he was drawing a pension from the government for vertigo and impairment of sight because of a cannon-shot wound in his head, is for the jury upon all the evidence of the case. Black v. Travelers' Ins. Co. (C. C. App. 3d C.) 500

19. An injury cannot be declared, as matter of law, to be a bodily infirmity, within the meaning of a warranty in a life-insurance policy, without evidence that it affects 61 L. R. A.

to some extent the actual physical condition of the insured. Id.

Forfeitures.

20. A provision of a policy insuring against loss by the accidental discharge of an automatic fire extinguisher, that notice shall be given of "any known defect" which shall render the system more than usually hazardous, and that it shall be immediately repaired, refers to defects in the system itself, and not to those in the fasteners of shutters on the windows of the buildings, although the use of the latter in a defective condition may make possible the breaking of the apparatus and its consequent discharge. Wertheimer-Swartz Shoe Co. v. United States Casualty Co. (Mo.) 766

21. The condition that a policy of insurance on mortgaged premises should be void if, with knowledge of the insured, foreclosure proceedings should be commenced, is not limited to foreclosure proceedings of which the insured had notice at the time or before they were commenced, but covers all such proceedings of the commencement of which he acquired knowledge at any time before the loss occurred. Delaware Ins. Co. v. Greer (C. C. App. 8th C.) 137

22. The effect of the mortgage clause, "loss, if any, payable to ———, mortgagee, as his interest may appear," or of words of similar import, attached to policies of fire insurance, is to make the mortgagee the simple appointee of the mortgagor, to receive the proceeds of the amount of his interest, and to place his indemnity at the risk of every act and omission of the mortgagor that would avoid, terminate, or affect the insurance of the latter's interest under the terms of the policy. Id.

23. Surrender of the right to extended insurance for the term earned by the premiums paid is not effected by the execution of, and failure to pay, a premium note, a clause in which provides that such failure shall work a forfeiture of the policy, "except as to the right to a surrender value or paid-up policy, which may be provided in the policy," where the policy provides, under the head of surrender values, for either a paid-up policy or extended insurance, and states that, in case of a failure to demand a paid-up policy within six months after default, the policy will be extended without request or demand for the time specified in the schedule annexed. Drury v. New York L. Ins. Co. (Ky.) 714

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1. The illegal sale of intoxicating liquors is a public nuisance, affecting the whole community in which the sale is carried on, and may be abated by process instituted in the name of the state. *Lofton v. Collins* (Ga.) 150

2. The legislature may permit a town to establish a dispensary for the exclusive sale of ardent spirits, although in so doing it may render necessary the expenditure of money, and ultimately the imposition of a tax. *Farmville v. Walker* (Va.) 125

3. Public money may be lawfully expended in the regulation and control of the traffic in ardent spirits. Id.

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Release of One as Constituting a Discharge of All, see RELEASE, 1, 2.

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Review of Order Vacating Default Judgment, see APPEAL AND ERROR, 7.

Infringement of Vested Rights by Statute Empowering Court to Modify Judgment, see CONSTITUTIONAL LAW, 1.

As Constituting a Contract within Meaning of Constitutional Provision Forbidding Impairment of Obligation of Contracts, see CONTRACTS, 17.

Jurisdiction of Federal Court to Restrain Enforcement of Unconscionable Judgments in General, see COURTS, 10, 11, 15.

Conclusiveness in Federal Courts of Decision of State Court, see COURTS, 16.

1. A dismissal of a replevin suit for want of prosecution, with judgment for return of the property, after reversal by the appellate court of a judgment in plaintiff's favor, and remanding of the case for new trial, is not conclusive as to the title to the property in a subsequent suit on the replevin bond. *Gilbert Use of Bishop v. American Surety Co.* (C. C. App. 7th C.) 253

2. A judgment for plaintiff in an action to remove from plaintiff's land a permanent wall erected by defendant, which cannot be removed by legal process, in which action

the plaintiff asks only for the relief appropriate in a legal action to recover real property, is a bar to a subsequent suit in equity to compel the removal of the wall, under statutes establishing one form of action, and requiring the complaint to state the facts constituting the cause of action, and demand the judgment to which plaintiff supposes himself entitled. *Hahl v. Sugo* (N. Y.) 226

3. It will be presumed, in support of a judgment, when questioned in another proceeding, that the instruments sued on were negotiable if that fact is essential to the judgment. *Hall v. Henderson* (Ala.) 621
Collateral attack.

4. A decision by a court which, after having acquired jurisdiction of defendant, rendered a money judgment, and awarded execution, that, either under its general jurisdiction or by statutory authority, it may appoint a receiver in aid of the execution without further notice to defendant, is not subject to collateral attack. *Phelps v. Mutual Reserve Fund L. Asso.* (C. C. App. 6th C.) 717

5. A defendant appearing specially to contest the jurisdiction of the court over him for insufficient service of process is bound by a judgment sustaining it until it is reversed by a court of appellate jurisdiction, and he cannot attack it in a collateral proceeding in another court by seeking to enjoin execution of the judgment finally rendered against him. *Id.*

6. A judgment in favor of a receiver cannot be attacked collaterally when it is not void on its face, on the ground that he had been discharged as receiver before the rendition of the judgment, since, if he had no right or capacity to maintain the suit, that should have been set up in defense. *Hall v. Henderson* (Ala.) 621

Relief against; setting aside.

7. The burden is upon the moving party upon motion to vacate a judgment entered by excusable default to show diligence in seeking relief, and a failure to do so is fatal to the application. *Wheeler v. Castor* (N. D.) 746

8. In addition to a sufficient technical affidavit of merits, the moving party upon motion to vacate a judgment entered by excusable default must set out a defense which goes to the merits of the action, and strict practice requires that such showing of merits should be made by a proposed answer, verified, served, and filed with the motion. *Id.*

9. The failure of an officer of a state, whom foreign corporations are compelled by the statutes of the state to appoint their agent to receive service of process as a condition of doing business in the state, to comply with a statute which requires him to send a summons to the defendant, to which it is directed, immediately upon its receipt, is not such fault or negligence of the defendant corporation as will estop it from securing equitable relief from an uncon-

scionable judgment, which it was prevented from defending itself against by the neglect of the officer. *National Surety Co. v. State Bank* (C. C. App. 8th C.) 394

10. A defense to the merits embodied in an affidavit merely, and not in a proposed verified answer, upon motion to vacate a judgment entered by excusable default, is a substantial compliance with the rule requiring a defense on the merits to be shown, and may be accepted by the trial court, in its discretion, in lieu of a proposed verified answer. *Wheeler v. Castor* (N. D.) 746

11. The statute of limitations is a legal and meritorious defense within the meaning of the rule requiring a valid defense to the merits to be shown to justify the vacation of an irregular default judgment. *Id.*

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Judgment; in an action at law as bar to subsequent suit in equity on same cause of action. 226

Right to sue in tort and recover on a contract. 125

By excusable default; setting aside of; sufficiency of affidavit of merit without service of proposed answer; statute of limitations as meritorious defense; exercise of discretion by court in vacating. 748

Right to open default judgment to let in defense of statute of limitations. 746

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Effect of death of one of the parties after, upon remedy by execution. 353

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JURY.

See also **TRIAL**, 2-8.

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LANDLORD AND TENANT.

Liability of Landlord for Failure to Comply with Statute Requiring Construction of Fire Escape, see **BUILDINGS**, 1.

Admission, in Evidence, of Lease Void under Statute of Frauds, see **EVIDENCE**, 4.

1. Unless a lease provide for repairs by a landlord, he is not bound to either repair or rebuild in case of accidental destruction. *Arbenz v. Exley, W. & Co.* (W. Va.) 957

2. In case of the total destruction by fire

of a leased building the tenant is not discharged from further obligation to pay rent, by W. Va. Code 1899, chap. 72, § 22, providing that no covenant by a lessee to leave the premises in good condition shall bind him, in case the buildings are destroyed without his fault, to erect such buildings again or pay for the same or any part thereof. *Id.*

3. A landlord's covenant to repair is independent and does not release from rent where the repairs are not made, but is to be enforced by recouping damages in an action for rent or by a separate action for damages. *Id.*

4. A tenant of land, not merely of a room or apartment, must pay rent for his term, though a building on it, included in the lease, without fault on his part, is totally destroyed by fire, unless the lease otherwise provide. *Id.*

5. One who enters into possession under a written lease without seal for a term greater than five years is a tenant at will, but if he pays periodical rent the tenancy is by law one from year to year, and he must pay rent accordingly, and he can only end the tenancy by notice to quit, and cannot discharge himself from rent by abandoning the premises. *Id.*

6. The owner of a structure to be used as a toboggan slide at a bathing resort is liable for resulting injuries in case a person attempting to use it falls from it by reason of insufficiency of the railing, although it is in possession of a tenant, if the railing intended for the protection of persons upon it is so faulty in construction that such accidents are likely to happen. *Barrett v. Lake Ontario Beach Improvement Co. (N. Y.)* 829

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Liability of landlord for nuisance maintained by tenant on property; where premises leased for every purpose for which they were used. 188

Liability of owner of property for accident caused by defect in, while in hands of tenant; negligent construction of toboggan slide in hands of tenant. 830

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Exercise of, as Not a Denial of Equal Protection of the Laws, see CONSTITUTIONAL LAW, 3.

LEVY AND SEIZURE.

The death of a plaintiff in execution after 61 L. R. A.

the execution has been issued and placed in the hands of the levying officer does not prevent such officer from enforcing the same, nor from making any entries thereon that may be necessary to prevent the dormancy of the judgment, even though there be no legal representative upon the estate of the plaintiff in execution, and no request be made by anyone interested in the judgment to have such entries made. *Hatcher v. Lord, (Ga.)* 353

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Levy on dead man's estate under judgment obtained during his life; where his estate has not been administered; effect of death of plaintiff in execution after judgment rendered. 353

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LIBEL AND SLANDER.

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That defamatory matter in a pleading refers to a stranger to the record does not deprive it of its absolute privilege, if it is pertinent and relative to the issue. *Crockett v. McLanahan (Tenn.)* 914

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Libel; privilege of defamatory words used in pleading; relevancy or pertinency of remarks; statements relating to strangers to the record. 914

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As Constituting Proper Purpose for Exercising Power of Eminent Domain, see EMINENT DOMAIN, 3.

LIENS.

Right of Attorney to Protect Lien by Preventing Dismissal of Action, see ACTION OR SUIT, 3.

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Liens; amount in dispute in case of injunction against enforcement of, against specific property. 781

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Power to Exercise Right of Eminent Domain, see EMINENT DOMAIN, 1.

LIMITATION OF ACTIONS.

Defense of, as Constituting a Valid Defense on Motion to Open Default Judgment, see JUDGMENT, 11.

1. The statute of limitations is not, under modern authority, regarded with disfavor by the courts, but it is regarded as a plea of equal merit with other lawful defenses to an action. *Wheeler v. Castor* (N. D.) 748

2. The statute of limitations begins to run against the liability of policy holders in a mutual insurance society to contribute towards indebtedness of the society at the time it is adjudged insolvent and a receiver is appointed for it. *Boyd v. Mutual Fire Asso.* (Wis.) 918

3. The statute of limitations does not begin to run against liability on a covenant of warranty in a deed of real estate until there is an eviction. *Wiggins v. Pender* (N. C.) 772

4. Executors or administrators of deceased officers of a corporation stand in no different position, as to the running of the statute of limitations against claims to hold such officers liable to creditors of the corporation for misfeasance or malfeasance in office, than the officers themselves would occupy. *Boyd v. Mutual Fire Asso.* (Wis.) 918

5. That the liability of stockholders of a corporation for corporate debts has become barred by the statute of limitations does not prevent the enforcement of their liability as directors, although they are sued in both capacities in the same action. Id.

6. The interruption of the running of the statute of limitations against the liability of a stockholder of a corporation to creditors by the bringing of an action to wind up its affairs and collect the assets is not prevented by the fact that he is plaintiff instead of defendant in the action. Id.

7. Creditors of a corporation who are compelled to resort to equity to collect its assets, possess no greater right to be relieved from the effect of the statute of limitations than the corporation itself would have had in an action at law. Id.

8. The relation of officers and directors of the corporation to it and its stockholders is not such as to prevent their taking the benefit of the statute of limitations in an action to hold them liable for misfeasance or malfeasance in office. Id.

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9. Making a director of a corporation a party to an action to wind up its affairs and collect its assets does not prevent the running of the statute of limitations against his liability for acts of misfeasance or malfeasance in office, if such acts are not included in the cause of action. Id.

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When statute begins to run as to liability on premium notes; running of, against liability of corporate officers for malfeasance; necessity of service of summons upon defendant to stop running of statute; effect of commencement of action against corporation to sequester its assets to stop running of statute in favor of officers; as bar to liability of policy holders for unpaid premium notes; applicability of, to trusts. 922

Right to open default judgment to let in defense of statute of limitations. 746

Opening default judgment to let in defense of. 748

LOCAL ASSESSMENTS.

See PUBLIC IMPROVEMENTS.

LOCAL IMPROVEMENTS.

See PUBLIC IMPROVEMENTS.

MANDAMUS.

1. A mine owner may maintain an application in his own name for a writ of mandamus, without the intervention of the attorney general, to compel a railroad company, whose road is his only means of access to market, to furnish cars, which it refuses to do except upon conditions which are illegal; and it is immaterial that the same conditions are exacted of other shippers along the line. *Lorraine v. Pittsburg, J. E. & E. R. Co.* (Pa.) 502

2. The right of an individual to apply for a writ of mandamus to compel a railroad company to serve him is not taken away by a statute which provides that, when the writ is sought to procure the performance of a public duty only, the proceeding shall be in the name of the commonwealth at the relation of the attorney general, where it also provides that it shall issue on the application of a person beneficially interested. Id.

3. Mandamus is a proper remedy to compel a railroad company to furnish cars to a shipper, which it refuses to do except on compliance with illegal conditions. Id.

4. Mandamus proceedings against a railroad company may be instituted in the county where the tracks are laid, and within the limits of which its operating officers are, although its business officers are in another county, under a statute giving to courts of any county jurisdiction to issue writs to corporations "being or having their chief place of business within the county." Id.

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Mandamus; to compel furnishing of water and gas; to compel performance of duty by public corporation. 53

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To compel payment of money by public officer. 345

MASTER AND SERVANT.

Exemption of Existing Contracts from Operation of Statute Limiting Hours of Labor, see CONSTITUTIONAL LAW, 4.

Power of Statute to Limit Hours of Labor of Employees of Public Service Corporations, see CONSTITUTIONAL LAW, 7.

Necessity of Consideration for Contract Modifying Existing Contract of Employment, see CONTRACTS, 5.

1. A chartered street railroad is a "railroad company" within the meaning of Ga. Civ. Code 1895, §§ 2297, 2323, making railroad companies liable to one servant for injuries inflicted by a fellow servant. *Savannah, T. & I. of H. Ry. v. Williams* (Ga.) 249

2. A street railroad is not within the provisions of a statute making corporations owning or operating railroads liable for injuries to one servant by the negligence of another while engaged in the work of operating such railroad. *Sams v. St. Louis & M. R. R. Co.* (Mo.) 475

3. That a street car company is organized under the general railroad law, and has claimed to exercise the right of eminent domain, does not bring it within the terms of a statute making railroad companies "owning and operating a railroad" liable for injuries sustained by one servant "injured in the work of operating such railroad," by reason of the negligence of a fellow servant, where the company is in fact operating only a street railroad. *Id.*

4. Voluntary service for excessive hours is forbidden by a statute which expressly states that its purpose is to limit the usual hours of labor of street-car employees, although it merely forbids officers of the corporation to exact more than a certain number of hours per day. *Re Ten-Hour Law for Street Ry. Corps.* (R. I.) 612

Duty and liability of master.

5. Gross negligence is not necessary to render a master liable for injury to an employee through his failure to furnish a safe place in which to work. *Tradewater Coal Co. v. Johnson* (Ky.) 161

6. Having coal hanging in a mine in such a way as to be likely to fall on employees who attempt to work in proximity to it is negligence as matter of law. *Id.*

7. Failure to perform a duty as to fire escapes, imposed by statute for the benefit of persons employed in the building, which is the proximate cause of the death of an employee, which death is the natural and ordinary consequence of the failure, is evidence of negligence to be submitted to the jury. *Carrigan v. Stillwell* (Me.) 163

8. Violation of a statute forbidding the employment in factories of children of a certain age may be found to be negligence which will support a civil action for injuries resulting therefrom, although it is punishable under the statute as a misdemeanor. *Marino v. Lehmaier* (N. Y.) 811

Assumption of risks.

9. A brakeman on a railroad does not assume the risk of accident from the proximity of a jigger stand to a switch, where he does not know of it, and is not chargeable with such knowledge in the exercise of ordinary care in the performance of his duties. *Murray v. Boston & M. R. R.* (N. H.) 495

10. Knowledge on the part of a brakeman of a jigger stand near a switch which he is required to use is not shown by the fact that he had been over the road ten or twelve times within two months of the accident, when the stand is not so conspicuous as necessarily to attract his attention, and men who worked with him during the time testified that they had not noticed it. *Id.*

11. The manner of the occurrence of an accident to a railroad employee, when disclosed by the evidence, may warrant an inference in his favor as to want of knowledge of the unsafe condition of his working place, as tending to show that he did not assume the risk of such condition. *Id.*

12. That jigger stands are frequently placed along railroad tracks does not charge a brakeman, as matter of law, with notice that one may be near a switch that he is required to use, where they usually lead into car houses, and are not placed near switches. *Id.*

13. A child whose employment in a factory is forbidden by statute because of his immature age is not, as matter of law, chargeable with contributory negligence, or with having assumed the risk of employment, in case he is injured while so employed. *Marino v. Lehmaier* (N. Y.) 811

Fellow servants and their negligence.

14. A car starter does not represent the principal in ordering the motorman of a street car to move the car forward so as to clear the switch at the terminus of the line, where the car is being moved from one track to the other, preparatory to making the return trip, so as to render the principal liable for an injury thereby caused to the conductor; but he is a fellow servant of the conductor. *Sams v. St. Louis & M. R. R. Co.* (Mo.) 475

15. Failure of loaders to perform their duty and remove loose coal hanging in a mine, which renders the place unsafe for other employees to work in, is the negligence of the master, and not of the fellow servant of a machine man's helper; so that the master is not relieved from liability for injury to him, caused by such negligence, on the theory that the injury was caused by the act of his fellow servant. *Tradewater Coal Co. v. Johnson* (Ky.) 161

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Master and servant; employment of child in violation of factory law; liability for in-

jury to child; contributory negligence; assumption of risk. 812

Effect of fact that servant did not perform his duty, to relieve master from liability; master's liability generally for acts of servant; joint negligence of master and servant; notice to employee of danger as notice to master. 120

Negligence of vice principal; applicability of fellow servant act to street railroads. 476

Duty to furnish safe place to work; question for jury as to; mere knowledge of existence of object causing injury; in absence of proof of appreciation of danger. 496

Liability for negligence of fellow servants; duty to furnish safe place to work; delegation of, to another; duty to warn inexperienced servant. 162

Criminal liability of master for ill-treatment of, or neglect of, servant, causing death. 293

MAXIMS.

He who comes into equity must do so with clean hands, see EQUITY, 2.

Aqua currit et debet currere, ut currere solebat. Salt Lake City v. Salt Lake City W. & E. P. Co. (Utah) 648

Causa proxima, non remota, spectatur. Fetter v. Fidelity & C. Co. (Mo.) 459

Certum est quod certum reddi potest. Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (C. C. App. 6th C.) 402

Cessante ratione cessat ipsa lex. Savannah, T. & I. of H. Ry. v. Williams (Ga.) 249

De minimis non curat lex. Salt Lake City v. Salt Lake City W. & E. P. Co. (Utah) 648

Expressio unius est exclusio alterius. State ex rel. Garrett v. Froehlich (Wis.) 345; Ex parte Cox (Fla.) 734

Ex turpi causa non oritur actio. Palmer v. Palmer (Utah) 641

Inclusio unius est exclusio alterius. Ex parte Cox (Fla.) 734

Sic utere tuo ut alienum non laedas. Louisville & N. Terminal Co. v. Jacobs (Tenn.) 188

So use your own rights and property as to do no injury to those of others. West Virginia C. & P. R. Co. v. State use of Fuller (Md.) 574

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Damnum absque injuria. 506

Equity looks on that as done which ought to have been done. 233, 792

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When one of two innocent parties must suffer on account of the fraud of a third person, he who puts it in the power of the latter to commit the fraud must sustain the loss. 634

MENTAL ANGUISH.

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METERS.

Requiring Consumers to Use Water Meters, see WATERS, 28-30.

MINES.

Injuries to Employees, see MASTER AND SERVANT.

Land in possession of persons prospecting for oil thereon with the intention of locating it as mineral land is not vacant and open to settlement, within the meaning of the act of Congress of June 4, 1897, permitting the exchange thereof for land within a forest reserve, although no oil or mineral is known to exist therein, and no claim thereto appears on the records of the land office. Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. App. 9th C.) 230

MINORS.

Violation of Statute Forbidding Employment of, as Evidence of Negligence, see MASTER AND SERVANT, 8.

MONOPOLY.

Forfeiture of Rights of Corporations Entering into, see CORPORATIONS, 3. See also CONTRACTS, 8-10; EVIDENCE, 14.

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See also CONSPIRACY.

Monopolies; combinations to prevent competition; validity; right to inquire into, collaterally. 255

MORTGAGE.

Foreclosure of, as Defeating Interest of Mortgagee in Insurance Policies, see INSURANCE, 7.

Extension of Time to Purchaser of Mortgaged Property Who has Assumed Debt, as Constituting a Discharge of Mortgagor, see PRINCIPAL AND SURETY, 1.

1. Withdrawal of bonds, the owner of which has borne his share of the expenses of protecting the common interests, from a syndicate agreement to purchase at the foreclosure sale for the protection of the bondholders the railroad by which the bonds were issued, to which they were committed by the agent of their owner, cannot be made by the agent without the owner's consent, or required by other members of the syndicate. Reed v. Schmidt (Ky.) 270

2. A trustee for holders of bonds secured by a railroad mortgage cannot create a pool for the purpose of buying in property for the exclusive benefit of a favored and chosen number of bondholders, but all must be given a fair opportunity to share on equal terms. Id.

3. Holders of bonds secured by a mortgage on a railroad, which is bought in at foreclosure sale for the benefit of the bondholders, who offer within a reasonable time to bear their proportion of the expenses necessary to carry the sale into effect, are entitled to share in the benefit of the purchase, under a statute providing for the purchase

of such property for the benefit of security holders, and entitling all holders of the same class of securities to equal privileges in any such purchase with other holders of the same class. *Id.*

4. Where property bought at a foreclosure sale for the benefit of security holders has been resold, holders of securities who were entitled to the benefit of the pool, but were excluded therefrom, are entitled to an accounting of the proceeds after deducting what they should have contributed to the expenses. *Id.*

5. A mortgagor who departs from the state without giving the mortgagee any information as to where he may be found, or leaving any instructions as to the forwarding of his mail, cannot object to the act of the mortgagee in declaring the mortgage due for default for want of notice to him of intention to do so, as required by an equity rule, where notice was in fact mailed to his last known address. *Julien v. Model Building, L. & I. Asso. (Wis.)* 668

6. The satisfaction of record by a vendor of land, of a mortgage given to secure the performance of a contract by the vendee, in consideration of which the conveyance was made, whereby he bound himself, in case of a sale of the property, to pay to certain persons, strangers to the transaction, specified sums of money, the satisfaction being made before such third persons had any knowledge of their rights under the contract and mortgage, does not impair their rights; and it is competent for either of them, notwithstanding the satisfaction of the mortgage, to prosecute a suit for a foreclosure of the same to enforce the performance of the promise made for their benefit. *Tweeddale v. Tweeddale (Wis.)* 509

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Extension of time on mortgage to release maker of mortgage note; agreement by grantee to pay mortgage on property; necessity that mortgagee sue grantee in name of mortgagor; relation of mortgagor and grantee as that of principal and surety; implied assent by directors of corporation to extensions made by treasurer. 761

Mortgage clause in insurance policy; effect on mortgagee's rights of act of mortgagor; foreclosure proceedings. 137

Amount in dispute in case of injunction to restrain enforcement of, against specific property. 785

MUNICIPAL CORPORATIONS.

Certiorari to Review Water Rates Fixed by Municipality, see CERTIORARI, 1.
Constitutionality of Statute Fixing Wages of Laborers on Public Improvements, see CONSTITUTIONAL LAW, 6.

Establishment of Grade of Street as Entitling Abutting Owners to Compensation, see EMINENT DOMAIN, 6.

Liability for Obstructing Highway Contractor in Constructing Bridge, see HIGHWAYS.

Liability to Indictment for Failure to Compel Abatement of Nuisance, see NUISANCES, 1.

Legality of Publication of Ordinance in Sunday Paper, see SUNDAY.

Public Water Supply, see WATERS, 21-31.

See also PUBLIC IMPROVEMENTS.

1. Charter authority to punish disorderly persons of all sorts empowers a municipal corporation to do more than provide for the punishment of those already punishable under the provisions of the general law. *Re Stegenga (Mich.)* 763

2. A municipal corporation may provide for the punishment of persons loitering about the streets and barrooms in idleness, without habitation or visible means of support, and without being able to give a satisfactory account of themselves, under charter authority to punish disorderly persons of all kinds. *Id.*

3. The right to establish a dispensary for the sale of intoxicating liquors is not conferred upon a municipality by a charter provision giving it exclusive power to "control and direct" the sale of liquors within its limits,—especially when the county in which the dispensary is located had, prior to its establishment, adopted the local option law, prohibiting the sale of liquors in that county. *Lofton v. Collins (Ga.)* 150

4. A municipal corporation may reimburse a member of its police department who is by statute made its officer and required to remove nuisances from the city streets, the amount which he is required to pay upon a judgment recovered against him for shooting a bystander, in attempting, under obedience to the orders of his superior officer, to shoot a mad steer at large in the streets. *State ex rel. Crow v. St. Louis (Mo.)* 593

5. It is not legally practicable to notify an alderman of a special meeting of the board to be held on the evening of the day on which the call is issued, where at the time of the call he is absent from the state and beyond reach; and failure to give him notice will not affect the validity of the meeting. *Knoxville v. Knoxville Water Co. (Tenn.)* 888

Liability for injuries.

6. Notice to an assistant building inspector of intention to place apparatus for heating an abutting building under the sidewalk is notice to the city, where the chairman of the board of public works referred the applicant for permission to make the necessary alterations to that official as the one having authority to grant the permission. *Beall v. Seattle (Wash.)* 583

7. Notice of intention to place heating apparatus under a sidewalk, while not notice that it has been done, is such notice as emphasizes the duty of inspection to discover if it is really done. *Id.*

8. Consent on the part of a city to the placing of heating apparatus under the sidewalk may be found from the fact that it

made no inspection after receiving notice that it would be so placed. Id.

9. A prima facie case of negligence, rendering a city liable to a traveler injured by the explosion of a boiler under the sidewalk, in the absence of evidence that it exercised reasonable care in the premises, is made out by showing that it consented to the maintenance of the boiler there under conditions, which were a violation of the city ordinance prescribing the structural work to be used in case the space under the walk was to be utilized. Id.

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Of Municipal Corporation in Permitting Constructing of Steam Boiler under Sidewalk, see MUNICIPAL CORPORATIONS, 9.

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1. It is the general rule that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles. *Huset v. J. I. Case Threshing Mach. Co.* (C. C. App. 8th C.) 303

2. A manufacturer who, without giving notice of its character or qualities, delivers to another a threshing machine which, at the time of delivery, he knows to be imminently dangerous to the life or limbs of anyone who may use it for the purpose for which it is intended, is liable to an employee of the purchaser who sustains injury from its dangerous condition, notwithstanding the absence of any contractual relation. Id.

3. A person constructing a toboggan slide to be used by the public for a consideration, at a bathing resort, is bound to anticipate and provide against injuries from defects in construction, to the extent that reasonable, prudent men might foresee the necessity of doing. *Barrett v. Lake Ontario Beach Improvement Co.* (N. Y.) 829

4. The explosion of a boiler, unplanned, will raise a presumption of negligence. *Beall v. Seattle* (Wash.) 583

5. A boy does not become, as matter of law, a loungee by stopping in a street on his way home to rest and cool off, after finishing a game which he had been playing in a

vacant lot, so as to prevent his recovering for injuries by the fall upon him of lumber illegally piled in the highway. *Kessler v. Berger* (Pa.) 611

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NUISANCES.

As to Element of Damages, see **DAMAGES**, 4.

1. A municipal corporation is not subject to indictment for failure to compel the abatement of a nuisance to which it has not contributed, consisting of the emptying of filth into an open drain on private property within its limits. *Georgetown v. Com.* (Ky.) 673

2. Where, by charter, a terminal company is given discretion as to the location of its roundhouse, it cannot escape liability in case the house is located so as to constitute a nuisance to adjoining property by showing that the use made of the property is reasonable. *Louisville & N. Terminal Co. v. Jacobs* (Tenn.) 188

3. The construction of a roundhouse for the housing of engines, and leasing it for that purpose, do not render the owner liable for a nuisance created by the manner in which it is used, if improper, and not ordinary, use of it is necessary to make it a nuisance. Id.

4. In an action against the owner of a roundhouse operated so as to constitute a nuisance, evidence is admissible that it is not operated by the owner, but is leased to, and in possession of, a third person. Id.

5. The closing of a street under authority of the municipality for the purpose of constructing a bridge to carry it across a river is not a nuisance so long as reasonable diligence is exercised in the prosecution of the work. *Lund v. St. Paul, M. & M. R. Co.* (Wash.) 506

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PARTNERSHIP.

Power of Wife to Enter into Partnership Agreement with Husband, see **HUSBAND AND WIFE**, 1.

1. One who has entered into partnership with a third person is not, in purchasing goods on behalf of the partnership from a former creditor, bound to disclose the fact of his partnership, so that his failure to do so will entitle the creditor to apply money paid upon the purchase price upon the old indebtedness, and refuse to fill the order. *Hoaglin v. Henderson* (Iowa) 756

2. A claim which the debtor holds against one of the partners cannot be set off in an action on a partnership claim. Id.

3. The individual interests of a partner in a claim due the firm cannot be reached by garnishment in a court which can acquire no jurisdiction over the partnership or determine the interest of the partner in the claim. Id.

4. As between a surviving partner and the executor of the deceased one, the firm name is an asset of the partnership which the executor has a right to have sold for the settlement of the partnership affairs, and it does not become the property of the surviving partner. *Slater v. Slater* (N. Y.) 796

5. A purchaser at a sale of the assets of a partnership for settlement of its affairs, at which the firm name is sold as an asset, has a right to use it upon compliance with the law governing the use of assumed business names, although he is not the surviving partner. Id.

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Liability for Defamatory Matter in, see LIBEL AND SLANDER.

1. The technical rules of pleading are not applicable in a habeas corpus proceeding; and where a writ has been issued, and in response thereto the person detained has been brought into court, it is not the proper practice to demur to the petition for want of sufficient allegations. *Simmons v. Georgia Iron & Coal Co. (Ga.)* 739

2. Want of probable cause for the insertion of defamatory matter in a pleading is not admitted by a demurrer to the declaration setting it up in a subsequent suit to recover for the alleged libel. *Crockett v. McLanahan (Tenn.)* 914

3. An estoppel as to liability for receiving assets of a corporation cannot be set up by a defendant in an answer which at the same time denies that he has received any such assets. *Hall v. Henderson (Ala.)* 621

Complaint.

4. Allegations that a minor, fifteen years of age, did not know that he was doing wrong in making an arrangement with a brakeman on a passenger train, under which, in consideration of a sum of money paid to the brakeman, he was permitted to ride upon the platform of the baggage car, on condition that he leave the car at all stations and keep out of sight, and did not know that he was exposing himself to any great danger in following such directions, are not sufficient to take the case out of the rule that a person so riding is not a passenger, or to relieve the minor from responsibility for his own negligence, where it is not alleged that he had not ordinary intelligence for his age, or that he lacked capacity to understand the nature of the transaction. *Mendenhall v. Atchison, T. & S. F. R. Co. (Kan.)* 120

5. The complaint in an action to require the removal from plaintiff's property of a permanent wall built thereon by defendant, removal of which cannot be effected by legal process, should not only state the facts necessary for an action at law to recover real property, but it should ask for the necessary equitable relief, stating the facts which would entitle the plaintiff thereto, under statutes establishing one form of action, and requiring the complaint to state the facts constituting the cause of action, and demand 61 L. R. A.

the judgment to which plaintiff supposes himself entitled. *Hahl v. Sugo (N. Y.)* 226

6. Immediate death, within the requirements of a statute authorizing a suit by a personal representative of deceased for such death caused by negligence, is sufficiently charged by an allegation that, because of absence of fire escapes, deceased, who was rightfully in defendant's building, "was then and there burned to death and consumed by fire, and then and thereby lost her life." *Carrigan v. Stillwell (Me.)* 163.

7. Allegations that certain persons who cast their votes for a bond issue were not legal voters because not registered as required by law are pertinent and relative to a proceeding to enjoin the issuance of the bonds because not authorized by the voters. *Crockett v. McLanahan (Tenn.)* 914

Demurrer.

8. Joining a defendant against whom the statute has not run in a demurrer by several defendants setting up the statute of limitations will prevent its being sustained in favor of any of them. *Boyd v. Mutual Life Asso. (Wis.)* 918

9. A complaint by trustees is not demurrable for failure to state who the *cestuis que trust* are, or that they have authorized the suit by the trustees in their own names. *Hall v. Henderson (Ala.)* 621

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PRESUMPTIONS.

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PRINCIPAL AND AGENT.

Purchase of Property by Agent as Creating Trust for Benefit of Principal, see TRUSTS, 1, 2.

Discretion or authority to sell the land is not requisite to disable an agent employed to solicit and conduct customers to his principals, engaged in obtaining options on land and reselling it at higher prices, from buying for himself a tract of land which his principal contemplated buying, and holding it adversely to the latter, even after the termination of his agency. *Trice v. Comstock (C. C. App. 8th C.)* 176

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PRINCIPAL AND SURETY.

Release of Indorser of Note by Acceptance from Maker of Less than Amount Due, see **BILLS AND NOTES**, 5.

1. An extension of time without the consent of the mortgagor, to an assignee of the mortgaged property, who has assumed the debt and agreed with the mortgagee to pay it, discharges the liability of the original mortgagor. *Franklin Sav. Bank v. Cochran* (Mass.) 760

2. A director of a corporation who has transferred mortgaged property to it upon its agreement to assume and pay the mortgage, does not, by permitting the treasurer of the corporation to act on its behalf in the management of its fiscal affairs, consent to his negotiating an extension of the time for payment, so as not to be discharged by such extension, of which he has no knowledge. *Id.*

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Mortgagor and grantee who agrees to pay mortgage as principal and surety; release of mortgagor by extension of time to grantee. 761

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Of Note, see **BILLS AND NOTES**.

PROXIMATE CAUSE.

1. The question of proximate or remote cause does not arise as between the elements of a cause which hurled a car out of a right of way to the injury of a bystander, where, although in point of time each act was prior to that which succeeded it, all taken together constituted the efficient cause, but for the occurrence of which the accident would not have happened. *West Virginia C. & P. R. Co. v. State use of Fuller* (Md.) 574

2. When a car is thrown off from the right of way of a railroad company to the injury of a stranger, that act must be regarded as the efficient cause of the injury in determining the liability of the railroad company, and not the various steps which lead to it; so that the company cannot relieve itself from liability by showing that neither of such steps was negligent. *Id.*

3. Riding in the coach set apart for colored passengers, contrary to the rules of the carrier and provisions of the statute, is not negligence on the part of a white person which will prevent a recovery for his death through the negligence of the carrier, although he would not have been injured had 61 L. R. A.

he not been in that coach. *Florida C. & P. R. Co. v. Sullivan* (C. C. App. 5th C.) 410

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Proximate cause; necessity of showing that accident was proximate cause of death, in order to recover on accident insurance policy. 337

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Legality of Publication of Ordinance in Sunday Paper, see **SUNDAY**.

PUBLIC IMPROVEMENTS.

1. Failure to follow, in a contract for a street improvement, the specifications contained in the advertisements for bids, renders the contract void, where the charges are beneficial to the contractor and the city charter provides that contracts for public work shall be let only to the lowest bidder after advertising for bids. *Diamond v. Mankato* (Minn.) 448

2. The decision of a city council that public necessity requires the making of a street improvement is final, unless it appears that its action is arbitrary and fraudulent, where the city charter provides that such improvements may be initiated on a petition of a majority of the lot owners affected thereby, but that the council may, when in its judgment public necessity requires it, make the improvement without any petition. *Id.*

3. The fact that there was no pressing necessity for a street improvement, and that in view of the financial condition of the city it was unwise to force it upon protesting property owners, is not sufficient to warrant the conclusion that the city council, which by charter is given power to make such improvements when, in its judgment, public necessity requires them, acted arbitrarily or fraudulently in ordering the work to be done. *Id.*

4. Limiting the asphaltum to be used in a street improvement to two particular kinds, when there are others just as good, and including in the specifications other restrictions and provisions which tend to deter contractors from bidding, render a subsequent contract for the improvement void, where by charter all contracts for public work are required to be let to the lowest bidder. *Id.*

5. Abutting property cannot be assessed for a street improvement to an amount equal to or in excess of its value. *Louisville v. Bitzer* (Ky.) 434

6. The court cannot correct an assessment against abutting property for a street improvement, which is annulled because a case of spoliation is established, so as to permit the warrant to be enforced to some extent, where the evidence shows that the property has received no benefit at all from the improvement. *Id.*

7. A statutory provision that a city shall not be liable for a street improvement without the right to enforce the amount against

the property benefited does not apply to cases where the city has no power to make the improvement at the cost of the adjacent property. Id.

8. An agreement by a contractor for a street improvement that he will look, alone, to the property assessed, and in no event shall he be entitled to recover from the city, will not prevent such recovery, where the city had no authority to make the improvement at the cost of the abutting property, where the agreement was made under a statute which contained a similar exemption, and was re-enacted by the legislature after it had been construed not to be applicable to such cases. Id.

9. Property owned by a sub school district, and used exclusively for purposes of public education, is not subject to local assessment for a municipal improvement, where the statute does not expressly make it so, but provides for collection of such assessments by sale of the property. *Pittsburg v. Sterrett Subdistrict School* (Pa.) 183

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PUBLIC MONEY.

Right to Spend in Regulating and Controlling Sale of Intoxicating Liquors, see *INTOXICATING LIQUORS*, 2, 3.

1. An appropriation to cover the expenses incurred and paid by a municipal officer in the discharge of his duty is not within a constitutional prohibition of the granting of public money to an individual. *State ex rel. Crow v. St. Louis* (Mo.) 593

2. The legislature cannot appropriate money from the public funds to redeem warrants issued under an invalid law providing for the treatment of inebriates at public expense, which are in the hands of innocent purchasers, where the Constitution provides that taxation shall be uniform, and requires the legislature to provide a tax sufficient to defray the estimated expenses of the state, since these provisions require taxes to be for a public, and not for a private, purpose. *Wisconsin ex rel. Garrett v. Froehlich* (Wis.) 345

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Roundhouse as Nuisance, see **NUISANCES**, 2-4.

Personal Injuries, see **PROXIMATE CAUSE**.

See also **CARRIERS**; **MORTGAGE**.

1. The charter duty of a railroad company to pay the damages inflicted on individuals by the exercise of its powers is not removed because it is compelled by the state to make changes in its roadbed for the public good. *McKeon v. New York, N. H. & H. R. Co. (Conn.)* 730

2. A railroad company which permits a car to break loose from a train on a grade, and run down into collision with another car at the foot of the decline in such a way as to be hurled off of the right of way to the injury of a bystander, is liable for the injury thereby caused to him, unless it is shown that the accident was unavoidable. *West Virginia C. & P. R. Co. v. State use of Fuller (Md.)* 574

3. A railroad company owes the duty to persons near its track to use air brakes on its cars, if they are necessary to prevent them from breaking from the train on an incline and running down in such a way as to be hurled from the track to the possible injury of persons who may be there. *Id.*

4. The cutting of a train of cars on a side track, leaving some on one side and some on the other of a highway, where the view of the other tracks is partially obscured thereby, is not an invitation to the public to cross without using ordinary precaution to ascertain if such crossing can be safely made. *Passman v. West Jersey & S. R. Co. (N. J. Err. & App.)* 609

5. A traveler on a bicycle is required to use the same care and prudence before passing over a railroad as is required of a pedestrian. *Id.*

6. A traveler on a highway, about to pass over a railroad track, must make reasonable use of his senses to ascertain if such crossing can be safely made, before attempting it, and if his failure to do so contributes to his injuries, he cannot recover damages therefor. *Id.*

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REAL PROPERTY.

The record of a mortgage given to secure the performance of a contract made in consideration of a conveyance of land, which, though it went to the vendor only, showed that by the terms of the contract the vendee bound himself, in case of a sale of the land by him, to pay to certain persons, strangers to the transaction, specified sums of money, constitutes constructive notice of the rights of such third persons to a purchaser from the vendee, rendering him a party to a wrongful satisfaction of the mortgage by the original vendor. *Tweeddale v. Tweeddale (Wis.)* 509

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Joinder of Action in Favor of Receiver with Action in Favor of Creditor, see **ACTION OR SUIT**, 2.

Appointment for Purpose of Enforcing Execution, see **EXECUTION**, 2.

Misapplication of funds belonging to a corporation, by its receiver, and gross misconduct by him in managing the receivership, constitute a good cause of action in favor of his successor, but not in favor of the creditors of the corporation. *Boyd v. Mutual Fire Assn. (Wis.)* 918

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1. A reservation of the right to proceed against the others will not prevent a settlement with, and release of, one of several joint tort feors from operating as a discharge of all. *McBride v. Scott* (Mich.) 445

2. Where a settlement with part of several joint tort feors expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue; and the others are not thereby discharged from liability for their tort. *Gilbert v. Finch* (N. Y.) 807

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A proceeding for the appointment of a receiver in aid of an execution is merely ancillary to the suit in which the execution was rendered, and is not subject to removal from a state to a Federal court. *Phelps v. Mutual Reserve Fund L. Asso.* (C. C. App. 6th C.) 717

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1. Equity will not compel the issuance of a policy of insurance in accordance with the provisions of a contract to insure, where the property intended to be covered has been destroyed, and its owner has received from other insurers more than its value. *Insurance Co. of N. A. v. Schall* (Md.) 300

2. Specific performance of a contract to issue a policy of insurance will not be granted where it was effected by agents of the property owner, and was not binding on him without ratification, and he did not ratify it until after the loss, when it was to his interest to do so. Id.

STATUTES.

Construction of Act of Congress so as to Limit Its Action to That Which Congress might Rightfully Prohibit, see CONGRESS.

1. A statute giving mortgages to building and loan associations priority over all liens filed subsequently to the date of their record cannot be declared void on the ground that it is contrary to public policy *Julien v. Model Building L. & I. Asso. (Wis.)* 668

Title.

2. A provision making the lien of a mortgage to a building and loan association superior to other liens filed subsequent to the recording of the mortgage is within a title, "An Act Regulating Building and Loan Associations." *Id.*

3. A law applicable to building and loan associations as a class is a public and general, and not a private or local, law, within the meaning of the constitutional provision respecting the form of title to acts. *Id.*

Construction.

4. A proviso at the end of a section of a municipal charter, punctuated only by commas, giving the council power by a two-thirds vote to do what is prohibited by the general terms of the section, which forbid releasing a lawful tax, exempting from any burden imposed by law, paying any demand not authorized by law, compromising any disputed demand, or paying any demand for alleged injuries, will not be limited to the immediately preceding clause, but will apply to all equally, in the absence of anything to indicate why it should not be so applied, while, on the contrary, the history of the statute indicates an intention that the proviso shall apply to the whole section. *State ex rel. Crow v. St. Louis (Mo.)* 593

Repeal.

5. A statute enacted to give immediate effect to certain provisions of a general revision of the statutes will not operate as a repeal or modification of other sections of the revision, which, under the general plan, do not take effect until a subsequent period, where the intent was not to change the laws by carrying them into the revision. *Julien v. Model Building L. & I. Asso. (Wis.)* 668

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SUBROGATION.

The principle of subrogation does not apply in favor of directors of an insurance company who applied its funds to procure their substitution in place of the officers of another company, with a view to transfer its business to their own company, so as to entitle them to have the remedy against those who receive the money preserved in case they are compelled to make good money so appropriated. *Gilbert v. Finch (N. Y.)* 807

SUBSCRIPTION.**NOTES AND BRIEFS.**

Subscription; to pay money for cost of railroad if completed within certain time; effect of failure to complete road. 343

SUNDAY.

Publication of an ordinance in a Sunday newspaper is not insufficient, under a statute making it evidence when printed and published, where such publication is not forbidden by statute or public policy, and, by reason of its larger circulation, publication in such paper is the most effective notice that can be given. *Knoxville v. Knoxville Water Co. (Tenn.)* 888

SYNDICATE.**NOTES AND BRIEFS.**

Syndicate; to preserve rights of bondholders; right of bondholder to insist on being admitted. 270

TAXES.

For Purpose of Establishing Town Dispensary for Sale of Intoxicating Liquors, see INTOXICATING LIQUORS, 2, 3.

Local Assessments, see PUBLIC IMPROVEMENTS.

See also PUBLIC MONEY.

A "seat" in an unincorporated stock exchange, which can only be disposed of subject to the regulations of the exchange, is not taxable under a statute which makes no direct provisions for its assessment, where the provision for assessment of tangible personal property "at its cash value without looking to a forced sale" is inapplicable, and no attempt has been made to assess such seats since the organization of the exchange, a period of fifty years. *Baltimore v. Johnston* (Md.) 568

NOTES AND BRIEFS.

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What constitutes "property" which may be taxed; seat or membership in stock exchange as; construction of tax statute; binding effect of decision in subsequent suit for taxes of other year. 568

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TELEGRAPHS.

Sufficiency of Notice Sent by Telegraph, see CERTIORARI, 2.

An attorney at law for plaintiff in certiorari who contracts with a telegraph company for the sending of a message giving notice of the sanction of the writ and the time and place of hearing, which the company fails to deliver within the time agreed upon, in consequence of which the certiorari is dismissed for want of said notice, and who, after having paid his client the amount involved in the certiorari proceedings, sues the company for the nondelivery of the message, occupies the position of the plaintiff, and it is incumbent upon him to show that he would have succeeded in the certiorari proceeding, and was damaged by its dismissal, and where he fails to show this, and paid his client under what he thought was a moral obligation, he cannot recover. *Western U. Teleg. Co. v. Bailey* (Ga.) 933

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Telegraphs; right of company to establish reasonable rules fixing office hours; contract with attorney to send telegram for principal; service of notice of certiorari by telegraph. 934

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Trade name; as part of good will of business; interest of surviving partner in; right to use one's own name so as to impair value of good will; property in name at common law; adoption by partnership of name of individual partner as firm name; assignment in gross of right to name; effect of involuntary sale of good will to pass right to name; right of purchaser of good will to. 797

TRESPASS.

A man cannot be prosecuted for criminal trespass for entering upon his wife's land with intent to make his residence there, although she has left him and removed from the premises upon good grounds for believing that he has been guilty of adultery, and has forbidden him again to enter upon them, and the Constitution provides that her property shall be and remain her sole and separate estate. *State v. Jones* (N. C.) 777

NOTES AND BRIEFS.

Trespasser; right of, to recover for negligent injuries. 121

TRIAL.

An Instruction Favorable to Complain- ing Party Not Ground for Reversal, see APPEAL AND ERROR, 11.

1. To entitle the defendant to the opening and conclusion of the argument in the trial of a case arising *ex delicto*, when the act complained of was not one which, under the law, could be justified, it is necessary

that the defendant by proper pleadings admit, not only the commission of the act which it is alleged was wrongful, but also such other facts as would entitle the plaintiff to have a verdict, without proof, for the amount claimed in the petition. *Brunswick & W. R. Co. v. Wiggins* (Ga.) 513

Jury.

2. Where irregularities occur in the summoning of a special venire, it is incumbent upon the defendant or his counsel to interpose his objection at the proper time, and it is waived if it is raised for the first time after verdict. *Queenan v. Territory* (Okla.) 324

3. The provisions of the Oklahoma statute in relation to the selecting, summoning, and impaneling of a jury are not mandatory, but merely directory, and hence mere irregularities will not be deemed prejudicial unless it is clearly shown that some injury has resulted therefrom. *Id.*

4. In the absence of an express statute making a juror incompetent who has been convicted of a criminal offense punishable by imprisonment in a penitentiary of another state, such conviction and sentence can have no effect, by way of penalty or of personal disability or disqualification, beyond the limits of the state in which the judgment was rendered. *Id.*

5. The right to challenge a juror for disqualification is not a constitutional right which cannot be waived, but is a statutory right which may be waived by defendant or his counsel, even in a capital case. *Id.*

6. Failure to object to a juror who has been convicted of a felony, when that fact is called to the attention of defendant's counsel during the progress of a criminal trial, waives any objection to the disqualification, and an objection made after a verdict has been rendered, upon motion for new trial, comes too late. *Id.*

7. The provisions in the Constitution of the United States in relation to trials by jury for crimes, and to criminal prosecutions, apply to the territories of the United States. *Id.*

8. Objection to a juror because he is a nonresident of the county comes too late on motion for new trial. *People v. McFarlane* (Cal.) 245

Questions of law and fact.

9. Whether or not defamatory matter in a pleading is pertinent to the issue is a question of law for the court. *Crockett v. McLanahan* (Tenn.) 914

10. The jury must decide whether or not a structure intended to be used by the public for a consideration is constructed with that due care which, in the judgment of prudent men, in view of its purpose, should have been exercised to prevent injuries to persons using it. *Barrett v. Lake Ontario Beach Improvement Co.* (N. Y.) 820

11. Whether or not a city should have known that a boiler for the heating of an abutting building was located under the 61 L. R. A.

sidewalk is a question for the jury, where the city ordinances prescribe a certain kind of structural work in case the space under the walk is to be utilized, require inspection by city officials of all alterations in buildings, and a permit to make certain alterations affecting that walk, which would require inspection, had been granted. *Beall v. Seattle* (Wash.) 583

Instructions.

12. Giving a correct instruction at the request of one of the parties does not correct an error in the general charge, unless the instructions there given are recalled or explained. *Standard L. & Acci. Ins. Co. v. Sale* (C. C. App. 6th C.) 337

13. In the trial of an action brought to recover damages against a railroad company for injuries sustained by the running and operation of a train of cars, it is error to charge in such manner as to convey to the jury the impression that, if they should believe that both the company and the person injured were equally negligent, the plaintiff could recover. *Brunswick & W. R. Co. v. Wiggins* (Ga.) 513

14. An instruction that not every derangement of the mind will excuse one for the commission of crime, but that, if one has sufficient mind to know right from wrong regarding the particular act and is able to understand the consequences of such act, the law recognizes him as sane and holds him responsible, is proper. *Queenan v. Territory* (Okla.) 324

15. It is not error to reject a prayer for instructions, the theory of which is covered by others which are granted. *West Virginia C. & P. R. Co. v. State use of Fuller* (Md.) 574

16. Refusal to give an instruction requested by defendant in a criminal case is not error, where the instruction was covered by the general charge of the court. *Queenan v. Territory* (Okla.) 324

Verdict.

17. There is no error in refusing to direct a verdict for defendant, if, upon the evidence, the jury may, without acting unreasonably, find for plaintiff. *Standard L. & Acci. Ins. Co. v. Sale* (C. C. App. 6th C.) 337

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TRUSTS.

Right of Trustees to Maintain Action without Joining *Cestui Que Trust*, see ACTION OR SUIT, 4.

In Favor of Creditors in Proceeds of Insurance, see INSURANCE, 4, 5.

1. The fact that a principal has no title to or control over the property to which the agency relates does not prevent a trust for his benefit from arising when the agent, after the termination of his agency, purchases the property and holds it adversely to his principal. *Trice v. Comstock* (C. C. App. 8th C.) 176

2. An agent employed to solicit and conduct probable customers to his principals engaged in procuring from owners options to purchase their property at fixed prices and in selling it at higher prices, who by means of his agency obtains information which he probably would not otherwise have secured as to the location, value, products, and probable income of a tract of land, cannot, even after the termination of his agency, purchase such tract and hold it for his own 61 L. R. A.

benefit adversely to his former principals; and the title thus obtained by the agent is charged with a constructive trust for the benefit of the principals, which a court of equity will enforce. *Id.*

3. Where a trustee under a will, in disregard of the testator's directions, uses trust funds in her hands, together with her own funds, to buy real estate, and took the title in her own name, the amount of trust funds so used not being precisely ascertainable, but exceeding one half of the price paid at the time of purchase, the *cestuis que trust* are entitled, in equity, to elect whether they will claim a charge upon the real estate for the amount of trust funds so invested, or will claim the real estate itself, as owners, subject to a charge for the trustee's own money so used, and, in endeavoring to ascertain how much trust money and how much of the trustee's own money had been invested in the property, every reasonable intendment should be made against the trustee, through whose default the truth has become obscure. *Bohle v. Hasselbroch* (N. J. Err. & App.) 323

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VENDOR AND PURCHASER.

Construction of Contract, see CONTRACTS, 11.

1. The actual payment before notice of an adverse claim of the purchase price is indispensable to the maintenance of the claim that one is a bona fide purchaser of property for value, without notice. *Trice v. Comstock* (C. C. App. 8th C.) 176

2. As between different persons to whom a common grantor had conveyed the same parcel of land, the elder deed gives the better title. *Wiggins v. Pender* (N. C.) 772

VESTED RIGHTS.

See CONSTITUTIONAL LAW, 1.

VOTERS AND ELECTIONS.

1. No punishment can be inflicted for violation of the Federal statute declaring that all qualified citizens shall have a right to vote at all elections without distinction of race, color, or previous condition of servitude, unless it is prescribed by statute. *Karem v. United States* (C. C. App. 6th C.) 437

2. Legislation authorized by U. S. Const. Amend. 15, to protect the elective franchise must be addressed to state, and not individual, action, unless the individual assumes to exercise the power of the state. *Id.*

3. Congress cannot punish mere lawless acts of individuals in preventing colored persons from voting at purely state elections. *Id.*

4. Appropriate legislation for the infringement of U. S. Const. Amend. 15, protecting the elective franchise of colored citizens, is not found in U. S. Rev. Stat. § 5508 (U. S. Comp. Stat. 1901, p. 3712), which provides for punishment of persons who shall conspire to injure a citizen in the free exercise of any rights secured to him by the Constitution or laws of the United States, since it is not limited to state action, which is the only action in respect to such franchise which Congress can prohibit. *Id.*

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WATERS.

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Injuries to Adjoining Lands by Water Soaking through from Canal, see **CANALS**, 3.

Certiorari to Review Action of Municipal Corporation in Fixing Water Rates, see **CERTIORARI**, 1.

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Restraining Removal of Water Mains, see **INJUNCTION**, 3.

See also **WHARVES**.

1. Where a small strip of land which lies between a government grant and a river is washed away so that the granted land becomes riparian, and then accretions to the granted land carry the river boundary far beyond its old location, they will belong to the grantee, and no title will vest in the government which it can grant to a third person. *Widdecombe v. Chiles* (Mo.) 309

2. A lower owner cannot obstruct a natural waterway so as to flood the lands above him. *Mullen v. Lake Drummond Canal & W. Co.* (N. C.) 833

3. A sweat ditch constructed by a canal company along its embankment either upon the site of an old waterway which drained adjoining property, or as a substitute for one running in the same general direction, must be considered as the waterway, so that it cannot be closed without liability for the injuries thereby inflicted on the upper owner. *Id.*

Public; navigable.

4. A state may, in the absence of congressional legislation, authorize an obstruction in the bed of a navigable river of the United States, where it is entirely within its limits, which is necessary to repair a bridge which has been placed across the stream under its authority, although the stream extends into another state. *Kansas City M. & B. R. Co. v. J. T. Wiygul & Son* (Miss.) 578

5. The title to lands under the tide waters is vested in the respective states, and may be granted by them to individuals. *Shepard's Point Land Co. v. Atlantic Hotel* (N. C.) 937

6. A street platted between a navigable river and the highway along the shore, and which is incapable of being used as a street, does not affect the rights of the owner of the land bordering on the river as against one claiming the title to the land under the water. *Id.*

7. When soil on the shore of a navigable water is granted by the state to private owners, certain rights pass as incident to the grant, with which the state cannot interfere itself, or permit others to interfere, except for public uses, and then only upon making compensation. *Id.*

8. A grant to a riparian owner of land under the water in front of his property, under a statute providing for the grant of such property to such owners "for the purpose of making wharves," does not convey an absolute title which may be separated from the upland so as to cut off the riparian rights of the owner of such land,—at least where the policy of the state has been not to grant the absolute ownership of the soil under the water. *Id.*

9. A grant of the upland by a riparian owner who has obtained from the state a grant of the land under water in front of his property "for the purpose of erecting

wharves" will include the rights under the water, so that the grantor will retain no title which will sustain an action for possession of the land under the water. *Id.*

10. The provision in the act of Congress of March 3, 1899, forbidding obstructions in navigable rivers which are not authorized by Congress, does not apply to an obstruction placed in the bed of a river for the purpose of repairing a bridge which had been placed across the river under state authority prior to the passage of that act. *Kansas City M. & B. R. Co. v. J. T. Wiygul & Son (Miss.)* 578

Appropriation.

11. One who has appropriated water from a flowing stream, and devoted it to a beneficial use, has a vested right thereto with which no court can interfere, or permit subsequent appropriators to do so. *Salt Lake City v. Salt Lake City Water & E. P. Co. (Utah)* 648

12. An appropriator does not forfeit his right to use the water by the fact that he has not put it to actual use, where he has prosecuted the construction of the necessary ditches and flumes with reasonable diligence, but has been prevented from making use of the water by the opposition of prior appropriators. *Id.*

13. Appropriated water is subject to secondary appropriation above the head of the ditch of the prior appropriator for the purpose of furnishing power, the water to be delivered to the prior appropriator near the head gate of his ditch and the point where it is needed for use by him, if the rights of the latter are not interfered with. *Id.*

14. The destruction of a section of the ditch of a prior appropriator, and unlawful interference with his control and regulation of the flow of water appropriated by him, are not effected by taking the water from the river above his head gates, by a secondary appropriator, for the generation of power, and delivering it into his ditch above the point where it is needed by him, where he may still have use for such section of the ditch, and may manage his head gates and control the water in the canal. *Id.*

15. A prior appropriator having the right to change his point of diversion cannot deny the right of a subsequent appropriator to take water near his head gate, until he has perfected his arrangements and appliances for effecting the change. *Id.*

16. A constitutional prohibition of the alienation of the source of water supply by municipal corporations does not prevent a secondary appropriation of the water, to be used above the point where it is needed by the municipality, without injury to its rights. *Id.*

17. The claimants of water rights, who, by junior appropriations and attempts to impound the water, render necessary the appointment of commissioners to regulate the respective rights of the parties, may be

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charged with the expenses, to the exclusion of the prior appropriators. *Id.*

18. An appropriation of water which has been made effectual by use of a tail race under agreement with the prior appropriator cannot be rendered ineffectual by the withdrawal of the consent and a resort to litigation to prevent further use of the water. *Id.*

19. The generation of electricity to furnish light, heat, and power to the people of adjoining towns is a beneficial use for which water may be appropriated. *Id.*

20. So long as a prior appropriator's use of the water is neither interfered with nor abridged, he has no just cause to complain although another appropriator above him also uses the same water for a beneficial use. *Id.*

Public water supply.

21. To authorize an irrevocable contract by a municipality as to the rates to be charged consumers for water furnished by a water company, legislative power to make it must be unquestionable. *Knoxville v. Knoxville Water Co. (Tenn.)* 888

22. A provision in a charter of a water company that the municipality "shall have power by ordinance to regulate the price of water" gives the municipality the continuing right to regulate the charges, limited only by a condition that such rates shall not be unreasonable or oppressive. *Id.*

23. It is not unreasonable to give a municipality whose inhabitants are to be supplied by a water company the right to regulate the rates, since the question of the reasonableness of the regulation is always open to judicial investigation. *Id.*

24. That a municipal corporation has an option to purchase a plant for water supply at a certain date will not invalidate its regulation of rates to be charged by the owner, on the theory that they may be fixed so low as to destroy the value of the plant, since the owner may resort to the courts for protection. *Id.*

25. A contract by a municipality as to the rates to be charged by a water company which is chartered for a term of years does not prevent its altering such rates from time to time, where the charter provides that it shall in no way interfere with the police or general powers of the municipality, which shall have power by ordinance to "regulate" the price of water. *Id.*

26. Requiring approval by the common council of a city of the act of the board of public works in fixing water rates does not give the council power to take the initiative in the matter, where its former power in that regard was repealed, and a board of public works was established, with power to fix rates which should not be in force until submitted to and approved by the council. *State ex rel. Hallauer v. Gosnell (Wis.)* 33

27. The recommendation of water rates by an executive board may be made necessary to their adoption by the legislative body of a city, although the fixing of rates is a legislative, and not an executive, function. *Id.*

28. A municipal corporation may require consumers of water in certain cases to use meters and keep them in repair at their own expense, under charter authority to legislate as to means for ascertaining amounts to be paid as water rates by consumers, and to make regulations for the protection of the works and the use thereof. Id.

29. A water meter is not so exclusively for the benefit of the one furnishing the water that the duty to furnish it cannot be imposed upon the consumer. Id.

30. An ordinance for the protection of waterworks is not void for unreasonableness which requires all consumers using large service pipes to provide meters while giving other consumers an option to do so. Id.

31. The courts have no right to interfere with the discretion of a city in the exercise of the power conferred upon it to provide a system of waterworks and control and regulate the same. *Asher v. Hutchinson Water, L. & P. Co.* (Kan.) 52

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Waters; right of state to authorize obstruction of navigable river to make repairs on bridge; where Congress has not legislated with reference thereto; what waters are navigable; obstruction as nuisance. 579

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Liability of owner of wharf or dock for injury to vessel in, caused by unsafe condition of. 950

Right to make second appropriation of, above point of first appropriation; appropriation for city water supply; as trust for benefit of citizens; vested right in use of; right of appropriator to insist that water continue flowing as when appropriation made; failure to make use of water after appropriation; right of appropriator in corpus of water. 649

Liability of canal owner for injury to neighboring lands by leakage and flooding; damage from seepage and percolating waters; duty to maintain sweat ditches; surface waters; duty to provide means for disposing of sand and mud thrown in from canal; right to divert watercourse; obstruction of drainway. 837

Duty and liability of municipality with respect to drainage. 673

Establishment and regulation of municipal water supply:—(I.) Power to procure 61 L. R. A.

or furnish: (a) of municipality: (1) in general; (2) charter authority; (b) of private corporation; (c) extraterritorial rights; (d) right of way; (II.) purchase or construction of plant: (a) power of municipality; (b) contract to purchase: (1) in general; (2) compensation; (c) provision of fund; (1) bonding; (2) taxation: (a) in general; (b) local assessments; (c) payment for work; (d) liability for injuries; (III.) contract for water: (a) power of municipality; (b) who to act for municipality; (c) form of contract; (d) construction; (e) subject-matter; (f) consideration; (g) validity: (1) in general; (2) term; (h) breach; (i) estoppel; liability for work or water accepted; (j) change or enforcement; (k) collateral contracts; (IV.) rights of taxpayer; (V.) use of highways: (a) right of public to use; (b) right of water company; (VI.) rights and duties of water company: (a) exclusiveness of franchises: (1) right to confer; (2) when conferred; (3) protection of rights; (4) what is infringement; (b) duty as to furnishing water: (1) as to quantity and quality: (a) in general; (b) quality; (c) quantity; (2) as to consumer; (a) general duty; (b) free supply; (c) remedy for breach of duty: (1) specific performance; (2) forfeiture of franchise; (3) other remedies of municipality; (4) suit by consumer; (d) assignability of franchise; (e) control of rates: (1) governmental power; (2) method of fixing; (3) amount; (4) effect of contract; (5) judicial supervision; (f) regulations; (g) rights after expiration of franchise; (VII.) rights and duties of consumer: (a) in general; (b) fixing and collection of rates; (1) duty to pay; (2) amount; (3) meters; (4) discrimination; (5) enforcement: (a) in general; (b) by stopping supply; (6) other matters; (VIII.) rights and duties of municipality: (a) in general; (b) regulations; (c) rates; (d) lease or sale of plant. 33

Mandamus to compel furnishing of; duty of public corporation to supply; relief from duty by contract; difference between franchise granted by city and franchise granted by state. 53

Right of city to require consumers to pay for meters; rates for; reasonableness of. 38

Regulation of rates of; delegation of power to regulate to city; power of city to renounce right to regulate; regulation as impairment of charter rights of company. 888

WHARVES.

1. The mere fact that a vessel owner has to go through mud to reach a berth in a dock does not cast upon him the risk of injury from a ledge of rocks of which he has no notice, and of which the owner of the dock knows, or by the exercise of reasonable care and diligence could ascertain. *Garfield & P. Coal Co. v. Rockland-Rockport Lime Co.* (Mass.) 946

2. The master of a vessel which is to lie in a regular berth at a wharf is under no ob-

ligation to take soundings to determine whether or not the berth is safe for the vessel, where he has been assured by the wharf owner or his agent that it is a proper one.

Id.

NOTES AND BRIEFS.

Wharfs; liability of owner of, for injury to vessel by unsafe condition of. 950

WILLS.

1. The destruction of a will expressly revoking a former one revives the latter, under a statute providing that a will can be revoked only by a subsequent will declaring the revocation of former ones. *Stetson v. Stetson* (Ill.) 258

2. The destruction of a will *animo revocandi* will be presumed, where it was taken into the custody of the testator, and cannot be found after his death. Id.

3. Where a bequest is to one or more persons living, and to the children of another who is dead, whatever may be the relations of the parties to each other, the legatees will take *per capita*, unless it appears from the context or some clause in the will, or from the circumstances in view of which it was made, shown by competent extraneous evidence, that the testator intended a stirpital distribution. *Collins v. Feather* (W. Va.) 660

4. A fee simple is conveyed by a devise to one absolutely and forever, and is not cut down by a subsequent clause directing the disposition of any remainder which may be undisposed of at the death of the devisee. *Roth v. Rauschenbusch* (Mo.) 455

5. Where a testator having two sons and two daughters living, eight grandchildren of a deceased daughter, and the widow and two children of a deceased son, to provide for, gave to one of the sons valuable real estate and \$1,000 out of his personal estate; to the other valuable real estate; to the widow of the deceased son and her two daughters other real estate; and then directed that the remainder of his personal property be equally divided between his children, and the grandchildren of his deceased daughter, but that before such division of the personal property was made his two living daughters should each receive \$1,000 apiece out of it, the eight children of the deceased daughter take *per capita*, and not *per stirpes*. *Collins v. Feather* (W. Va.) 660

NOTES AND BRIEFS.

Wills; parol evidence to show intention of testator; giving effect to intention expressed in will; distribution *per capita* or *per stirpes*; devise to several persons "equally" as creating tenancy in common. 661

Establishment by chancery court of destroyed will after death of testator; contest of validity of probated will; as trial *de novo*; revocation of will by execution of subsequent one; necessity of proving entire contents of revoking will; right to claim under revoked will where revoking will has been lost; revival of revoked will by cancellation 61 L. R. A.

of revoking will; necessity of re-establishing revoked will; effect of nonproduction of revoking will; jurisdiction of court of chancery to admit will to probate; what constitutes valid will; necessity that revoking will be admitted to probate; sufficiency of evidence to justify probate of lost will; presumption of revocation. 259

Devise to one absolutely and forever as giving right to sell property; where subsequent words direct disposition of remainder at death of devisee. 456

WITNESSES.

1. Testimony of a husband in his own behalf, in an action brought after the death of his wife to adjust their respective rights in a note secured by deed of trust given for money loaned, a part of which was contributed by each, is precluded by a statute providing that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, the other party shall not be admitted to testify in his own favor. *Johnston v. Johnston* (Mo.) 166

2. A witness may testify from the record of his testimony at a former trial if he swears that the evidence then given was true, and he testifies to certain facts of his own recollection, although he has only an imperfect recollection of the events there narrated after hearing it read, under a statute providing that a witness may testify from a writing made when the facts therein stated were fresh in his memory, or he knew that the facts were correctly stated therein, although he retained no recollection of the particular facts. *People v. McFarlane* (Cal.) 245

3. The reading of evidence given at a former trial by a witness for defendant may properly be denied where, two or three days immediately before the day set for trial, one of defendant's counsel was informed that a certain person could tell him exactly where the witness was located, and he gave up the search for him after two or three unsuccessful efforts to see the person, although subpoenas previously issued for the witness had been fruitless. Id.

4. An objection to the testimony of the surviving party to a cause of action in his own behalf, which is forbidden by statute, is not waived by cross-examining him only as to matters covered by his examination in chief. *Johnston v. Johnston* (Mo.) 166

5. Upon a prosecution for rape effected though a sham marriage the prosecuting witness cannot be asked as to conversations which she had with third persons who charged her with criminal intimacy with accused. *Lee v. State* (Tex.) 904

6. While a jury trying a case should give to the evidence of a witness only the weight to which it is, in their opinion, entitled, yet they cannot, in the determination of the issues involved, because of the fact that a particular witness was in the employ of one of the parties, arbitrarily disregard his testi-

mony. Brunswick & W. R. Co. v. Wiggins
(Ga.) 513

NOTES AND BRIEFS.

Witnesses; right of persons not expert to
give their impression as to sanity or insan-
ity of person. 325

Competency of person unable to under-
stand subject in regard to which he testifies.
266

Right of witness to refresh memory by
former testimony. 245

WRIT AND PROCESS.

1. Where an employer is made a party
to a suit to enjoin a multiplicity of garnish-
ment proceedings to reach exempt wages,
and the suit has been properly brought
against him in any county, and service of
summons therein has been made on him, a
summons issued to the sheriff of another
county, where the judgment creditor resides,
which is properly served on him, gives the
court jurisdiction of all the parties to the
action, and full power to grant the proper
relief therein. Siever v. Union P. R. Co.
(Neb.) 319

2. The defendant served in the county
where a suit is brought must have a sub-
61 L. R. A.

stantial interest in the legal questions in-
volved and the relief prayed for and must be
a real, and not a sham, defendant, in order
that an action may be deemed "rightly
brought" within the meaning of Neb. Code
Civ. Proc. § 65, providing that where an ac-
tion is rightly brought in any county accord-
ing to the provisions of another section per-
mitting an action to be brought in any
county where one of the defendants resides,
a summons shall issue to any other county
against any one or more of the defendants.
Id.

NOTES AND BRIEFS.

Writ and process; service within county
upon nominal defendant to justify issuing
of summons to person in other county. 320

Service upon foreign insurance company;
by service upon insurance commissioner;
after company has ceased doing business in
state. 719

Service on foreign corporation; statute re-
quiring state officer to be appointed as agent
to accept service; failure of officer to notify
corporation of service of summons; effect on
rights of corporation; sufficiency to give
state court jurisdiction to render judgment.
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